
SUPREME COURT OF THE STATE OF FLORIDA

IVANA VIDOVIC MLINAR,
Appellant/Plaintiff,
vs.

CASE NO: SC14-54
LOWER TRIBUNAL Nos.
FOURTH DCA: 4D12-1332
15th JUD. CIR.: 502008CA036246
(PALM BEACH)

UNITED PARCEL SERVICE INC.,
Appellee/Defendant,

RECOVERY MANAGEMENT
CORP. d/b/a CARGO LARGO,
PAK MAIL OF WELLINGTON,
INC., and AARON ANDERSON,
Defendants.

APPENDIX TO INITIAL BRIEF OF APPELLANT
Volume Four B

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEALS
AFFIRMING FINAL JUDGMENT OF
THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
OF FLORIDA IN AND FOR PALM BEACH COUNTY

SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
Attorneys for Appellants
By: Jack Scarola
Fla. Bar No. 169440
Patrick E. Quinlan
Fla. Bar No. 750263
Mara Ritchie Poncy Hatfield
Fla. Bar No. 037053

LAW OFFICES OF SHANNON
MAHONEY, PA
315 11th Street
West Palm Beach, FL 33401
Attorneys for Appellants
By: Shannon M. Mahoney
Fla. Bar No.: 0194948
smmahoney@mahoneylegal.com
mrh@searcylaw.com
jsx@searcylaw.com
peq@searcylaw.com

TABLE OF CONTENTS

VOLUME ONE:

- TAB O: Opinion of Fourth District Court of Appeal
TAB A: Initial Brief of Appellant filed in Fourth District Court of Appeal
TAB B: Answer Brief of Appellee filed in Fourth District Court of Appeal
TAB C: Reply Brief of Appellant filed in Fourth District Court of Appeal

VOLUME TWO:

- TAB R: Record of Sixteenth Judicial Circuit on Appeal, pages 1-156

VOLUME THREE:

- TAB R: Record of Sixteenth Judicial Circuit on Appeal, pages 157-253

VOLUME FOUR:

- A. TAB R: Record of Sixteenth Judicial Circuit on Appeal, pages 254-378
(Opposition to Motion to Dismiss)
B. TAB R: Record of Sixteenth Judicial Circuit on Appeal, pages 378-END

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-serve, and US Mail this 3rd day of JUNE, 2014, to all counsel on the attached list.

/s/ Mara Ritchie Poncy Hatfield

MARA R.P. HATFIELD

Florida Bar No. 37053

Email: mrh@searcylaw.com; dtm@searcylaw.com

Searcy Denney Scarola Barnhart & Shipley, P.A.

2139 Palm Beach Lakes Boulevard

West Palm Beach FL 33409

Telephone: (561) 686-6300

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION

IVANA VIDOVIC MLINAR,)

Plaintiff)

v.)

UNITED PARCEL SERVICE INC.,)

PAK MAIL OF WELLINGTON,)

INC., RECOVERY MANAGEMENT)

CORP. d/b/a CARGO LARGO and)

AARON ANDERSON,)

Defendants.)

CASE NO:
502008CA0036246XXXXMB

DEFENDANT, UNITED PARCEL SERVICE, INC.'S
NOTICE OF FILING SUPPLEMENTAL AUTHORITY

Defendant, UNITED PARCEL SERVICE, INC. ("UPS"), by and through its undersigned counsel, hereby gives notice of filing *Polesuk v. CBR System's Inc.*, Case No. 05-CV-8324(GBD), 2006 WL 2796789 (S.D.N.Y. 2006) (attached *Exhibit "A"*) as supplemental authority in reply to Plaintiff's Response to UPS' Motion to Dismiss Plaintiff's Second Amended Complaint. Said authority was provided to counsel for Plaintiff prior to the January 20, 2012 hearing on UPS' Motion to Dismiss Plaintiff's Second Amended Complaint.

Respectfully Submitted,




HAMILTON, MILLER & BIRTHISEL, LLP

David R. Heffernan
Florida Bar No.0893005
Evan S. Gutwein
Florida Bar No.0058741
Attorneys for Defendant
United Parcel Service Inc.
150 Southeast Second Avenue
Suite 1200
Miami, Florida 33131-2332
Telephone: (305) 379-3686
Facsimile: (305) 379-3690

ALSTON & BIRD LLP
Angela Adams
Alston & Bird LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
Telephone: (404) 881-7000
Fax: (404) 881-7777
Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished upon the attached Service List by mail delivery on this 23rd day of January, 2012.



Evan S. Gutwein

Westlaw

Page 1

Not Reported in F.Supp.2d, 2006 WL 2796789 (S.D.N.Y.), Fed. Carr. Cas. P 84,469
(Cite as: 2006 WL 2796789 (S.D.N.Y.))

C

United States District Court,
S.D. New York.

Jonathan D. POLESUK, Peri Polesuk and Cameron
Polesuk, Plaintiff,

v.

CBR SYSTEMS, INC. a/k/a Cord Blood Registry
Systems, Q International Courier, Inc. a/k/a Quick
International Courier and American Airlines, Inc.,
Defendants.

No. 05 CV 8324(GBD).
Sept. 29, 2006.

MEMORANDUM DECISION AND ORDER

DANIELS, J.

*1 Defendant Q International Courier, Inc. a/k/a Quick International Courier ("Quick"), a common carrier, is moving, pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss the complaint on the grounds that the state law claims asserted against it are preempted by the Carmack Amendment of the Interstate Commerce Act, 49 U.S.C. § 14706. The Carmack Amendment governs the liability of interstate carriers for the loss or damage to property during transport. Quick seeks, in the alternative, to limit its liability to two hundred dollars (\$200 .00), which it claims is the maximum dollar amount provided for in the liability provisions of the parties' bill of lading. Additionally, Quick is seeking an order dismissing the cross-claims asserted against it by co-defendant CBR Systems, Inc. ("CBR") or, in the alternative, staying the litigation of such claims pending arbitration.^{FN1}

FN1. In Quick's supplemental memorandum, Quick raises, for the first time, its application regarding the cross-claims. It was incumbent upon Quick to file a formal Notice of Motion and not to simply include its request in its subsequent filings in connection with the pending motions. See, Fed.R.Civ.P. 7(b); Local Civil Rule 6.1.

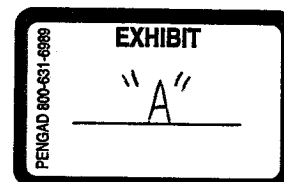
Nevertheless, CBR substantively responded to Quick's application without raising the issue of the procedural deficiencies in the manner in which Quick made this application. Accordingly, the Court will address Quick's motion to dismiss or stay the cross-claims on the merits.

CBR has cross-moved to dismiss the complaint against it "on the grounds that CBR is an implied carrier in the stream of commerce under the 'Carmack Amendment' and as such, CBR's liability should likewise be limited to \$200 or in the alternative that CBR is a third-party beneficiary of the bill of lading and by a parity of reasoning CBR's liability therefore should also be limited to \$200. To the extent that the Court is not inclined to grant the same remedy and relief to CBR that is requested by Quick, then CBR opposes Quick's motion on the grounds that Quick's motion is premature in light of the fact that no substantive pre-trial discovery has occurred and the facts and circumstances of the loss and evidence necessary to oppose Quick's motion may not be in CBR's possession." (CBR's Mem. at 2).

Additionally, plaintiffs have cross-moved, pursuant to Fed.R.Civ.P. 15(a), for an order granting them leave to amend their complaint to assert additional causes of action against Quick, including a claim under the Carmack Amendment.^{FN2}

FN2. Defendant American Airlines has not filed any papers in regard to the pending motions. American Airlines made an offer of judgment, pursuant to Fed.R.Civ.P. 68, whereby it offered to allow judgment to be taken against it in the amount of fifty dollars (\$50.00).

The state law causes of action against Quick are dismissed as preempted by the Carmack Amendment. Plaintiffs are granted leave to file an amended complaint, but only to the extent that they



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(Cite as: 2006 WL 2796789 (S.D.N.Y.))

may assert a cause of action under the Carmack Amendment against Quick and plead additional factual allegations. CBR's cross-claims against Quick are stayed pending arbitration. The motions are denied in all other respects.

This action arises as the result of the destruction of placenta cord blood while in transit to CBR's facility for cryogenic freezing. The blood was to be stored for the potential future use in stem cell therapy for the newborn himself or other family members. Plaintiffs Jonathan and Peri Polesuk were allegedly contacted by CBR while Ms. Polesuk was pregnant with her son, the infant plaintiff. Plaintiffs allege that CBR "is a clinical-stage biotechnology company in the business of, among other things, collecting, testing, processing, and preserving umbilical cord blood ("Cord Blood")-a procedure known as 'banking.'" (Compl. ¶ 3). Plaintiffs assert that "Cord Blood, which is also called 'placenta blood,' is the blood that remains in the umbilical cord and placenta following birth and after the cord is cut. In the past, Cord Blood was routinely discarded with the placenta and umbilical cord." (*Id.* ¶ 7). Plaintiffs claim that "[t]he stem cell found in the cord blood are genetically unique to the baby and the family." (*Id.* ¶ 8). Plaintiffs contend that "[t]he actual and potential uses of neonatal stem cells found in Cord Blood to treat and cure disease are significant and growing." (*Id.* ¶ 10).

*2 Plaintiffs allege that CBR sent them various promotional and registration materials wherein CBR represented that it "is the most trusted name in Cord Blood banking." (*Id.* ¶ 16). Plaintiffs further allege that "via the CBR's website, CBR also made the following representations to prospective customers with regard to the transportation of the Cord Blood to CBR:

'One-Step shipping service, which requires only a single phone call after your baby's birth. CBR's systems are fully integrated with Quick International Courier to provide easy pick-up and seamless tracking ...'

and

'CBR offers simple, prearranged shipping with an experienced courier, requiring only one phone call after your baby's birth. Our automated tracking system is designed to help facilitate timely delivery of your baby's cord blood to our laboratory. You can relax with your new baby while we track your sample every step of the way.'" (*Id.* ¶ 17).^{FN3}

FN3. In opposing Quick's motion, plaintiffs submitted copies of CBR's website pages. The website indicates that, pursuant to CBR's "One-Step Shipping" practice, "[t]he collection kit is pre-labeled and ready to be shipped 'as-is.'" (J. Polesuk Aff. Ex. 6 at 1). The website further provides that "[t]o take advantage of One-Step Shipping through Quick International, simply call the carrier after your baby's birth," the "collection kit will then be picked up directly from the hospital room." (*Id.*).

Plaintiffs allege that CBR's representations as to the ease of shipping the cord blood were made for the purpose of inducing plaintiffs to enter into a contract with CBR, and that plaintiffs were so induced. (*Id.* ¶¶ 24-24, 27-28). Plaintiffs allege that CBR's representations, in this regard, were false because "CBR did not use adequate level of standards to transport the [plaintiffs'] newborn son's Cord Blood units to CBR's Cord Blood Banking facility, given the nature and importance of the shipment." (*Id.* ¶ 19). Plaintiffs claim that Quick couriers would deliver the cord blood to CBR's facility by placing it on regularly scheduled airline flights and having other Quick couriers pick up the shipments at the destination airlines' baggage terminals. (*Id.* ¶ 22). Plaintiffs maintain that "[g]iven the nature of the specimens, greater care should have been taken with the materials." (*Id.* ¶ 23).

Plaintiffs further allege that immediately after

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their son's birth in 2003, CBR arranged for Quick to pick up the cord blood unit for transport to CBR's banking facility located in Arizona.^{FN4} (*Id.* ¶ 29). Plaintiffs contend that at the time of the pick up, a representative of Quick gave plaintiff Jonathan Polesuk a receipt. (J. Polesuk Aff. ¶ 9). Quick maintains that the "receipt" was a bill of lading. The address for "CBR Systems, Inc. Stem Cell Bank" was preprinted on the delivery information portion of the form. Jonathan Polesuk's signature appears in the space designated for "Shipper's Signature." In the "Special Instruction" section, the phrase "UMBILICAL BLOOD FOR STORAGE" was preprinted. The form contains two boxes that the shipper may check: one is for "Basic \$200 Insurance" and the other is "Shipper Waives Insurance." Neither box was marked. Additionally, the area allowing for the monetary insurance value to be filled in was left blank. The form provides that the "Shipper certifies that the commercial value, nature of the goods, and the content are true and correct, assumes responsibility for charges, and agrees to conditions on the reverse side."

FN4. In plaintiffs' proposed amended complaint, they allege that immediately following their son's birth, "plaintiffs, in compliance with [their] instructions from CBR, placed a call to Quick to pickup plaintiffs' Cord Blood ..." (Proposed Am. Compl. ¶ 30).

*3 Plaintiffs maintain that the reverse side of the form given to them was blank; a claim which Quick disputes. Quick submitted a photocopy of the front side of the bill of lading allegedly issued to plaintiffs at the time of the pick up, as well as a copy of the front and back of a sample bill of lading form, which Quick was allegedly utilizing in 2003. (Greenberg Aff. ¶¶ 2-3, Ex. A, B). Quick's copy of the purported bill of lading issued to plaintiffs differs from the form submitted by plaintiffs. Plaintiffs' form identifies itself as "QUICK BILLING COPY 2." The form submitted by Quick, although somewhat blurred, does not state it is a

billing copy. The sample bill of lading form, which Quick claims is similar to the bill of lading at issue, identifies itself as "SHIPPER'S RECEIPT 1." On the reverse side of the sample copy of shipper's receipt form, it states, in part:

Acceptance of this bill of lading by the shipper shall constitute the shipper's agreement to the following:

2. The shipment is insured by Quick for loss, damage or destruction, irrespective of the cause including but not limited to negligence, to actual fair market value (limit \$200.00) during pick-up, transport and delivery. There is a charge of \$3.00 for this insurance and it will be charged automatically unless shipper waives all coverage by checking appropriate box on front of this bill of lading. The responsibility of Quick under this paragraph shall be reduced to the extent of the value of any insurance carried by the shipper [f]or any lost or damaged shipment.

3. Quick shall not be liable for any loss other than or in an amount in excess of that which is described in paragraph 2 above unless arrangements concerning the same are made in advance of shipment. Shipper may request additional insurance up to a maximum of \$5,000.00 per shipment by showing the amount on the face of this bill of lading and by paying an additional fee as agreed to by the shipper and Quick. The additional valuation and fee must be agreed upon by Quick prior to shipment and must be entered on the face of this bill of lading.

Plaintiffs maintain that when they contacted CBR twenty-four hours after handing over the cord blood, CBR informed them that the cord blood had been destroyed. Plaintiffs allege that "while the Cord Blood was being transported from the Quick Courier to American Airlines, the Cord Blood units were completely destroyed." (Compl. ¶ 37). CBR allegedly advised plaintiffs that a gust of wind caused the box containing the blood to fall from a luggage cart onto the tarmac at an airport in Texas. A truck

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(Cite as: 2006 WL 2796789 (S.D.N.Y.))

subsequently ran over the box destroying the cord blood.

Plaintiffs contend that “Quick was negligent by failing to use its promised highest level of standards to transport Plaintiffs’ Cord Blood ..., failing to have a secure chain of custody in play for Plaintiffs’ Cord Blood shipment to ensure delivery within 32 hours of birth and failing to have a proper standard of care for handling such fragile and irreplaceable goods.” (*Id.* ¶ 45). Plaintiffs further claim that Quick had negligently interfered with plaintiffs’ contract with CBR because, despite Quick’s knowledge that the failure to timely deliver the cord blood could threaten its viability, Quick negligently failed to transport the blood in a timely fashion in that it failed to take ordinary and basic precautions to protect the shipment and to treat it as a fragile, perishable and unique item. (*Id.* ¶¶ 50, 51).

*4 Plaintiffs have asserted claims against CBR for fraud, breach of contract and negligence. The two cause of action asserted against defendants Quick and American Airlines are pled as state law claims for negligence and negligent interference with a contract.^{FN5} CBR has asserted cross-claims against Quick and American Airlines for contractual indemnification, common law indemnification, breach of contract for failing to obtain insurance coverage, and contribution.

FN5. New York State does not recognize the tort of negligent interference with a contract. *Alvord & Swift v. Stewart M. Muller Constr. Co., Inc.*, 413 N.Y.S.2d 309, 312 (N.Y.1978); *Barry & Sons, Inc. v. Instinct Prods, LLC*, 788 N.Y.S.2d 71, 73 (N.Y.App.Div.2005) (citations omitted); *Rosario-Suarz v. Wormuth Bros. Foundry Inc.*, 649 N.Y.S.2d 225, 227 n. 2 (N.Y.App.Div.1996).

Plaintiff is seeking to amend the complaint to add three additional causes of action against Quick, namely: tortious interference with a contract for allegedly intentionally interfering with plaintiffs’ con-

tract with CBR; a Carmack Amendment claim, and a breach of Quick and CBR’s “Professional Service Agreement” (“Service Agreement”). With regard to the proposed claim for breach of the Service Agreement, plaintiffs contend that they were third-party beneficiaries to that contract.

The Service Agreement provides that Quick was to act as a “Contractor” to provide delivery of the cord blood to CBR’s facilities. Paragraph six of the Service Agreement states, in pertinent part:

RELATIONSHIP OF PARTIES. The relationship between the Parties is solely an independent contractor relationship. Contractor and its agents and employees are not agents or employees of CBR, and have no authority to act for or on behalf of CBR or to bind CBR to any contract or in any manner without the express approval in writing of CBR. (Grande Decl. Ex. A ¶ 6).

Pursuant to the terms of the Service Agreement, Quick “assumes liability for, and hereby agrees to indemnify, defend, and hold harmless CBR ... from and against any and all liabilities, obligations, losses, damages, expenses, costs (including reasonable attorneys’ fees), injuries and claims of any kind, arising out of the acts or failure to act of Contractor ...” (*Id.* ¶ 9). The Service Agreement requires Quick to maintain, *inter alia*, “[p]rofessional liability coverage, including coverage for errors and omissions, of at least \$1,000,000.” (*Id.* 12(a)). Additionally, Quick was to obtain comprehensive general liability coverage, and “[c]argo insurance coverage in the amount of \$1,200.00 per work order for the loss, destruction or delay exceeding 72 hours from the time of pick up.” (*Id.* ¶ 12(b), (e)). CBR was to be named as an additional insured on such insurance policies. (*Id.* ¶ 12). The Service Agreement further provides that it is to “be governed by and construed according to the laws of the State of California.” (*Id.* ¶ 22). The Agreement states that, “a dispute under this Agreement” which cannot be resolved through mediation and other appropriate dispute resolution, “shall be settled by arbitration to be held in California, pur-

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(Cite as: 2006 WL 2796789 (S.D.N.Y.))

suant to the rules of the American Arbitration Association.” (*Id.* ¶ 24).

After the instant action was filed, CBR sent Quick a “letter to serve as a formal tender of the defense and indemnity on behalf of CBR and [CBR] request [ed] that Quick immediately honor its obligations [under the Service Agreement] to defend and indemnify CBR in this action.” (Grande Decl. Ex. B at 3). Quick advised CBR that “[t]he tender [was] rejected because the allegations made against [CBR] in this action sound in fraud and/or breach of contract and are not covered by the indemnification provision in the Agreement, which excludes damages due to willful acts of CBR.” (Grande Decl. Ex. C).

*5 In reviewing a complaint for dismissal under Rule 12(b)(6), the Court must accept the factual allegations in the complaint as true and draw all reasonable inferences in plaintiffs' favor. *Bolt Elec., Inc. v. City of New York*, 53 F.3d 465, 469 (2d Cir.1995). The complaint should only be dismissed where it appears beyond doubt that plaintiffs can present no set of facts entitling them to relief. *Conley v. Gibson*, 355 U.S. 41, 46 (1957); *Ryder Energy Distrib. Corp. v. Merrill Lych Commodities, Inc.*, 748 F.2d 774, 779 (2d Cir.1984). On a motion to dismiss, pursuant to Fed.R.Civ.P. 12(b)(6), the Court is precluded from considering matters outside the complaint. *Courtenay Comm'n, Corp. v. Hall*, 334 F.3d 210, 213 (2d Cir.2003). In this regard, the complaint includes any statements or documents incorporated by reference into the complaint. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir.2002) (quoting *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel., Co.*, 62 F.3d 69, 72 (2d Cir.1995)).
FN6

FN6. Among the materials submitted by the parties are: (1) the Service Agreement; (2) copies of the form signed by Mr. Pole-suk; and (3) a page of CBR's website. Since plaintiffs rely on such documents in the drafting of their original and proposed amended complaints, consideration of

these materials is appropriate. Additionally, Quick submitted a sample bill of lading form. Reference to this form is limited solely to providing a context in which to examine the parties' arguments, and not in regard to the substantive merits of the motions themselves.

THE PARTIES' ARGUMENTS

Quick argues that the complaint should be dismissed because the state law claims asserted against it, in the complaint and proposed amended complaint, are preempted by the Carmack Amendment. Quick alternatively argues that the terms of the subject bill of lading limits its liability to \$200. Quick contends that the bill of lading form expressly provided that the shipment was insured for its fair market value (limit \$200.00) by Quick for loss or damage, unless the shipper opted to purchase additional insurance, which the plaintiffs failed to do. Quick contends that the bill of lading “form complies with the federal common law requirements that the carrier give the shipper an option of greater protection in order to limit its liability.” (Quick's Mem. at 7). Specifically, the form had boxes designated for the basic \$200 insurance and for additional insurance coverage, and the reverse side of the form contained a notice that Quick's liability is limited to \$200 unless the shipper elected to buy additional insurance.

CBR asserts that it is seeking the same relief as Quick. CBR contends that its liability is limited because the applicability of the Carmack Amendment extends to CBR as it is an implied carrier, as well as a third-party beneficiary of the bill of lading. In the event that the Court rejects CBR's claims that it too is entitled to the protections of the Carmack Amendment, CBR argues that Quick's motion should be denied without prejudice. CBR argues that Quick's motion is premature because CBR needs discovery in order to obtain the necessary evidence to oppose the motion. Specifically, discovery is necessary regarding what other arrangements, if any, plaintiffs made with Quick for the

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(Cite as: 2006 WL 2796789 (S.D.N.Y.))

shipment of the cord blood, and whether the loss of the cord blood was wanton, willful or constituted gross negligence, or whether any party, including Quick, acted with unclean hands.

Additionally, CBR, as well as the plaintiffs, maintains that this is a case of first impression with regard to the applicability of the Carmack Amendment to shipments of umbilical cord blood. Hence, the motion to dismiss should be denied because the facts of this case presents a unique legal issue. CBR contends that it is unclear whether cord blood constitutes property, freight, goods, or a package within the meaning of the Carmack Amendment. They further argue that the liability limitation provisions, upon which Quick relies, may be void against public policy given the nature of the shipment and the totality of the circumstances surrounding this case. CBR asserts that “[i]n theory, Quick was shipping a potentially life-saving substance ...” (CBR’s Mem. at 9). CBR further argues that even if the Carmack Amendment applies, Quick may not be able to limit its liability by virtue of the fact that plaintiffs were allegedly afforded a choice of insurance on the bill of lading because it is unclear whether \$200, or even the maximum \$5,000 insurance available, is sufficient to adequately compensate plaintiffs for their loss.

*6 Plaintiffs further argue that the Carmack Amendment is inapplicable because they are not “shippers.” Plaintiffs contend that they did not enter into a contractual relationship with Quick and, to the extent that any agreement exists, it is between Quick and CBR. They claim that “[t]o permit Quick to rely upon the Carmack Amendment vis-a-vis the [plaintiffs] would allow Quick: (1) to be protected against [plaintiffs] without the [plaintiffs] having an opportunity to negotiate the terms with Quick such as asking for or obtaining additional insurance; and (2) void its contract with CBR (or effectively make the contract a nullity despite Quick’s representations therein to the contrary).” (Pls.’ Mem. Opp’n Quick’s Mot. to Dismiss at 8). Plaintiff further claims that the back of the receipt given to

them by Quick did not contain any language limiting Quick’s liability.

THE CARMACK AMENDMENT

I. Preemption

The Carmack Amendment “addresses the subject of carrier liability for goods lost or damaged during shipment, and most importantly provides shippers with the statutory right to recover for the *actual loss* or injury to their property caused by any of the carriers involved in the shipment.” *Cleveland v. Beltman N. Am. Co., Inc.*, 30 F.3d 373, 377 (2d Cir.1994) (emphasis in original).^{FN7} The Carmack Amendment also preserves the common law right of a carriers to limit their liability exposure.^{FN8}

FN7. The Carmack Amendment provides, in pertinent part:

A carrier providing transportation ... shall issue a receipt or bill of lading for property it receives for transportation ... That carrier and any other carrier that delivers the property and is providing transportation ... are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and ... Failure to issue a receipt or bill of lading does not affect the liability of a carrier. 49 U.S.C. § 14706(a)(1).

FN8. Section 14706(c)(1)(A) of 49 U.S.C. provides: “[A] carrier ... may ... establish rates for the transportation of property ... under which the liability of the carrier for such property is limited to a value established by written or electronic declaration

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of the shipper or by written agreement between the carrier and shipper if the value would be reasonable under the circumstances surrounding the transportation.”

The issues raised by plaintiffs and CBR regarding whether Quick complied with the necessary requirements to limit its liability, as well as whether any limitation of liability should be void against public policy, have no bearing on whether the Carmack Amendment preempts the state law claims asserted against Quick. Such matters relate solely to whether any recovery against Quick, for a cause of action brought under the Carmack Amendment, is limited to a maximum of \$200. Notwithstanding CBR and plaintiffs' contentions to the contrary, no discovery is necessary with regard to Quick's motion to dismiss on preemption grounds. See, *Taylor v. Mayflower Transit, Inc.*, 22 F.Supp.2d 509, 511 (W.D.N.C.1998) (Finding that plaintiffs, in claiming that discovery is necessary to resolve the issue of whether the Carmack Amendment applies, are confusing the issues of the application of the Amendment with defendants' limitation of liability.).

The only appropriate issue raised, with regard to the applicability of the Carmack Amendment, is whether it applies to shipments of cord blood. Whether cord blood constitutes “property,” for purposes of the Amendment presents purely a question of law, resolution of which is not dependent on the development of a factual record. Despite opponents' purported need for discovery, they have not identified any specific item of discovery relating solely to this limited issue. No additional factual information will have any bearing on the legal question whether shipments of cord blood fall within the scope of the Carmack Amendment or whether the claimed “potential, life-saving” nature of the shipment warrants its exemption under the Amendment.

*7 The Amendment imposes liability upon interstate carriers for “the actual loss or injury to the *property*” occurring during transportation. 49 U.S.C. § 14706(a)(1) (emphasis added) The stat-

utory language of the Carmack Amendment of the Interstate Commerce Act speaks in terms of the transportation of “property.” However, “[t]he Interstate Commerce Act does not define “property.” *Woodfeathers, Inc. v. Washington County, Oregon*, 180 F.3d 1017, 1022 (9th Cir.1999); see also, *Interstate Commerce Comm'n v. Browning-Ferris Indus., Inc.*, 529 F.Supp 287, 289 (N.D.Ala.1981) (“Congress conspicuously omitted a definition of ‘property’ from the Interstate Commerce Act.”). Prior to its abolishment in 1996, the Interstate Commerce Commission (“ICC”) was vested with jurisdiction over interstate transportation by a motor carrier transporting passengers and property. See, *Interstate Commerce Commission Termination Act of 1995*, Pub.L. N. 104-88, 109 Stat. 803. The ICC had observed that the word “property” “is subject to many different meanings. ‘Property’ connotes ownership as well as value. Something that is owned can be ‘property’ notwithstanding its lack of economic value.” *Nuclear Diagnostic Labs., Inc., Contract Carrier Application*, 1979 WL 11177, at *2, 131 M.C.C. 578, 580 (I.C.C. June 4, 1979) (internal quotation marks and citations omitted). However, the Ninth Circuit Court of Appeals, in *AGG Enterprises v. Washington County*, 281 F.3d 1324 (9th Cir.2002), observed that the ICC case law interpreting the term “property” is irrelevant for purposes of a preemption analysis. Rather, the proper focus is whether Congress had a clear and manifest intent to preempt state and local regulation relating to the transportation of property by carriers. *AGG Enters.*, 281 F.3d at 1329 (Addressing the scope of the Federal Aviation Administration Authorization Act's preemption of state regulation of motor carriers transporting property.); cf., *Wilson v. IESI N.Y. Corp.*, -F.Supp.2d-, 2006 WL 2136307, at *9 (M.D.Pa. July 28, 2006) (In contemplating the definition of “property,” the district court questioned whether any deference should be afforded to the ICC's decisions in light of its abolishment and the subsequent transfer of its regulatory functions over motor carriers.).

“The ‘ultimate touchstone’ of a preemption

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(Cite as: 2006 WL 2796789 (S.D.N.Y.))

analysis is congressional intent: 'Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it." ' *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 639, 641 (2d Cir.2005) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996)). "State law is preempted implicitly where the federal interest in the subject matter regulated is so pervasive that no room remains for state action indicating an implicit intent to occupy the field, or where the state regulation at issue conflicts with federal law or stands as an obstacle to the accomplishment of its objectives." *Roundout Elec., Inc. v. NYS Dep't of Labor*, 335 F.3d 162, 166 (2d Cir.2003).

*8 No legislative history exists in connection with the enactment of the Carmack Amendment as it was adopted without discussion or debate. *Cleveland*, 30 F.3d at 377 (citing 40 Cong.Rec. 7075 (1906)). The courts have clearly articulated Congress' intent in enacting the Amendment, as well as Congress' understanding that its preemptive force would be broad and sweeping. The Amendment was enacted to establish a nationally uniform policy governing the interstate carriers' liability for property loss so as not to subject carriers to diverse policies and legislation of varying states. *Adams Express Co. v. Croninger*, 226 U.S. 491, 503 (1913); *New York, N.H. & H.R.R. Co. v. Nothnagle*, 346 U.S. 128, 130 (U.S.1953). To effectuate the goal of national uniformity, the Amendment preempts all state law claims arising in connection with the interstate shipment of property by carriers. *Adams Express*, 226 U.S. at 505-506 ("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."). "Congress has created a broad, comprehensive scheme covering the interstate shipment of freight ... [which] occupie[s] the field to the exclusion of state law." *N. Am. Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229, 233-34 (2d Cir.1978). As the Second Circuit Court of Appeals explained:

In enacting it Congress intended to provide interstate carriers with reasonable certainty and uniformity in assessing their risks and predicting their potential liability. The Carmack Amendment did this both by establishing a single uniform regime for recovery by shippers directly from the interstate common carrier in whose care their items are damaged, and by preempting the shippers' state and common law claims against a carrier for loss or damage to goods during shipment. *Project Hope v. M/V IBN SINA*, 250 F.3d 67, 73 n. 6 (2d Cir.2001) (internal quotation marks, brackets and citations omitted).

The Carmack Amendment is "comprehensive enough to embrace responsibility for all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation ..." *Georgia, Florida, Alabama Ry. Co. v. Blish Milling Co.*, 241 U.S. 190, 196 (1916). There is no question that the Carmack amendment preempts state common law remedies that might be asserted against a carrier for damages to goods shipped under a proper bill of lading. *Cleveland*, 30 F.3d at 378. It is the exclusive remedy available to a shipper to recover damages from a carrier. *Id.* at 380-82.

An examination of the statutory language of the Carmack Amendment, in conjunction with its legislative purpose, reveals that the term "property," as used therein was intended to refer generally to any interstate shipment of a tangible item under a bill of lading or receipt, as oppose to denoting a particular type or category of property. The Amendment was intended to completely dominate the area of interstate carriers liability for the loss or damage to an item during transportation without regard to the nature of the matter being shipped. To make the applicability of the Carmack Amendment contingent upon the nature of the item circumvents the very purpose for the Amendment, *i.e.*, to create a national uniform system whereby interstate carriers could reasonably assess their risk and predict their potential liability. To engage in an individual and arbitrary assessment as to the inherent nature of the con-

Not Reported in F.Supp.2d, 2006 WL 2796789 (S.D.N.Y.), Fed. Carr. Cas. P 84,469
(Cite as: 2006 WL 2796789 (S.D.N.Y.))

tent of a shipment in order to determine whether it is the proper subject of the Carmack Amendment would engender an atmosphere of uncertainty; precisely what the Amendment sought to eliminate.

*9 Presumably had Congress wished to place biological material possessing potentially lifesaving qualities outside the reach of the Carmack Amendment it would have specifically provided for its exclusion as it did in regard to other types of property. The Carmack Amendment only applies to motor carriers "subject to jurisdiction under subchapter I ... of chapter 135 ..." 49 U.S.C. § 14706(a)(1). Exempted from such jurisdiction include motor vehicles transporting, *inter alia*, ordinary livestock, agricultural commodities, and seafood which has not been treated for preserving. 49 U.S.C. § 13506(a)(6)(A), (B), (D); *see also*, *Taiyo Americas, Inc. v. Honey Transport, Inc.*, 464 F.Supp. 1249 (S.D.N.Y.1979) (Finding seafood shipment was exempt from the provisions of the Carmack Amendment.). Statutorily providing that certain identified categories of property are exempt, for purposes of the Carmack Amendment, gives rise to an inference that Congress intended to limit the exceptions to the ones stated. *See*, *United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference ... is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."); *see also*, *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."); *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 517 (2d Cir.1996) ("The canon of construction that says 'expressio unius est exclusio alterius' cautions against creating additional exceptions to complex statutory exceptions."). There is no basis to believe that Congress was unaware that urgent medical and potentially lifesaving substances are regularly transported by interstate carriers when it limited the types of property that fall

outside the scope of the Amendment.

Although CBR claims that it is unclear whether cord blood constitutes property, freight, goods or a package for purposes of the Carmack Amendment, it offers no other designation to ascribe to such shipments. To exclude cord blood from any recognized shipment category would result in the creation of an amorphous category free from established regulations and laws. There is no legal justification for such a result.

Courts have previously adjudicated claims brought under the Carmack Amendment for loss or damage to shipments of blood. *See eg.*, *Pharma Bio, Inc. v. TNT Holland Motor Express, Inc.*, 102 F.3d 914 (7th Cir.1996); *Bio-Lab, Inc. v. Pony Express Courier Corp.*, 911 F.2d 1580 (11th Cir.1990). Moreover, human remains have been classified as "goods" and "freight" in actions for injuries to goods transported by international and domestic air transportation. *See eg.*, *Onyeausi v. Pan Am*, 952 F.2d 788 (3d Cir.1992) (Finding that excluding human remains from the definition of "goods" would exempt a significant number of claims, thus exposing air carriers to inestimable liability and would undermine the goal of uniformity.); *Johnson v. Am. Airlines, Inc.*, 834 F.2d 721, 723-24 (9th Cir.1987) (Concluding that only if the shipper had opted to declare an excess value for the remains on the air waybill, "could the plaintiffs expect to have the shipment treated as other than 'goods.'"); *Milhizer v. Riddle Airlines, Inc.*, 185 F.Supp. 110, 113 (E.D.Mich.1960) ("Considering the fact that the shipment in issue here was accepted as a piece of freight and handled as such and that the transportation rates applicable to air freight in general were applied, it is difficult to see why a box of human remains should not fall into the category of air freight in general."), *aff'd*, 289 F.2d 933 (6th Cir.1961).

*10 In finding that human remains fall within the definition of "goods," the Third Circuit explained:

Human remains can have significant commercial

Not Reported in F.Supp.2d, 2006 WL 2796789 (S.D.N.Y.), Fed. Carr. Cas. P 84,469
(Cite as: 2006 WL 2796789 (S.D.N.Y.))

value, although they are not typically bought and sold like other goods. * * * Human tissue and organs which are taken from the recently deceased have inestimable value in transplant operations. Although remains which are used for these medical and scientific purposes are usually donated, rather than bought and sold, this does not negate their potential commercial value. * * * Notwithstanding the legality of selling some parts of the human body, most notably blood and sperm, we believe these state laws against organ and tissue sales are premised on moral and ethical, rather than economic considerations. In fact, the very existence of these state laws indicates that there would be a market for human remains in the absence of government intervention. *Onyeanusi*, 952 F.2d at 792.

In other legal areas unassociated with transportation, blood and other bodily fluids have been held to constitute property. *See eg., United States v. Garber*, 607 F.2d 92, 97 (5th Cir.1979) (For tax purposes, extremely rare "blood plasma ... like any saleable part of the human body, is tangible property."); *see also, Kurchner v. State Farm Fire & Cas. Co.*, 858 So.2d 1220 (Fla.Dist.Ct.App.2003) (Florida State court held that destruction of cryopreserved sperm is "property damage," as oppose to "bodily injury" under terms of insurance policy because sperm outside the body is property as it is no longer part of the body.).

As ordinarily used, the word "property" means the thing possessed. *See, Wells Fargo & Co. v. Mayor and Aldermen of Jersey City*, 207 F. 871, 876 (D.N.J.1913), *aff'd*, 219 F. 699 (3d Cir.1915). With regard to property interests, the United States Supreme Court has "never held that a physical item is not 'property' simply because it lacks a positive economic or market value." *Phillips v. Washington Legal Found.*, 524 U.S. 156, 169-70 (1998). The Supreme Court explained that "property is more than economic value; it also consists of the group of rights which the so-called owner exercises in his dominion of the physical thing, such as the right to

possess, use and dispose of it." *Id.* at 170 (internal citations and quotation marks omitted); *see also, Black's Law Dictionary* (8th ed. 2004) (Defining property as "[t]he right to possess, use, and enjoy a determinate thing ...; the right of ownership). The Second Circuit Court of Appeals recognized that, in the context of an action for the loss of a donated organ instituted by the plaintiff-intended recipient, the use of the term "property" is not merely a legal fiction because the plaintiff has a practical use for the organ. *Colavito v. New York Organ Donor Network, Inc.*, 438 F.3d 214 (2d Cir.2006).

Thus, a finding that shipments of cord blood constitute "property" for purposes of the Carmack Amendment is consistent with both the purpose and intent of the Amendment, and with property law in general.

*11 Plaintiffs' additional argument, that the Carmack Amendment is inapplicable because they are not "shippers," is unavailing. "A 'shipper' is defined as '[o]ne who tenders goods to a carrier for transportation.'" *Am. Home Assurance Co. v. ZIM JAMAICA*, 418 F.Supp.2d 537, 538 n. 1 (S.D.N.Y.2006) (*quoting Black's Law Dictionary* 1383 (7th ed.1999)). This definition is applicable to plaintiffs. Plaintiffs tendered the cord blood to the Quick carrier to be transported to CBR's facility, and Mr. Polesuk even signed the "receipt" as the shipper. In any event, the Carmack Amendment does not limit the class of plaintiffs that may seek recovery thereunder to only shippers. Rather, such an action may be brought by any person entitled to recover under the receipt or bill of lading. *See generally*, 49 U.S.C. § 14706(a)(1); *see also, Esprit de Corp. v. Victory Express, Inc.*, 111 F. 3d 138, 1997 WL 191466, at * 1 n. 3 (9th Cir. 1997) (unpublished decision) ("[T]he Carmack Amendment does not restrict recovery to 'shippers.'"). Any individual to whom the carrier owes a duty to transport an item is a proper party plaintiff to maintain a Carmack action against a carrier. *See eg., Windows, Inc. v. Jordan Panel Sys. Corp.*, 177 F.3d 114, 117-18 (2d Cir.1999) ("Suits under the Car-

Not Reported in F.Supp.2d, 2006 WL 2796789 (S.D.N.Y.), Fed. Carr. Cas. P 84,469
(Cite as: 2006 WL 2796789 (S.D.N.Y.))

mack Amendment may be brought against a carrier by any person entitled to recover in the carrier's 'bill of lading,' including the buyer who was to receive the goods[,] as well as the seller thereof.) (citations omitted); *Travelers Indem. Co. of Illinois v. Schneider Specialized Carriers, Inc.*, 2005 WL 351106, at *6 (S.D.N.Y. Feb. 10, 2005) (Finding that the consignee and subrogee are bound by the Carmack Amendment.).

Finally, there is no merit to plaintiffs' argument that their claims fall outside the scope of the Carmack Amendment because they did not directly contract with Quick. The lack of contractual privity does not render the Amendment inapplicable. *See, Esprit de Corp.*, 1997 WL 191466, at * 1 ("The Carmack Amendment ... holds a 'common carrier' liable for loss or injury to goods incurred during transport, regardless of the lack of contractual privity.").

Accordingly, plaintiffs' action against Quick for the loss of the shipment of cord blood is governed by the Carmack Amendment. Thus, by virtue of the preemptive scope of the Amendment, plaintiffs are precluded from maintaining any state law causes of action against Quick premised on the loss of, or damage to, the cord blood while in transit. Dismissal of the pending state law causes of action against Quick are therefore warranted.

Plaintiffs seek leave to file an amended complaint to add two additional state law causes of action against Quick, as well as a claim under the Carmack Amendment. Quick has not advanced any specific argument in opposition to plaintiffs' request to add a Carmack cause of action. Leave to amend should be freely given when justice dictates. Fed.R.Civ.P. 15(a); *Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 234-35 (2d Cir.1995). Where there is neither a showing of the movants' undue delay, bad faith or dilatory motive, nor a showing of undue prejudice to the opposing party by virtue of allowance of the amendment, leave to amend should be granted. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also, Grace v. Rosen-*

stock, 228 F.3d 40, 53-54 (2d Cir.2000). Where the additional proposed causes of action would not withstand a motion to dismiss, the granting of leave to add such claims would be futile, and hence the motion should be denied accordingly. *See, Journal Publ'g Co. Am. Home Assurance Co.*, 771 F.Supp. 632, 635 (S.D.N.Y.1991) (*quoting Glick v. Koenig*, 766 F.2d 265, 268 (7th Cir.1985)); *see also, Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir.1993).

*12 The circumstances warrant granting plaintiffs an opportunity to file an amended complaint to assert a Carmack cause of action against Quick. *See generally, Miracle of Life, LLC v. N. Am. Van Lines, Inc.*, 368 F.Supp.2d 494, 498-99 (D.S.C.2005) (Instead of recharacterizing plaintiffs' state law claims as asserting Carmack Amendment claims, the court determined that "the more prudent course of action is to grant Plaintiffs leave to amend their complaint to properly assert Carmack claims."). Regardless of how plaintiffs designate the proposed state law causes of action, they are nothing more than claims seeking to recover for the loss of property which was being transported by an interstate carrier. The claims are not premised on any alleged wrongful conduct committed by Quick which is separate and distinct from the loss of the shipment of cord blood. Therefore, granting leave to amend the complaint to assert these additional state law causes of action would be futile because they too are preempted by the Carmack Amendment.

Accordingly, the state law claims against Quick are dismissed, and plaintiffs are granted leave to file an amended complaint to add a Carmack claim.

II. Limitation of Liability

Quick's Limitation of Liability

A carrier may not exempt itself from all liability for the loss or damage to property due to the carrier's own negligence. *Adams Express*, 226 U.S. at 503. Agreements that allow a carrier to completely exculpate itself from liability are violative of public policy as "they would tend to invite care-

Not Reported in F.Supp.2d, 2006 WL 2796789 (S.D.N.Y.), Fed. Carr. Cas. P 84,469
(Cite as: 2006 WL 2796789 (S.D.N.Y.))

lessness on the part of the carrier.” *Shippers Nat'l Freight Claim Council, Inc. v. Interstate Commerce Comm'n*, 712 F.2d 740, 746 (2d Cir.1983). The Carmack Amendment does provide a means by which carriers may limit their liability exposure. Such limitations are not deemed to be an attempt by the carrier to exonerate itself from losses attributable to its own negligence. Rather, they operate to provide the carrier with knowledge of the extent of its potential liability for the loss or damage to the property so that the carrier may seek to be compensated in proportion to the risk it assumes. *Id.* at 746.

“[A] carrier's ability to ‘limit [its] liability is a carefully defined exception to the Carmack Amendment's general objective of imposing full liability for the loss of shipped goods; courts, thus carefully scrutinize agreements purporting to limit such liability.’” *Emerson Elec. Supply Co. v. Estes Express Lines, Corp.*, 451 F.3d 179, 186 (3d Cir.2006) (quoting *Carmana Designs, Ltd. v. N. Am. Van Lines, Inc.*, 943 F.2d 316, 319 (3d Cir.1991)). “[T]he proper test to be applied to every limitation of the common-law liability of a carrier [is] its just and reasonable character ...” *Shippers Nat'l*, 712 F.2d at 747 (internal alteration and emphasis in original) (quoting *Hart v. Pennsylvania R.R.*, 112 U.S. 331, 342 (1884)). “Accordingly, so long as the limitation of liability was the result of a fair, open, just and reasonable agreement between carrier and shipper, entered into by the shipper for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk, and the shipper was given the option of higher recovery upon paying a higher rate, the agreement was enforceable at common law.” *Id.* at 746 (internal quotation marks and citations omitted).

*13 “The federal common law requirement that the carrier give the shipper an option of greater protection in order to limit its liability validly is called the ‘release-value doctrine.’” *Kemper Ins. Cos. v. Federal Express Corp.*, 115 F.Supp.2d 116, 122 (D.Mass.2000), *aff'd*, 252 F.3d 509 (1st Cir.2001). “[U]nder the ‘released value’ doctrine, contractual

provisions that merely limit carrier liability for lost or damaged cargo ... ordinarily are valid and enforceable so long as they (1) are set forth in a reasonably communicative form, so as to result in a fair, open, just, and reasonable agreement, between the carrier and shipper; and (2) offer the shipper a possibility of higher recovery by paying the carrier a higher rate.” *Nippon Fire & Marine Ins. Co., Ltd. v. Skyway Freight, Sys., Inc.*, 235 F.3d 53, 59-60 (2d Cir.2000) (citations and internal quotation marks omitted). The released value doctrine does not require that the alternative liability limit offered by a carrier be the full value rate. *Kemper*, 252 F.3d at 513, 515.

The granting of Quick's alternative application to limit its liability to \$200 is precluded by the existence of a number of disputed factual issues pertaining to whether Quick satisfied all the legal prerequisites necessary to entitle it to limit its liability. See e.g., *Stein Jewelry Co. v. United Parcel Serv., Inc.*, 228 F.Supp.2d 304, 307-308 (S.D.N.Y.2002) (Whether carrier provided adequate notice that carrier's tariff excluded shipped goods from insurance coverage presented a factual issue not appropriate for determination on a motion to dismiss.). For example, plaintiffs deny that the receipt given to them by the Quick courier contained any writing on the reverse side, which according to Quick, would have contained the liability limitation provisions. Quick, however, contends that “plaintiffs cannot claim that they only received a single page receipt with no terms and conditions” because “[a] complete bill of lading form, with the contractual language and all of the pages, is included in the collection kit provided by CBR to each of its customers” and plaintiffs admit that CBR provided them with the pre-printed Quick label. (Quick's Supplemental Mem. at 9). The nature and full content of the materials provided to plaintiffs is a factual matter for discovery. Additionally, CBR's website advises that the collection kit is “pre-labeled and ready to be shipped ‘as-is.’” Such instructions would not necessarily place customers on notice that it was incumbent upon them to read the terms purportedly

Not Reported in F.Supp.2d, 2006 WL 2796789 (S.D.N.Y.), Fed. Carr. Cas. P 84,469
(Cite as: 2006 WL 2796789 (S.D.N.Y.))

set forth in the shipment forms. Furthermore, it cannot be ascertained, prior to discovery, whether the plaintiffs were even aware that they were allegedly entering into a transportation contract with Quick when Mr. Polesuk signed the receipt. Accordingly, Quick's application to limit its liability to \$200, in accordance with the purported terms of the receipt/bill of lading, is premature.

*14 CBR and plaintiffs, however, argue that the application of the release value doctrine to shipment of cord blood should be deemed void as against public policy, and hence Quick's ability to limit its liability would not be the proper subject of discovery. Such a blanket prohibition of the release value doctrine to any shipments of "potentially lifesaving substance" is inappropriate. For example, the Eighth Circuit Court of Appeals, in *Hampton v. Federal Express Corp.*, 917 F.2d 1119 (8th Cir.1990), held that the release value doctrine applied to a shipment of potentially lifesaving blood samples. In *Hampton*, blood samples, of an infant cancer patient in need of a bone marrow transport, were to be shipped to a medical center where they were to be matched with the most suitable of five potential donors. A contract of carriage entered into by the hospital-shipper and common carrier clearly limited the carrier's liability to \$100, and the shipper did not avail itself of the opportunity to declare a higher value. The carrier had no knowledge of the nature of the content of the shipment. In a wrongful death action commenced by the infant's father against the carrier, the Eighth Circuit held that the carrier was "entitled to partial summary judgment under the released value doctrine, limiting its liability to \$100, the amount stated in the contract of carriage between it and the shipper" because the "nature and extent of damages suffered by plaintiff ... were not reasonably foreseeable to the carrier ..." *Hampton*, 917 F.2d at 1120. The Eighth Circuit reasoned that if the carrier "had known of the contents of the package, it might have charged a higher rate, exercised additional care, have obtained insurance, or might not have accepted the responsibility." *Id.* at 1125.

Unlike *Hampton*, in the case at bar the special instructions section of the purported bill of lading indicates that the content of the shipment was an umbilical cord, and Quick was contractually obligated to have obtain additional insurance for such shipments pursuant to the terms of its Service Agreement with CBR. Thus, the concerns expressed in *Hampton* that the carrier could not reasonably foresee the true extent of its liability exposure and obtain insurance commensurate with such exposure, are not concerns present in the instant case. Although the release value doctrine is not void as a matter of law, whether the release value doctrine operates to limit Quick's liability is a factual issue.

CBR's Limitation of Liability

However, resolution of this factual issue will have no bearing on CBR's exposure of liability. CBR argues that, pursuant to the Carmack Amendment, its liability should be limited in accordance with the \$200 limitation set forth in the purported bill of lading because CBR was a third-party beneficiary thereof, as well as an implied carrier. CBR maintains that at all relevant times Quick was acting as its agent, and that "it was CBR which ultimately placed the cord blood within the stream of commerce albeit with the help of Quick and American Airlines as intermediaries." (CBR's Mem. at 6). In addition to acting as CBR's agent, CBR asserts that Quick was simultaneously acting for CBR's benefit when it attempted to transport the blood to CBR's facility, a necessary step in order for CBR's contract with plaintiffs to be effectuated. Thus, CBR claims it suffered injury as a result of the non-delivery because, *inter alia*, it exposed CBR to liability to the plaintiffs. CBR therefore asserts that CBR was clearly a third-party beneficiary of Quick's alleged bill of lading agreement with the plaintiffs and is, therefore, entitled to the same benefits of the limitation of liability as its agent, Quick.

*15 The Carmack amendment applies only to carriers and freight forwarders. *See*, 49 U.S.C. §

Not Reported in F.Supp.2d, 2006 WL 2796789 (S.D.N.Y.), Fed. Carr. Cas. P 84,469
(Cite as: 2006 WL 2796789 (S.D.N.Y.))

14706(a)(1). CBR is not a carrier, and its self-serving characterization of itself as an "implied carrier" does not alter its legal status. According to the terms of CBR and Quick's Service Agreement, the "purpose" of the Agreement was that "CBR requires delivery service" and that Quick "is in the business of providing services of the type required by CBR and has agreed to furnish the same ..." (Grande Decl. Ex. A at 1). The plain language of the Service Agreement indicates that CBR is not, in any manner, a provider of transportation services, but rather is one in need of such services. Moreover, CBR's contention that Quick was acting as its agent is similarly belied by the express provisions of the Service Agreement. The Agreement explicitly provides that Quick is not the agent of CBR, and that the relationship between the parties is solely that of an independent contractor relationship. A party who enters into a service contract, with regard to an item to be delivered to it, does not gain a carrier-type status merely because it also contractually arranged for the transportation of that item by a carrier.

Nor is there any basis to find that CBR was an intended third-party beneficiary of the alleged bill of lading. "Under the Carmack Amendment, shipping 'contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties.'" *St. Paul Fire & Marine Ins. Co. v. Schneider Nat'l Carriers, Inc.*, 2006 WL 522455, at * (S.D.N.Y. Mar. 3, 2006) (quoting *Toyomenka, Inc. v. S.S. Tosaharu Maru*, 523 F.2d 518, 521 (2d Cir.1975)). Under New York law, only an intended, rather than an incidental, beneficiary of a contract can assert a third-party beneficiary claim thereunder. *Mortise v. United States*, 102 F.3d 693, 697 (2d Cir.1996); *National Westminster Bank PLC v. Grant Prideco, Inc.*, 261 F.Supp.2d 265, 272 (S.D.N.Y.2003). "[O]ne is an intended beneficiary

if one's right to performance is appropriate to effectuate the intention of the parties' to the contract and either the performance will satisfy a money debt obligation of the promisee to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." *Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Island Operating Corp.*, 735 N.Y.S.2d 83, 98 (N.Y.App.Div.2001) (internal quotation marks and citations omitted); see also, *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 925 F.2d 566, 573 (2d Cir.1991). "An incidental beneficiary is a third party that may derive a benefit from the performance of a contract though that party is neither the promisee nor the one to whom performance is to be rendered." *Roosevelt Islander*, 735 N.Y.S.2d at 98. In determining whether a third-party is an intended beneficiary of a contract, "the actual intent of the parties is critical." *Edge Mgt. Consulting Inc. v. Blank*, 807 N.Y.S.2d 353, 368-69 (N.Y.App.Div.2006). The best evidence of the contracting parties intent as to whether a third party was an intended beneficiary to a contract, is the language of the agreement itself. *Id.* at 369. Nevertheless, "the obligation to perform to the third-party beneficiary need not be expressly stated in the contract." *Trans-Orient Marine*, 925 F.2d at 573.

*16 An examination of the surrounding circumstances, in addition to the purported agreement itself, reveals that neither Quick nor the plaintiffs entered into the claimed transportation contract with the intention that CBR would be a third-party beneficiary thereof. CBR's contention that the purported bill of lading inured to CBR's benefit, because it was necessary in order for CBR to effectuate its contract with the plaintiffs, merely makes CBR an incidental beneficiary of the contract, as opposed to an intended beneficiary.

Accordingly, CBR's cross-motion to dismiss the complaint or, in the alternative, to limit its potential liability to \$200, is denied.

ARBITRATION OF CROSS-CLAIMS

Not Reported in F.Supp.2d, 2006 WL 2796789 (S.D.N.Y.), Fed. Carr. Cas. P 84,469
(Cite as: 2006 WL 2796789 (S.D.N.Y.))

Quick maintains that the cross-claims asserted against it by CBR should be dismissed or stayed pending arbitration. CBR does acknowledge that the Service Agreement “ostensibly provides that disputes between CBR and Quick ‘under this Agreement’ should be resolved by arbitration.” (CBR Reply Mem. at 8). CBR, however, argues that the arbitration provision in the Agreement is inapplicable because the subject dispute “arises from the loss or destruction of [the] cord blood by Quick and or American Airlines and, therefore, is not a dispute arising under the Provider Agreement between CBR and Quick.” (*Id.*). CBR additionally claims that Quick has been remiss in initiating the arbitration of the issues. CBR further argues that the Service Agreement “does not provide that any arbitration would be binding on the parties and, as a result, it is likely that CBR’s cross-claims against Quick would end up before this Court regardless of an arbitrator’s decision on the merits.” (*Id.*).

The Federal Arbitration Act (“FAA”) “was intended to promote the enforcement of privately entered agreements to arbitrate ‘according to their terms.’” *Bank Julius Baer & Co., Ltd. v. Waxfeld, Ltd.*, 424 F.3d 278, 281 (2d Cir.2005) (quoting *Mastrobuono v. Sherson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995)). By virtue of the FAA, “Congress has declared a strong federal policy favoring arbitration as an alternative means of dispute resolution.” *Id.* (citation and internal quotation marks omitted). The language of the subject arbitration clause reveals that CBR and Quick agreed to arbitrate, and CBR concedes that the Agreement “ostensibly” provides that disputes thereunder are subject to arbitration. Where “the existence of an arbitration agreement is undisputed, doubts as to whether a claim falls within the scope of that agreement should be resolved in favor of arbitrability.” *Ace Capital Re Overseas Ltd. v. Cent. United Life Ins. Co.*, 307 F.3d 24, 29 (2d Cir.2002).

The arbitration clause in the Service Agreement does not limit the nature of the disputes subject to arbitration, but rather broadly provides that

any disputes under the agreement are arbitrable. “Where the arbitration clause is broad, there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties’ rights and obligations under it.” *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir.2001) (citation and internal quotation marks omitted). “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

*17 CBR’s cross-claims fall within the scope of the arbitration agreement. The cross-claims are premised on allegations of Quick’s negligence, recklessness and/or carelessness, Quick’s obligation to indemnify CBR, and Quick’s breach of the Service Agreement by failing to obtain and maintain the requisite liability insurance coverage naming CBR as an additional insured. Such issues are not merely collateral matters to the Service Agreement, but rather are directly related to the provisions of the Agreement. Accordingly, litigation of the cross-claims against Quick are stayed pending arbitration. *See*, 9 U.S.C. § 3.^{FN9}

FN9. Section 3 of 9 U.S.C. provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the

Not Reported in F.Supp.2d, 2006 WL 2796789 (S.D.N.Y.), Fed. Carr. Cas. P 84,469
(Cite as: 2006 WL 2796789 (S.D.N.Y.))

stay is not in default in proceeding with such arbitration.

CONCLUSION

Plaintiffs' motion for leave to file an amended complaint is granted, but only to the extent that they may assert a Carmack Amendment claim against defendant Quick, as well as add further factual allegations. Defendant Quick's motion to dismiss the complaint, or in the alternative to limit its liability, is granted to the extent that the state law claims, asserted in the original complaint are dismissed. Quick's motion to dismiss, or in the alternative to stay, the cross-claims asserted against it by defendant CBR is granted to the extent that the cross-claims are stayed pending arbitration. Defendant CBR's motion to dismiss the complaint, or in the alternative to limit its liability, is denied in all respects.

SO ORDERED:

S.D.N.Y., 2006.

Polesuk v. CBR Systems, Inc.

Not Reported in F.Supp.2d, 2006 WL 2796789
(S.D.N.Y.), Fed. Carr. Cas. P 84,469

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MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000397

INTENTIONALLY BLANK BECAUSE COURT HAS DEFENDANT'S NOTICE AS 19 PAGES, beginning on 379 and ending on 397, AND WE HAVE ONLY 18.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 50 2008 CA 036246XXXXMB
AH

IVANA VIDOVIC MLINAR,

Plaintiff(s),

vs.

UNITED PARCEL SERVICE INC., PAK
MAIL OF WELLINGTON, INC.,
RECOVERY MANAGEMENT CORP. d/b/a
CARGO LARGO and AARON ANDERSON,

Defendant(s).

NOTICE OF FILING

Plaintiff Ivana Vidovic Mlinar, by and through the undersigned counsel, hereby provides notice that the authorities cited by the Plaintiff in the Hearing of UPS's Motion to Dismiss held on January 20, 2011 have been filed with the Clerk of the Circuit Court, Palm Beach County.

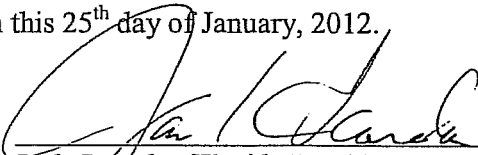
Braid Sales & Mktg. v. R & L Carriers, 838 So. 2d 590 (Fla. 5th DCA 2003).

Chicago, R. I. & P. R. Co. v. Maucher, 248 U.S. 359, 363 (U.S. 1919.)

Mesta v. Allied Van Lines Int'l, 695 F. Supp. 63, 65 (D. Mass. 1988.)

North Am. Van Lines v. Pinkerton Sec. Sys., 89 F.3d 452 (7th Cir. Ill. 1996.)

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all Counsel on the attached list on this 25th day of January, 2012.



Jack Scarola, (Florida Bar No.: 169440)
jsx@searcy.com
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Phone:(561) 686-6300
Fax: (561) 383-9451
Attorney for Plaintiff

COUNSEL LIST

Melissa A. Davis, Esquire
Angela Adams, Esquire
Alston & Bird
1201 West Peach Street, NW
Atlanta, GA 30309
Phone: (404)-881-7148
Fax: (404)-253-8524
Attorneys for United Parcel Service Inc.

Jeffrey Blaker, Esquire
Conroy, Simberg, Ganon, Krevans, Abel,
Lurvey, Morrow & Schefer, P.A.
1801 Centre Park Drive East, Suite 200
West Palm Beach, FL 33401
Phone: (561)-697-8088
Fax: (561)-697-8664
Attorneys for Recovery Management
Corporation d/b/a Cargo Largo

David R. Gutwein, Esquire
Hamilton, Miller & Birthisel, LLP
150 SE 2nd Avenue, Suite 1200
Miami, FL 33131
Phone: (305)-379-3686
Fax: (305)-379-3690
Attorneys for United Parcel Service Inc.

Shannon M. Mahoney, Esquire
Law Offices of Shannon M. Mahoney, P.A.
315 11th Street
West Palm Beach, FL 33401
Phone: (561)-659-4414
Fax: (561)-659-6991
Attorneys for Ivana Vidovic Mlinar



Analysis

As of: Jan 19, 2012

**BRAID SALES & MARKETING, INC., d/b/a FULL HOUSE
COMPANY, Appellant, v. R & L CARRIERS, INC., Appellee.**

Case No. 5D02-1168

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

838 So. 2d 590; 2003 Fla. App. LEXIS 514; 28 Fla. L. Weekly D 296

January 24, 2003, Opinion Filed

SUBSEQUENT HISTORY: [**1]
Rehearing denied by *Braid Sales & Mktg. v. R
& L Carriers, Inc.*, 2003 Fla. App. LEXIS 4393
(Fla. Dist. Ct. App. 5th Dist., Feb. 28, 2003)

PRIOR HISTORY: Appeal from the Circuit
Court for Brevard County, Lisa Davidson
Kahn, Judge. George W. Maxwell III, Judge.

DISPOSITION: REVERSED AND
REMANDED.

CASE SUMMARY:

PROCEDURAL POSTURE: The Circuit
Court, Brevard County (Florida), entered a
final judgment for appellant corporation and
against appellee interstate carrier on the
corporation's claim for damages to machinery it
shipped via the interstate carrier. However, the
trial court also applied federal law to limit the
damage award. Prior to trial, it had dismissed

the corporation's breach of contract claim by
applying that same federal law. The corporation
appealed.

OVERVIEW: The corporation sued the
interstate carrier for damages to machinery
shipped via the interstate carrier. The
corporation's first count alleged negligence. Its
second count alleged breach of an oral contract
under which the interstate carrier allegedly
promised to pay the full cost of repairing the
machinery. Prior to trial, the trial court granted
the interstate carrier's motion to dismiss the
second count. It held the Carmack Amendment,
49 U.S.C.S. § 14706, limiting an interstate
carrier's liability for loss or damage pursuant to
a tariff, preempted the contract action. After a
trial, the court found the interstate carrier
proved that, pursuant to the Carmack
Amendment, the corporation's damages were
limited to five times the amount of its shipping
costs. After judgment was entered, the
appellate court found the Carmack Amendment

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000401

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

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AH

IVANA VIDOVIC MLINAR,

Plaintiff(s),

vs.

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MAIL OF WELLINGTON, INC.,
RECOVERY MANAGEMENT CORP. d/b/a
CARGO LARGO and AARON ANDERSON,

Defendant(s).

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Plaintiff Ivana Vidovic Mlinar, by and through the undersigned counsel, hereby provides notice that the authorities cited by the Plaintiff in the Hearing of UPS's Motion to Dismiss held on January 20, 2011 have been filed with the Clerk of the Circuit Court, Palm Beach County.

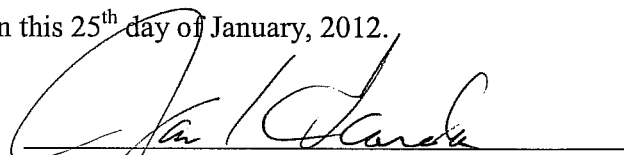
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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all Counsel on the attached list on this 25th day of January, 2012.



Jack Scarola, (Florida Bar No.: 169440)

jsx@searcylaw.com

Searcy Denney Scarola Barnhart & Shipley, P.A.

2139 Palm Beach Lakes Boulevard

West Palm Beach, Florida 33409

Phone:(561) 686-6300

Fax: (561) 383-9451

Attorney for Plaintiff

COUNSEL LIST

Melissa A. Davis, Esquire
Angela Adams, Esquire
Alston & Bird
1201 West Peach Street, NW
Atlanta, GA 30309
Phone: (404)-881-7148
Fax: (404)-253-8524
Attorneys for United Parcel Service Inc.

Jeffrey Blaker, Esquire
Conroy, Simberg, Ganon, Krevans, Abel,
Lurvey, Morrow & Schefer, P.A.
1801 Centre Park Drive East, Suite 200
West Palm Beach, FL 33401
Phone: (561)-697-8088
Fax: (561)-697-8664
Attorneys for Recovery Management
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David R. Gutwein, Esquire
Hamilton, Miller & Birthisel, LLP
150 SE 2nd Avenue, Suite 1200
Miami, FL 33131
Phone: (305)-379-3686
Fax: (305)-379-3690
Attorneys for United Parcel Service Inc.

Shannon M. Mahoney, Esquire
Law Offices of Shannon M. Mahoney, P.A.
315 11th Street
West Palm Beach, FL 33401
Phone: (561)-659-4414
Fax: (561)-659-6991
Attorneys for Ivana Vidovic Mlinar



Analysis

As of: Jan 19, 2012

**BRAID SALES & MARKETING, INC., d/b/a FULL HOUSE
COMPANY, Appellant, v. R & L CARRIERS, INC., Appellee.**

Case No. 5D02-1168

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

838 So. 2d 590; 2003 Fla. App. LEXIS 514; 28 Fla. L. Weekly D 296

January 24, 2003, Opinion Filed

SUBSEQUENT HISTORY: [**1]
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& L Carriers, Inc.*, 2003 Fla. App. LEXIS 4393
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DISPOSITION: REVERSED AND
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trial court also applied federal law to limit the
damage award. Prior to trial, it had dismissed

the corporation's breach of contract claim by
applying that same federal law. The corporation
appealed.

OVERVIEW: The corporation sued the
interstate carrier for damages to machinery
shipped via the interstate carrier. The
corporation's first count alleged negligence. Its
second count alleged breach of an oral contract
under which the interstate carrier allegedly
promised to pay the full cost of repairing the
machinery. Prior to trial, the trial court granted
the interstate carrier's motion to dismiss the
second count. It held the Carmack Amendment,
49 U.S.C.S. § 14706, limiting an interstate
carrier's liability for loss or damage pursuant to
a tariff, preempted the contract action. After a
trial, the court found the interstate carrier
proved that, pursuant to the Carmack
Amendment, the corporation's damages were
limited to five times the amount of its shipping
costs. After judgment was entered, the
appellate court found the Carmack Amendment

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000404

838 So. 2d 590, *; 2003 Fla. App. LEXIS 514, **;
28 Fla. L. Weekly D 296

did not apply as the interstate carrier did not show one requirement, that it maintained a tariff with the Interstate Commerce Commission. It also found the trial court erred in dismissing the second count as the Carmack Amendment did not preempt the breach of contract claim since that claim was independent of a damage claim.

OUTCOME: The judgment was reversed and the case was remanded for further proceedings.

LexisNexis(R) Headnotes

Transportation Law > Carrier Duties & Liabilities > Damages

Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Transportation Law > Rail Transportation > Carmack Amendment

[HN1] The Carmack Amendment, 49 U.S.C.S. § 14706, generally limits a motor carrier's liability for loss or damage to an interstate commercial shipment pursuant to a tariff, a document which sets forth a liability limit applicable absent a customer exercising the option to purchase higher liability limits.

Transportation Law > Carrier Duties & Liabilities > Bills of Lading

Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Transportation Law > Rail Transportation > Carmack Amendment

[HN2] One of the requirements for the application of the Carmack Amendment, 49 U.S.C.S. § 14706, is that the carrier involved maintain a tariff with the Interstate Commerce Commission.

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > Defenses

Transportation Law > Carrier Duties & Liabilities > Damages

Transportation Law > Interstate Commerce > Federal Preemption

[HN3] Preempted state law claims include all liability stemming from damage or loss of goods, liability stemming from the claims process, and liability related to the payment of claims. However, liability arising from separate harms - apart from the loss or damage of goods - is not preempted. For example, if an employee of a carrier assaulted and injured the shipper, state law remedies would not be preempted. Similarly, a claim of intentional infliction of emotional distress alleges a harm to the shipper that is independent from the loss or damage to goods and, as such, would not be preempted.

Transportation Law > Carrier Duties & Liabilities > Bills of Lading

Transportation Law > Interstate Commerce > Federal Preemption

Transportation Law > Rail Transportation > Carmack Amendment

[HN4] Neither the Carmack Amendment, 49 U.S.C.S. § 14706, nor public policy support a carrier's attempt to evade the legal responsibilities voluntarily assumed by entry into an independent contract.

COUNSEL: Allan P. Whitehead of Frese, Nash & Hansen, P.A., Melbourne, for Appellant.

Mark D. Shuman of Gray, Harris & Robinson, P.A., Melbourne, for Appellee.

JUDGES: PALMER, J. THOMPSON, C.J., and SAWAYA, J., concur.

OPINION BY: PALMER

OPINION

[*591] PALMER, J.

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000405

838 So. 2d 590, *; 2003 Fla. App. LEXIS 514, **;
28 Fla. L. Weekly D 296

Braid Sales & Marketing, Inc. appeals from a final judgment entered in its favor against R&L Carriers, Inc., which limited its damage claim to \$ 3,612.55. Concluding that the trial court improperly applied the limitations of the Carmack Amendment¹ to this case, we reverse the final judgment.

1 [HN1] The Carmack Amendment, 49 U.S.C. § 14706, generally limits a motor carrier's liability for loss or damage to an interstate commercial shipment pursuant to a tariff, a document which sets forth a liability limit which is applicable absent a customer exercising the option to purchase higher liability limits.

[**2] Braid sued R&L, an interstate carrier of goods, seeking compensation in excess of \$ 15,000.00 for damages to machinery shipped via R&L. Count I alleged a claim for negligence, and Count II alleged a claim for breach of an oral contract pursuant to which R&L promised to pay Braid the full cost of repairing the machinery. Prior to trial, the trial court granted R&L's motion to dismiss Count II, holding that the breach of contract claim was preempted by the provisions of the Carmack Amendment. The matter proceeded to trial on Count I before the court sitting without a jury. Upon review of the evidence, the court found that R&L had established its affirmative defense that, [*592] pursuant to the Carmack Amendment, Braid was not entitled to recover its full damages on Count I, but instead was limited to recovery of \$ 3,612.55, which represented five times the amount of its shipping costs. We disagree.

R&L had the burden to prove at trial its affirmative defense based upon the Carmack Amendment. [HN2] One of the requirements for the application of the Carmack Amendment is that the carrier involved maintain a tariff with the Interstate Commerce Commission. See *Rohner Gehrig Co. v. Tri-State Motor Transit*, 950 F.2d 1079 (5th Cir. 1992). [**3] While

the parties agreed that R&L was the carrier involved in the shipment at issue, the record demonstrates that the tariff introduced into evidence was not applicable to R&L because the participating carriers listed in the tariff did not include R&L. R&L contends that it adequately authenticated the tariff by having its employee testify that this tariff was applicable to R&L. However, since the tariff document unambiguously shows, on its face, that it is not applicable to R&L, that testimony could not alter the terms of the document. Since R&L did not establish that it maintained any tariff with the Interstate Commerce Commission, it failed to meet its burden of proving its affirmative defense. Accordingly, the damages suffered by Braid were not limited by the Carmack Amendment.

The trial court arguably reached the same conclusion in its final judgment, although not explicitly, when it held that "the 1997 tariff introduced into evidence, the controlling tariff in this action, did not list the named defendant, R&L as the carrier, but instead listed Gator Freightways, Inc., as the carrier." However, after reaching that conclusion, the trial court nonetheless found the 1997 tariff [**4] applicable by holding that Braid waived any issue as to the applicability of the tariff "by its prior conduct, and by introducing the 1999 amendment to the tariff in Plaintiff's case." We disagree. Although the trial court failed to specify what "prior conduct" constituted waiver, our review of the record shows no prior conduct which would legally constitute a waiver, and R&L does not argue that any such prior conduct existed.

In addition, the trial court's conclusion that Braid waived its argument regarding the applicability of the tariff by introducing the 1999 amendment to the tariff in Braid's case is erroneous. Braid's introduction of that document occurred after the trial court had already overruled its objection to the admissibility and relevancy of the 1977 tariff.

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000406

838 So. 2d 590, *; 2003 Fla. App. LEXIS 514, **;
28 Fla. L. Weekly D 296

Accordingly, its introduction could not legally constitute a waiver of the argument previously made.

R&L further argues that the terms of this tariff were incorporated into the agreement between the parties by the bill of lading. However, that bill of lading merely states that it is subject to "tariffs in effect on the date of issue of the bill of lading". As noted above, R&L failed to prove that any tariff relating [**5] to R&L was in effect on the date of the bill of lading.

In summary, the trial court erred in applying the Carmack Amendment to limit Braid's claim to damages for five times the shipping cost. Instead, Braid was entitled to recover whatever damages were proximately caused by the negligence of R&L.

Braid also challenges the trial court's dismissal of Count II of its amended complaint.² Count II set forth an independent [*593] claim for a breach of an oral agreement entered into between R&L and Braid after the shipment was completed. Braid argued that since the claim was based upon conduct occurring after the shipment was completed it was not legally precluded by the Carmack Amendment. R&L responded that dismissal was warranted because the Carmack Amendment provided the sole remedy and preempted all other federal or state claims and remedies relating to the loss or damage to cargo, citing to *Rini v. United Van Lines, Inc.*, 104 F.3d 502 (1st Cir. 1997).

2 Although we have concluded that the Carmack Amendment was not applicable in this case because R&L failed to prove that any tariff was on file related to R&L, that argument was not made by Braid in opposition to the motion to dismiss and, accordingly, it waived that argument in connection with Count II.

[**6] Rini involved a plaintiff's attempt to recover on claims which included an allegation

that while negotiating plaintiff's damage claim the shipper engaged in unfair and deceptive acts in violation of Massachusetts law, and intentionally inflicted emotional distress. The Rini decision noted that the Supreme Court of the United States had not clarified the extent to which the Carmack Amendment preempted other claims, but went on to rule that state statutes are preempted by the Carmack Amendment if they in any way enlarge the responsibility of the carrier for loss or at all affect the grounds of recovery or the measure of recovery. The court further construed the Carmack Amendment and the set of federal regulations that complement it as covering not only the actual transport of goods, but also the claims process:

[HN3] Preempted state law claims . . . include all liability stemming from damage or loss of goods, liability stemming from the claims process, and liability related to the payment of claims. . .

104 F.3d at 505-506. At the same time the Rini court recognized that liability arising from separate harms are not preempted:

On the other hand, liability arising [**7] from separate harms - apart from the loss or damage of goods - is not preempted. For example, if an employee of the carrier assaulted and injured the shipper, state law remedies would not be preempted. Similarly, a claim of intentional infliction of emotional distress alleges a harm to the shipper that is independent from the loss or damage to goods

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000407

838 So. 2d 590, *; 2003 Fla. App. LEXIS 514, **;
28 Fla. L. Weekly D 296

and, as such, would not be preempted.

Id.

Here, Braid's claim of an alleged oral contract between the parties for payment of repairs, entered into after the shipment was completed, constitutes a separate harm which is independent from the loss or damage to goods. As such the claim is not preempted. [HN4] Neither the Carmack Amendment nor public policy support a carrier's attempt to evade the legal responsibilities voluntarily assumed by entry into an independent contract.³

3 The federal cases which have discussed the scope of preemption of the Carmack Amendment are not in agreement as to what claims are preempted by the Carmack Amendment, even in the absence of an independent contract. For example, in *Mesta v. Allied Van Lines International, Inc.*, 695 F. Supp. 63 (D.Mass.1988), the court held that a claim against the carrier for deceptive acts and practice was based not on loss of property but on the carrier's actions in investigating and responding to the shipper's claim was not preempted. Similarly, in *Sokhos v. Mayflower Transit, Inc.*, 691 F. Supp. 1578 (D.Mass.1988), the court held that the Carmack Amendment did not preempt state law actions based on a carrier's improper handling of the plaintiff's claims for damage to goods. In *American*

Transfer and Storage Co. v. Brown, 584 S.W.2d 284 (Tex. Civ.Ct.App.1979), rev. on other grounds, 601 S.W.2d 931, 23 Tex. Sup. Ct. J. 426 (1980), cert. denied, 449 U.S. 1015, 66 L. Ed. 2d 474, 101 S. Ct. 575, the court held that the Carmack Amendment does not preempt a claim under the Texas Deceptive Trade Practices Act for misrepresentations made prior to the contract of carriage.

On the other hand, the court in *United Van Lines, Inc. v. Homburger*, 932 F. Supp. 139, (W.D.N.C.1996), held that a shipper's state law counterclaims against the carrier for pain and grief caused by the carrier's inept handling of the move plus the agent's false representation regarding billing were preempted by Carmack Amendment. Similarly, in *Margetson v. United Van Lines, Inc.*, 785 F. Supp. 917 (D.N.M.1991), the court found that claims for fraud against carrier were preempted by the Carmack Amendment where the damages claimed as a result of alleged fraud were for injury to and loss of use of goods. In *Pietro Culotta Grapes Ltd.v. Southern Pacific Transp Co.*, 917 F. Supp. 713 (E.D. Cal. 1996) the court similarly held that preemption related to claims based on conduct occurring after shipment.

[**8] REVERSED and REMANDED.

THOMPSON, C.J., and SAWAYA, J.,
concur.



**CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v.
MAUCHER.**

No. 85

SUPREME COURT OF THE UNITED STATES

248 U.S. 359; 39 S. Ct. 108; 63 L. Ed. 294; 1919 U.S. LEXIS 2320

**Argued December 17, 18, 1918
January 7, 1919**

PRIOR HISTORY: [***1] ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

CASE SUMMARY:

PROCEDURAL POSTURE: In a contract and personal injury action, defendant railroad sought review of a decision from the Supreme Court of the State of Nebraska, which upheld a judgment in favor of plaintiff circus employee.

OVERVIEW: The circus and railroad had a contract which allowed the circus to use the railroad's tracks. The contract further provided that the railroad would not be responsible for injury and that the circus would indemnify the railroad for injuries. The circus employee was injured when the circus train collided with a regular passenger train. The employee filed an action against the railroad. The state Supreme Court affirmed a personal injury verdict in favor of the employee, and the railroad sought review. It contended that the federal Carmack Amendment, U.S. Comp. Stat. §§ 584 and 595, superseded state law, and the contract provision

released it from liability. The employee contended that state law, which allowed for liability, applied. The court dismissed the appeal. It found that the Carmack Amendment applied only to transportation of goods and did not apply to injury of persons. It further found that laws that pertained to common carrier contracts did not apply because the employee's claim was not based on a carriage contract but on the general right of a human being not to be injured by the negligence of another.

OUTCOME: The court found that the railroad failed to raise a federal question and dismissed the railroad's appeal of the judgment in favor of the circus employee.

LexisNexis(R) Headnotes

*Admiralty Law > Personal Injuries > Maritime Tort Actions > Negligence > Comparative & Contributory Negligence
Transportation Law > Carrier Duties & Liabilities > Damages*

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000409

248 U.S. 359, *; 39 S. Ct. 108;
63 L. Ed. 294, **; 1919 U.S. LEXIS 2320, ***

Transportation Law > Rail Transportation > Carmack Amendment

[HN1] The Carmack Amendment deals only with the shipment of property. Its language is so clear as to leave no ground for the contention that Congress intended to deal with the transportation of persons.

LAWYERS' EDITION HEADNOTES:

Error to state court -- frivolous Federal question -- injury to circus employee -- what law governs. --

Headnote:

No Federal question of the substantial character essential to support a writ of error from the Federal Supreme Court to a state court is involved in the contention that since the Carmack Amendment of June 29, 1906 (34 Stat. at L. 595, chap. 3591, Comp. Stat. 1916, 8604aa), the Federal law governs the right of a circus employee injured in a railroad collision to recover damages from the railway company which was hauling the circus train in interstate commerce, where the contract of employment and the contract between the circus company and the railway company released the latter from liability for negligence. This statute deals only with the shipment of property, not with the transportation of persons, and, in addition, the circus employee was not even a passenger upon the railway.

[For other cases, see Appeal and Error, 1110-1137, in Digest Sup. Ct. 1908.]

SYLLABUS

The freedom of the States to establish and apply their own laws and policies touching the validity of contracts exempting carriers from liability to passengers for injuries due to negligence, was not affected by the Carmack Amendment, which deals only with shipments of property. P. 363.

An employee of a circus was injured by the negligent operation of a passenger train of a railroad company while traveling upon a train owned by the circus, which was being hauled over the tracks of the railroad company by its locomotive and crew pursuant to a special contract declaring the company not a common carrier therein and not liable for negligence. *Held*, that the employee was not a passenger of the railroad company, any that his cause of action was based on the general right not to be injured by the negligence of another. *Id.*

Writ of error to review *100 Nebraska*, 237, dismissed.

THE case is stated in the opinion.

COUNSEL: *Mr. William D. McHugh*, with whom *Mr. William H. Herdman* and *Mr. John M. Kelley* were on the brief, for plaintiff in error:

Under these contracts, cars of the circus company loaded with paraphernalia, [***2] an extensive menagerie of wild animals, tents, equipment, horses, wagons, performers and employees, all comprising the circus outfit, were moved over the lines of the plaintiff in error in interstate commerce. The contracts fixed the rights and liabilities of the parties with respect to the shipment and transportation. This court has repeatedly held that the power of railroad companies to contract with respect to their liability in matters of interstate transportation was the subject dealt with by the Carmack Amendment, and that, therefore, the laws and policies of particular States respecting the validity of such contracts, were superseded.

The validity of the contracts is a matter to be determined by the common law as declared by this court, and enforced by the federal courts throughout the United States.

The right of a common carrier, when acting outside the performance of its legal duties, as

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000410

248 U.S. 359, *; 39 S. Ct. 108;
63 L. Ed. 294, **; 1919 U.S. LEXIS 2320, ***

such to contract as a private carrier and to stipulate for freedom from liability for injury, due to its negligence, to persons or property carried under such contract, is broadly recognized by this court. *Railroad Co. v. Lockwood*, 17 Wall. 357, 377; *Santa Fe, Prescott & Phoenix* [***3] *Ry. Co. v. Grant Brothers Construction Co.*, 228 U.S. 177.

Under the common law, as applied by this court and federal courts generally, the plaintiff in error was under no obligation, as a common carrier, to move the circus outfit over its line as it was moving at the time of the injury. The rendition of such service, and the terms upon which the same will be rendered, is a matter for private bargain.

The defendant in error, at the time of his injury, was an employee of the circus and was being transported as such by his employer, as a part of its circus outfit, in a car and train belonging to his employer which his employer was running over the tracks of the plaintiff in error under the special contract. He had paid no fare and his only right to be there was by virtue of his contract of employment with the circus company and the special contract between plaintiff in error and the circus company. *Baltimore & Ohio S.W. Ry. Co. v. Voigt*, 176 U.S. 498, 512; *Railway Co. v. Mahoney*, 148 Indiana, 196; *Robertson v. Old Colony R.R. Co.*, 156 Massachusetts, 525; *Coup v. Railway Co.*, 56 Michigan, 111; *Chicago, Milwaukee & St. Paul Ry. Co. v. [***4] Wallace*, 66 Fed. Rep. 506, 510; *Wilson v. Atlantic Coast Line R.R. Co.*, 129 Fed. Rep. 774; *Clough v. Grand Trunk Western Ry. Co.*, 155 Fed. Rep. 81; *Sager v. Northern Pacific Ry. Co.*, 166 Fed. Rep. 526, 527.

Mr. Philip E. Horan, with whom *Mr. J. A. C. Kennedy* and *Mr. Yale C. Holland* were on the brief, for defendant in error.

JUDGES: White, McKenna, Holmes, Day, Van Devanter, Pitney, McReynolds, Brandeis, Clarke

OPINION BY: BRANDEIS

OPINION

[*361] [**295] MR. JUSTICE BRANDEIS delivered the opinion of the court.

Barnum & Bailey, who owned rolling stock adapted to carrying their circus equipment and personnel, made, in 1913, a special contract with the Chicago, Rock Island & Pacific Railway Company concerning transportation on its lines. The railway agreed for a sum fixed, to give the right to use its tracks and locomotives fully manned and supplied, [**296] to haul the circus trains. Barnum & Bailey agreed, among other things, that the railway was not acting therein as a common carrier; that it should not be liable for any injury, though arising from negligence, either to their own person or property or to that of any of their [*362] [***5] employees; and that they would indemnify the railway against any such injury.

While the circus train was being moved in Nebraska, from Lincoln to Atlantic, Iowa, it was crashed into by one of the railway's regular passenger trains; and Maucher, an employee of the circus, was injured. He had, by his contract of employment, agreed to release all railroad companies from any claim for injuries suffered while travelling with the circus on their lines; but he brought, in a state court of Nebraska, an action against the railway for damages, alleging that he had been injured by its negligence. The railway defended on the ground that its contract with Barnum & Bailey, and thus with the plaintiff, operated to release it from all liability; that since the contract related to a movement in interstate commerce, its validity was to be determined by the federal law; and that by the federal law the contracts were valid, although undertaking to release the railway from

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000411

248 U.S. 359, *; 39 S. Ct. 108;
63 L. Ed. 294, **; 1919 U.S. LEXIS 2320, ***

liability; since it was not acting as common carrier. *Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Brothers Construction Co.*, 228 U.S. 177. The trial court held that the liability was to be determined by the law of Nebraska; [***6] and entered judgment for plaintiff which was affirmed by the Supreme Court of the State. *100 Nebraska*, 237. The case came here on writ of error under § 237 of the Judicial Code.

The railway admits that prior to the enactment of the Carmack Amendment (Act of June 29, 1906, c. 3591, § 7, 34 Stat. 584, 595) Congress had not dealt with the right of carriers to limit by contract their liability for injuries occurring in interstate transportation, and that consequently the States were free to establish their own laws and policies and apply them to such contracts. *Pennsylvania R.R. Co. v. Hughes*, 191 U.S. 477. But it contends that this power of the States was superseded by the Carmack Amendment, since that amendment dealt with the power of carriers to contract in

respect to such liability; [*363] *Adams Express Co. v. Croninger*, 226 U.S. 491; *Boston & Maine Railroad v. Hooker*, 233 U.S. 97; that it was the intention of Congress to deal with the whole subject; and that the rights of plaintiff in respect to personal injuries is governed by the federal law. But [HN1] the Carmack Amendment deals only with the shipment of property. Its language is so clear as to leave [***7] no ground for the contention that Congress intended to deal with the transportation of persons. Furthermore, plaintiff was not even a passenger on the railway. His claim rests not upon a contract of carriage, but upon the general right of a human being not to be injured by the negligence of another. Compare *Southern Pacific Co. v. Schuyler*, 227 U.S. 601, 613. The case presents no substantial federal question. The writ of error is

Dismissed.



**Zeynep Mesta, et al., Plaintiffs, v. Allied Van Lines International, Inc.,
Defendant**

Civil Action No. 87-3051-C

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
MASSACHUSETTS**

695 F. Supp. 63; 1988 U.S. Dist. LEXIS 10292

August 30, 1988, Decided

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant carrier filed a motion to dismiss plaintiff customers' complaint, which alleged breach of contract, negligence, unfair and deceptive acts and practices, intentional infliction of emotional distress, negligent infliction of emotional distress, and injury to property under *49 U.S.C.S. § 11707*.

OVERVIEW: The customers contracted with a company to ship their personal belongings from Turkey to Massachusetts. The carrier was hired to pick up the goods once they arrived in Boston and to deliver them to the customers' home. The customers alleged that the carrier hired the subcontracted carrier to carry out its duties. Upon delivery, the customers' goods were damaged and a number of items were missing. The customers filed claims with the carrier, but to no avail. Subsequently, the customers filed suit to recover damages. The customers alleged breach of contract, negligence, unfair and deceptive acts and practices, intentional infliction of emotional

distress, negligent infliction of emotional distress, and injury to property. The carrier claimed that the subcontracted carrier was an independent contractor, and filed a motion to dismiss. The court found that the breach of contract, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress claims should be dismissed because they were preempted by the Carmack Amendment to the Interstate Commerce Act as codified at *49 U.S.C.S. §§ 11707, 10730, and 10103*. The carrier was liable under ch. 93A.

OUTCOME: In an action involving a bill of lading, the court granted the carrier's motion to dismiss the customers' claims for breach of contract, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress. In addition, the court held that federal law did not preempt the unfair and deceptive acts and practices' claim.

LexisNexis(R) Headnotes

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000413

695 F. Supp. 63, *; 1988 U.S. Dist. LEXIS 10292, **

Transportation Law > Carrier Duties & Liabilities > Damages

Transportation Law > Interstate Commerce > U.S. Interstate Commerce Commission

Transportation Law > Rail Transportation > Carmack Amendment

[HN1] An interstate carrier's liability for loss or damage to goods under federal law is set out in the Carmack Amendment to the Interstate Commerce Act (the Carmack Amendment) as codified at 49 U.S.C. §§ 11707, 10730, and 10103. Section 11707 states in relevant part a common carrier subject to the jurisdiction of the Interstate Commerce Commission (commission) shall issue a receipt or a bill of lading for property it receives for transportation under this subtitle that carrier and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the commission are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by the receiving carrier, the delivering carrier, or another carrier over whose line or route the property is transported in the United States.

Transportation Law > Carrier Duties & Liabilities > Bills of Lading

[HN2] 49 U.S.C.S. § 10103 provides in pertinent part except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law.

Contracts Law > Sales of Goods > Damages & Remedies > General Overview

Transportation Law > Carrier Duties & Liabilities > Damages

Transportation Law > Rail Transportation > Carmack Amendment

[HN3] The Carmack Amendment to the Interstate Commerce Act provides the

exclusive remedy for damages resulting from loss of, or injury to, goods transported by an interstate common carrier subject to the statute.

Civil Procedure > Dismissals > Involuntary Dismissals > General Overview

Governments > Courts > Authority to Adjudicate

[HN4] A district court may dismiss a claim on its own motion where a plaintiff is given an opportunity to address the issue.

COUNSEL: [**1] For Plaintiffs, Albert S. Robinson, Lisa L. Foster, Grindle, Robinson & Kertzman, Wellesley, Massachusetts.

For Defendants, Joseph B. Bertrand, Murphy, Demarco & O'Neill, Boston, Massachusetts.

JUDGES: Caffrey, Senior United States District Judge.

OPINION BY: CAFFREY

OPINION

[*63] MEMORANDUM

CAFFREY, SENIOR UNITED STATES DISTRICT JUDGE

This action was brought by the plaintiff to recover damages resulting from injuries to their property. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1332. The matter is now before the Court on the defendant's motion to dismiss.

I. Background

The facts, as alleged by the plaintiff, are as follows. The plaintiffs contracted with a company called Eurovan to ship their personal belongings from Turkey to Massachusetts. The defendant (Allied) was hired to pick up the goods once they arrived in Boston and to deliver the goods to the plaintiff's home. The plaintiff alleges that Allied, in turn, hired

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000414

695 F. Supp. 63, *; 1988 U.S. Dist. LEXIS 10292, **

Wakefield Distribution Systems to carry out Allied's duties.

On arrival in the United States, the goods were inspected by the U.S. Customs Service, which has stated that no damaged goods were noticed during the inspection. The plaintiff alleges that, after inspection, Wakefield Distribution disregarded specific instructions and took the goods out of the [**2] [*64] original shipping container. Upon delivery, the plaintiff claims, the goods were damaged, and a number of items were missing. The plaintiff filed claims with Allied, but Allied has not contacted the plaintiff about the matter for nine months. The plaintiff then brought this suit against Allied alleging breach of the contract of carriage (Count One), negligence (Count Two), unfair and deceptive acts and practices (Count Three), intentional infliction of emotional distress (Count Four), negligent infliction of emotional distress (Count Five), and injury to property under 49 U.S.C. § 11707 (Count Six).

II. Discussion

The defendant first argues that the breach of contract claim should be dismissed because there was no contract between Allied and the plaintiff. The defendant contends that Wakefield Distribution was an independent carrier, rather than an agent of Allied, as alleged by the plaintiff. On a motion to dismiss, however, the Court must accept all of the plaintiff's allegations as true. Therefore, it must be assumed, for the purposes of this motion, that Wakefield Distribution was the defendant's agent. As Allied's agent, Wakefield Distribution would have had the authority [**3] in certain circumstances to enter into a contract with the plaintiff on behalf of Allied. *See Cauman v. American Credit Indemnity Co.*, 229 Mass. 278, 283, 118 N.E. 259 (1918) (noting that the principle is responsible for the acts of his agent within the apparent scope of the agent's authority). As such, one cannot say

that, as a matter of law, there was no contract between Allied and the plaintiff.

The defendant's principle argument is that federal law supercedes state law regarding the liability of an interstate carrier for loss or damage to goods. [HN1] An interstate carrier's liability for loss or damage to goods under federal law is set out in the Carmack Amendment to the Interstate Commerce Act. What is commonly referred to as the Carmack Amendment (originally 49 U.S.C. § 20(11)) is now codified at 49 U.S.C. §§ 11707, 10730, 10103. Section 11707 states in relevant part:

A common carrier . . . subject to the jurisdiction of the Interstate Commerce Commission . . . shall issue a receipt or a bill of lading for property it receives for transportation under this subtitle. . . . That carrier . . . and any other carrier that delivers the property and is providing transportation or service subject to [**4] the jurisdiction of the Commission . . . are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States. . . .

[HN2] Section 10103 provides in pertinent part:

Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law.

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000415

695 F. Supp. 63, *; 1988 U.S. Dist. LEXIS 10292, **

Allied, through its agent, Wakefield Distribution, was a "delivering carrier" under § 11707. As such, the defendant is potentially liable under 49 U.S.C. § 11707 for the damage to the plaintiff's property. The principle issue is whether the Carmack Amendment preempts state law.

Congressional intent to preempt state law in a specific area can be evidenced by comprehensive legislation in that area. *Louisiana Public Service Comm'n v. F.C.C.*, 476 U.S. 355, 368, 90 L. Ed. 2d 369, 106 S. Ct. 1890 (1986). In the area of an interstate carrier's liability for loss of, or damage to, property, "almost every detail of the subject is covered [**5] so completely that there can be no rational doubt that Congress intended to take possession of the subject and supersede all state regulation with reference to it." *Adams Express Co. v. Croninger*, 226 U.S. 491, 505-6, 57 L. Ed. 314, 33 S. Ct. 148 (1913). See also *New York, New Haven & Hartford R.R. Co. v. Nothnagle*, 346 U.S. 128, 131, 97 L. Ed. 1500, 73 S. Ct. 986 (1953); *Hughes v. United Van Lines, Inc.*, 829 F.2d 1407, 1412-13 (7th Cir. 1987), cert. denied, 485 U.S. 913, 108 S. Ct. 1068, 99 L. Ed. 2d 248 (1988); *Air Products & Chemicals [*65] v. Illinois Central Gulf R.R. Co.*, 721 F.2d 483, 486 (5th Cir. 1983), cert. denied 469 U.S. 832, 83 L. Ed. 2d 64, 105 S. Ct. 122 (1984). It is clear that in enacting the Carmack Amendment, Congress intended to provide a uniform set of rules governing the liability of carriers. *Adams Express*, 226 U.S. at 506; *Air Products*, 721 F.2d at 486; *W.D. Lawson & Co. v. Penn Central Co.*, 456 F.2d 419, 422-23 (6th Cir. 1972). Allowing shippers to sue carriers under the myriad of potentially applicable state laws would undoubtedly frustrate Congress' intent. As such, most courts that have addressed the issue have held that the Carmack Amendment preempts state law in the area of interstate carrier's liability under a bill of lading. *Hughes*, 829 F.2d [**6] at 1414.

The only federal court to hold otherwise is the Court of Appeals for the Tenth Circuit. See *Reed v. Aaacon Auto Transport, Inc.*, 637 F.2d 1302, 1304-5 (10th Cir. 1981) (holding that the Carmack Amendment does not preempt all state law rules applicable to carrier liability). The Tenth Circuit's position, however, is contrary to statements made by the United States Supreme Court, as noted above, and has been directly criticized by the Court of Appeals for the Seventh Circuit. See *Hughes*, 829 F.2d at 1415. And finally, the Court of Appeals for the First Circuit has suggested that this circuit adheres to the majority view. See *Intech, Inc. v. Consolidated Freightways, Inc.*, 836 F.2d 672, 677 (1st Cir. 1987) (noting that the Carmack Amendment provides the exclusive remedy for damages incidental to the carrier's improper refusal to unload goods). This Court therefore adopts the majority view, and holds that [HN3] the Carmack Amendment provides the exclusive remedy for damages resulting from loss of, or injury to, goods transported by an interstate common carrier subject to the statute.

In this case, Counts One, Two, Four, and Five are state law claims for direct or consequential [**7] injuries arising from the loss of, or damage to, property carried under a bill of lading. As such, these claims are preempted by the Carmack Amendment, and should be dismissed. ¹ The plaintiff's ch. 93A claim is another matter. The defendant's liability under ch. 93A 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. See *Sokhos v. Mayflower Transit*, 691 F. Supp. 1578 (D. Mass. 1988) (holding that the Carmack Amendment does not preempt state law actions based on the carrier's improper handling of the plaintiff's claims for damage to goods); *American Transfer and Storage Co. v. Brown*, 584 S.W.2d 284 (Texas Civ. Ct. App. 1979), rev'd on other grounds,

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000416

695 F. Supp. 63, *; 1988 U.S. Dist. LEXIS 10292, **

601 S.W.2d 931 (1980), cert. denied, 449 U.S. 1015, 66 L. Ed. 2d 474, 101 S. Ct. 575 (holding that the Carmack Amendment does not preempt a claim under the Texas Deceptive Trade Practices Act for misrepresentations made prior to the contract of carriage). The 93A claim is not, therefore, preempted by federal law. ² Since the majority [**8] of the plaintiff's state law claims are preempted, this Court need not reach the other issues raised by the defendant regarding the sufficiency of those state law claims.

The defendant's motion to dismiss Count Three for failure to state a claim is denied.

1 The defendant, for some reason, moves to dismiss only Count Three on preemption grounds. It is clear, however, that these other counts should be dismissed for this reason also. In addition, though the defendant did not move to dismiss Count Two, the Court may dismiss that Count *sua sponte*. See *Literature, Inc. v. Quinn*, 482 F.2d 372, 374 (1st Cir. 1973) (noting that [HN4] a district court may dismiss a claim on its own motion where the plaintiff is given an opportunity to address the issue). The plaintiff was given ample opportunity to address the issue of preemption in this case.

2 The parties do not address the issue of whether the alleged actions of the defendant violate c. 93A. Accordingly, the Court declines to address this issue at this stage. The only issue decided is whether the c. 93A claim is preempted.

Order accordingly.

ORDER

CAFFREY, S.D.J.

In accordance with memorandum filed this date, it is ORDERED:

[*66] Counts One, Two, Four, and Five of the plaintiff's complaint are dismissed for failure [**9] to state a claim.



**NORTH AMERICAN VAN LINES, INCORPORATED, Plaintiff-
Appellant, v. PINKERTON SECURITY SYSTEMS,
INCORPORATED, FCLS/GM INVESTORS GROUP,
INCORPORATED, and G.M. LIMITED PARTNERSHIP,
Defendants-Appellees.**

No. 95-3325

**UNITED STATES COURT OF APPEALS FOR THE SEVENTH
CIRCUIT**

89 F.3d 452; 1996 U.S. App. LEXIS 17496

**February 6, 1996, Argued
July 16, 1996, Decided**

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 94 C 4536. Charles P. Kocoras, Judge.

DISPOSITION: REVERSED and REMANDED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff common carrier brought an action for negligence and breach of contract against defendants, a drop lot lessor and a security company. The United States District Court for the Northern District of Illinois entered summary judgment for the lessor and security company on grounds that the carrier's claim was barred by the Illinois Joint Tortfeasor Contribution Act (Act), 740 Ill. Comp. Stat. 100/2. The common carrier appealed.

OVERVIEW: After goods were stolen from lessor's drop lot in spite of the security company's protection, the carrier settled the shipper's reimbursement claim without extinguishing the liability of either the lessor or the security company as required by the release requirements of the act. The court held that the act did apply to the carrier's claims against the lessor and the security company. The Carmack Amendment, 49 U.S.C.S. §§ 10103, 11707, and 11730, created a nationally uniform rule of carrier liability concerning interstate shipments, thereby preempting the shipper's tort claims against the carrier. The bill of lading and their transportation agreement, which were contracts, defined both the shipper's right to relief and the carrier's liability. Accordingly, there could be no contribution as contemplated by the Act, because it did not apply by its own terms if either party's liability to the injured party was premised solely on a contract theory. Since the act did not apply to the carrier's claims for relief, the court did not address the

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000418

89 F.3d 452, *, 1996 U.S. App. LEXIS 17496, **

issue of whether the Act's release requirements were likewise preempted by the Carmack Amendment.

OUTCOME: The summary judgment for the drop lot lessor and the security company in the common carrier's action for negligence and breach of contract, which was characterized by the district court as a contribution action, was reversed. The case was remanded for further proceedings.

LexisNexis(R) Headnotes

Civil Procedure > Discovery > Methods > General Overview

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN1] In reviewing a district court's award of summary judgment, an appellate court stands in the shoes of the district court and assess the record de novo. This plenary review of the evidence requires that the appellate court employ the standard prescribed by *Fed. R. Civ. P. 56(c)* and determine whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. In this determination, the appellate court is obliged to view the facts and make all inferences favorably to the nonmoving party.

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

Civil Procedure > Summary Judgment > Standards > Legal Entitlement

Civil Procedure > Summary Judgment > Standards > Materiality

[HN2] A genuine issue of material fact exists for purposes of summary judgment if there is

sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If no such issue exists, the sole question is whether the moving party is entitled to judgment as a matter of law.

Transportation Law > Carrier Duties & Liabilities > Damages

Transportation Law > Interstate Commerce > U.S. Interstate Commerce Commission

Transportation Law > Rail Transportation > Carmack Amendment

[HN3] The Carmack Amendment, 49 U.S.C.S. §§ 10103, 11707, 11730, governs liability of a common carrier to a shipper for loss of, or damage to, an interstate shipment. At all times relevant to this dispute. The statute provides that a common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier is liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. 49 U.S.C.S. § 11707(a) (1995).

Civil Procedure > Federal & State Interrelationships > Erie Doctrine

Transportation Law > Carrier Duties & Liabilities > Damages

Transportation Law > Rail Transportation > Carmack Amendment

[HN4] The Carmack Amendment, specifically 49 U.S.C.S. § 10730, details the means by which carriers can negotiate for limits upon their liability under § 11707 by charging lower rates of carriage.

Constitutional Law > Supremacy Clause > Federal Preemption***Transportation Law > Carrier Duties & Liabilities > Damages******Transportation Law > Rail Transportation > Carmack Amendment***

[HN5] The Carmack Amendment, 49 U.S.C.S. §§ 10103, 11707, 11730, preempts all state or common law remedies available to a shipper against a carrier for loss or damage to interstate shipments. *U.S. Const. art. VI, cl. 2*. It codifies the common law rule that a carrier, though not an absolute insurer, is liable for damage to goods transported by it unless it can show that the damage was caused by (a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods.

Transportation Law > Air Transportation > Charters***Transportation Law > Carrier Duties & Liabilities > Bills of Lading******Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs***

[HN6] The Carmarck Amendment, 49 U.S.C.S. §§ 10103, 11707, 11730, specifically § 10730(c), preserves the common law rule that the parties could contract for a limitation of liability. Under § 10730(c), a carrier could negotiate limited liability in exchange for a reduced rate of transportation.

Torts > Procedure > Multiple Defendants > Contribution > General Overview***Torts > Procedure > Settlements > Multiparties > Contribution***

[HN7] The Illinois Joint Tortfeasor Contribution Act, 740 Ill. Comp. Stat. 100/2, specifically § 100/2(a), provides that where two or more persons are subject to liability in tort arising out of the same injury to person or

property there is a right of contribution among them, even though judgment has not been entered against any or all of them. 740 Ill. Comp. Stat.100/2(a). A tortfeasor who has settled with the injured party and has paid more than his pro rata share of the common liability may recover contribution from a joint tortfeasor only if the settlement extinguishes that joint tortfeasor's liability to the injured party. 740 Ill. Comp. Stat.100/2(b), (e). The injured party, the potential plaintiff, must have a cause of action sounding in tort against both the party seeking contribution and the party from whom contribution is sought.

Torts > Procedure > Multiple Defendants > Contribution > General Overview

[HN8] Under Illinois law, it is sufficient for the purposes of the Illinois Joint Tortfeasor Contribution Act (act), 740 Ill. Comp. Stat. 100/2 that there be potential liability sounding in tort. If either party's liability to the injured party is premised solely on a contract theory, there can be no contribution action as contemplated by the act.

COUNSEL: For NORTH AMERICAN VAN LINES, INCORPORATED, Plaintiff - Appellant: Christopher A. Garcia, SANCHEZ & DANIELS, Chicago, IL, USA. Barbara Naretto Petrunaro, Brian W. Bell, SWANSON, MARTIN & BELL, Chicago, IL, USA. Mark T. Mullen, James Cullen, COZEN & O'CONNOR, Philadelphia, PA, USA.

For PINKERTON SECURITY SYSTEMS, INCORPORATED, Defendant - Appellee: Michael W. Rathsack, Chicago, IL, USA. Michael J. Charysh, CHARYSH & SCHROEDER, Chicago, IL, USA. David H. Schroeder, CHARYSH & SCHROEDER, Chicago, IL, USA.

For FCLS/GM INVESTORS GROUP, INCORPORATED, Defendant - Appellee: Kurt

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000420

89 F.3d 452, *, 1996 U.S. App. LEXIS 17496, **

C. Mehofer, Laura B. Glaser, JOHNSON & BELL, Chicago, IL, USA.

JUDGES: Before ESCHBACH, KANNE, and EVANS, Circuit Judges.

OPINION BY: KANNE

OPINION

[*453] KANNE, *Circuit Judge*. The Interstate Commerce Act contains several provisions governing a motor carrier's liability to a shipper for the loss of, or damage to, an interstate shipment of goods. These provisions, which are commonly referred to collectively as the Carmack Amendment, have at one time or [*2] another since 1906 resided in different sections of Title 49 of the United States Code. At the time of this lawsuit, they were located at 49 [*454] U.S.C. §§ 10103, 11707, 11730.¹ These sections create a nationally uniform rule of carrier liability concerning interstate shipments and preempt all state and common law remedies covering this subject. *Adams Express Co. v. Croninger*, 226 U.S. 491, 504, 33 S. Ct. 148, 151, 57 L. Ed. 314 (1913); *Hughes v. United Van Lines*, 829 F.2d 1407, 1415 (7th Cir. 1987), *cert. denied*, 485 U.S. 913, 99 L. Ed. 2d 248, 108 S. Ct. 1068 (1988).

1 Congress substantially reorganized and modified Title 49 in the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. That act amended and recodified the provision of the Carmack Amendment governing motor carrier liability relevant to this appeal at 49 U.S.C. § 14706. *Id.*, Title I, § 103, ch. 147, 109 Stat. 907. Even if the modifications were retroactive, none would be material to this appeal. We shall refer in this decision to those sections of Title 49 in force prior to the enactment of the I.C.C. Termination Act.

[**3] This appeal presents for our review the district court's determination that the Carmack Amendment does not preempt the prerequisites to a claim for contribution prescribed by the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/2. Because we conclude that the Contribution Act does not apply to the plaintiff's claims for relief, we reverse the judgment of the district court and remand this matter without addressing the preemption issue.

I

There is no real dispute as to what happened.² Brown and Williamson Tobacco Corporation and North American Van Lines, Inc., entered into a transportation agreement on May 1, 1992, under which North American agreed to accept, transport, and deliver household goods tendered for carriage by Brown and Williamson. Each shipment was to be tendered under the terms and conditions of a bill of lading, but in the event of a conflict between those terms and the terms of the transportation agreement, the agreement would control. The agreement provided that North American would be liable as a common carrier for the loss, damage, theft, or destruction of the goods placed in its charge pursuant to the terms outlined in a schedule of rates issued under [*4] the applicable governing tariffs. Pursuant to the applicable tariff, North American limited its liability to Brown and Williamson to \$ 400,000 per shipment.

2 The parties stipulated to a statement of uncontested facts in conjunction with a proposed pretrial statement filed with the district court on July 5, 1995, during the pendency of the defendants' motions for summary judgment. To the extent practicable, we rely on those uncontested facts, but we view all facts and adopt all inferences in a light most favorable to the nonmoving party, here *North American Van Lines, Inc.*, as we must in reviewing

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000421

89 F.3d 452, *; 1996 U.S. App. LEXIS 17496, **

a grant of summary judgment. *See Tolentino v. Friedman*, 46 F.3d 645, 649 (7th Cir.), cert. denied, 132 L. Ed. 2d 856, 115 S. Ct. 2613 (1995).

On April 21, 1993, North American accepted 1,108 cases of Brown and Williamson cigarettes for transportation from Macon, Georgia, to Des Plaines, Illinois. Brown and Williamson tendered the cargo under a bill of lading, which described the shipment as weighing 38,512 pounds and comprising [**5] three varieties of cigarette. North American transported the cargo to Chicago, and it left the trailer containing the cargo at a drop lot located at 900 East 103d Street on April 24. Sometime in the wee hours of April 25, an unknown person drove a stolen North American tractor into the drop lot, hitched the trailer containing the cargo to the stolen tractor, and absconded with the cargo of Brown and Williamson cigarettes. The cargo had a wholesale value of \$ 779,309.40, and North American's insurance carrier paid Brown and Williamson \$ 400,000 as full satisfaction of North American's liability under the bill of lading.³

3 The Federal Bureau of Investigation later recovered 913 of the stolen cases of cigarettes, which Brown and Williamson reclaimed and destroyed. Brown and Williamson accordingly received a refund of the taxes paid on the recovered cigarettes in the amount of \$ 131,272.00. After this refund and North American's insurance carrier's settlement payment of \$ 400,000, Brown and Williamson was left with an unmitigated loss totalling \$ 248,037.40.

[**6] North American had leased the drop lot from FCLS/GM Investors Group, Inc., and GM Limited Partnership (the "lessors") on [*455] December 23, 1992.⁴ The lessors had previously contracted with Pinkerton Security Systems, Inc., to provide security services for the drop lot as contemplated by the lease

agreement. The lease agreement also required the lessors to make certain improvements to the leased premises, including the installation of an electric gate.

4 The lease does not mention GM Limited Partnership, but the parties' joint statement of undisputed facts admits that GM Limited Partnership was one of the lessors in the lease transaction. We assume that FCLS/GM Investors Group, Inc., is the general partner of GM Limited Partnership.

North American filed this diversity action under 28 U.S.C. § 1332 in the Northern District of Illinois on July 26, 1994. The complaint alleged two counts of negligence, one each against Pinkerton and the lessors, and one count of breach of contract against the lessors, and it specified [**7] damages of \$ 400,000. Pinkerton filed a motion for summary judgment on count one of the complaint on June 13, 1995, and the lessors filed a motion for summary judgment on counts two and three of the complaint on June 20, 1995. North American filed responses to these motions on July 5.

The district court entered summary judgment in favor of all defendants on August 31, 1995. In its memorandum opinion, the district court stated that North American's complaint asserted claims for contribution against the defendants. It held that the Contribution Act barred these claims because North American had settled Brown and Williamson's claim without obtaining a release extinguishing either defendant's liability for the loss of the cigarettes. North American argued that the Carmack Amendment preempted the release requirements of the Contribution Act, but the district court disagreed and held that the Carmack Amendment did not preempt the Contribution Act.

[HN1] In reviewing a district court's award of summary judgment, we stand in the shoes of

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000422

89 F.3d 452, *; 1996 U.S. App. LEXIS 17496, **

the district court and assess the record *de novo*. *Thiele v. Norfolk & Western Ry. Co.*, 68 F.3d 179, 181 (7th Cir. 1995). This plenary review of the evidence [**8] requires that we employ the standard prescribed by *FED. R. CIV. P. 56(c)* and determine whether the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). In this determination, we are obliged to view the facts and make all inferences favorably to the nonmoving party. *Tolentino*, 46 F.3d at 649.

[HN2] A genuine issue of material fact exists if "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986). If no such issue exists, the sole question is whether the moving party is entitled to judgment as a matter of law. We find that there are no genuine issues of material fact, and the question therefore is whether the defendants are entitled to summary judgment as a matter of law.

II

[HN3] The Carmack Amendment governs liability of a common carrier to a shipper for loss of, or damage to, an interstate shipment. At all times relevant to this dispute, the pertinent part [**9] of the statute provided as follows:

A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier . . . [is] liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this

paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported Failure to issue a receipt or bill of lading does not affect the liability of a carrier

49 U.S.C. § 11707(a) (1995). Another provision of [HN4] the Carmack Amendment details the means by which carriers can negotiate for limits upon their liability under § 11707 by [*456] charging lower rates of carriage. 49 U.S.C. § 10730 (1995).

Prior to the enactment of the Carmack Amendment, the liability of carriers for loss of, or damage to, interstate shipments was a matter either of common law, whether state or federal (at least until *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, [**10] 58 S. Ct. 817, 82 L. Ed. 1188 (1938)), or of state positive law. *Adams Express Co.*, 226 U.S. at 504, 33 S. Ct. at 151 (citing cases). The Adams Court described the complexities that bedeviled shippers and carriers under the old regime:

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

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000423

89 F.3d 452, *; 1996 U.S. App. LEXIS 17496, **

of his own state, or a carrier whose lines were extensive, to know, without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another.

226 U.S. at 505, 33 S. Ct. at 151-52. The Court recognized that the Carmack Amendment manifested [**11] Congress's intent "to take possession of the subject" and to prescribe uniform rules governing liability of carriers to shippers regarding interstate shipments. *Id.* at 506, 33 S. Ct. at 152.

[HN5] The Carmack Amendment thus preempts all state or common law remedies available to a shipper against a carrier for loss or damage to interstate shipments. *See U.S. CONST. art. VI, cl. 2; Adams Express Co.*, 226 U.S. at 505-06, 33 S. Ct. at 152; *Hughes*, 829 F.2d at 1414. It codifies the common law rule that a carrier, "though not an absolute insurer, is liable for damage to goods transported by it unless it can show that the damage was caused by (a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods." *Missouri Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 137, 84 S. Ct. 1142, 1144, 12 L. Ed. 2d 194 (1964) (quotation marks and subsequent citations omitted).

It also [HN6] preserves the common law rule that the parties could contract for a limitation of liability. *See 49 U.S.C. § 10730(c) (1995)* (presently codified as amended at 49 U.S.C. § 14706(c) (1996)); *see also Tokio Marine & Fire Ins. Co., Ltd.* [**12] *v. Amato Motors, Inc.*, 996 F.2d 874, 877 (7th Cir. 1993). Under § 10730(c), a carrier could negotiate limited liability in exchange for a reduced rate of transportation. North American

did, in fact, avail itself of then- § 10730(c) pursuant to the applicable tariff. This tariff is reproduced in the record and identified by the parties as I.C.C. NOAM 6050 Item 1009(R). It clearly states that North American's liability for loss and/or damage is limited to \$ 400,000 per shipment. By virtue of this written agreement, North American contracted for limited liability for loss or damage to all or any part of Brown and Williamson's cargo.

[HN7] The Contribution Act provides that "where 2 or more persons are subject to liability in tort arising out of the same injury to person or property . . . there is a right of contribution among them, even though judgment has not been entered against any or all of them." 740 ILCS 100/2(a). A tortfeasor who has settled with the injured party and has "paid more than his pro rata share of the common liability" may recover contribution from a joint tortfeasor only if the settlement extinguishes that joint tortfeasor's liability to the injured party. 740 ILCS [**13] 100/2(b), (e). The injured party--the potential plaintiff--must have a cause of action sounding in tort against both the party seeking contribution and the party from whom contribution is sought.

[HN8] Under Illinois law, it is sufficient for the purposes of the Contribution Act that there be potential liability sounding in tort. *Saint Paul Fire & Marine Ins. Co. v. Great Lakes Turnings, Ltd.*, 774 F. Supp. 485, 488 [*457] (N.D. Ill. 1991); *Cirilo's, Inc. v. Gleeson, Sklar & Sawyers*, 154 Ill. App. 3d 494, 507 N.E.2d 81, 83, 107 Ill. Dec. 417 (Ill. App. Ct. 1987). In other words, if either party's liability to the injured party is premised solely on a contract theory, there can be no contribution action as contemplated by the Contribution Act. *Jackson Nat'l Life Ins. Co. v. Gofen & Glossberg, Inc.*, 882 F. Supp. 713, 723 (N.D. Ill. 1995); *New England Mut. Life Ins. Co. v. LaSalle Nat'l Bank*, 697 F. Supp. 965, 970-71 (N.D. Ill. 1988); *Hennepin Drainage & Levee Dist. v.*

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000424

89 F.3d 452, *, 1996 U.S. App. LEXIS 17496, **

Klingner, 187 Ill. App. 3d 710, 543 N.E.2d 967, 969, 135 Ill. Dec. 399 (Ill. App. Ct. 1989).

The district court found that, as a matter of law, the Carmack Amendment did not preempt the liability release requirements of the Contribution Act because the Carmack Amendment exclusively governs the [**14] relationship between shippers and carriers and not the liability of third parties to carriers under state law contribution theories, which is how the district court characterized North American's claims for relief. The district court then determined that Brown and Williamson's claim against North American sounded in tort and, as a result, that the Contribution Act required North American to obtain a release pursuant to its settlement of Brown and Williamson's claim as a prerequisite to seeking damages either from the lessors or from Pinkerton.

The threshold issue in this case is the applicability of the Contribution Act to North American's claims for relief against the lessors and Pinkerton. If the Contribution Act does not apply, then there is no applicable state law to be preempted. See *Barnett Bank of Marion County N.A. v. Nelson*, U.S. , , 116 S. Ct. 1103, 1107-08, 134 L. Ed. 2d 237 (1996).

III

We hold that the Contribution Act does not by its own terms apply to North American's claims for relief against the defendants. North American entered into a contractual relationship with Brown and Williamson as evidenced by the transportation agreement and the bill of lading. The Carmack Amendment, [**15] which governs North American's liability to Brown and Williamson, was incorporated into the bill of lading as a matter of federal law. Therefore, North American's liability is part and parcel of its contractual relationship with Brown and Williamson.

North American's liability to Brown and Williamson arises under the bill of lading,

which is a contract. *Michigan Cent. R.R. Co. v. Mark Owen & Co.*, 256 U.S. 427, 430-31, 41 S. Ct. 554, 555, 65 L. Ed. 1032 (1921). The liability scheme of the Carmack Amendment is incorporated into the terms of this contract as a matter of law. *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.*, 241 U.S. 190, 195-96, 36 S. Ct. 541, 543-44, 60 L. Ed. 948 (1916); *Northern Pac. Ry. Co. v. Wall*, 241 U.S. 87, 91-92, 36 S. Ct. 493, 495-96, 60 L. Ed. 905 (1916). The determination of a carrier's liability to a shipper under a bill of lading covered by the Carmack Amendment is therefore a question of federal law. *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209, 213, 51 S. Ct. 453, 455, 75 L. Ed. 983 (1931); *Southern Ry. Co. v. Prescott*, 240 U.S. 632, 636, 36 S. Ct. 469, 471, 60 L. Ed. 836 (1916).

This federal law preempts Brown and Williamson's state law remedies against North American for the loss of the cargo, [**16] including those sounding in tort. Allowing such actions would be inconsistent with the Carmack Amendment's goal of a uniform rule of liability relieving shippers of the burden of determining which of the several carriers handling interstate shipments bears the blame for loss or damage under diverse state laws. See *Reider v. Thompson*, 339 U.S. 113, 119, 70 S. Ct. 499, 502, 94 L. Ed. 698 (1950); *S.C. Johnson & Son, Inc. v. Louisville & Nashville R.R. Co.*, 695 F.2d 253, 256 (7th Cir. 1982).

This is an action *ex contractu*. North American is liable to Brown and Williamson only under the terms of the bill of lading, which include the salient provisions of the Carmack Amendment, namely 49 U.S.C. §§ 10730, 11707. The district court based its contrary conclusion mainly upon its reading of *R.H. Fulton v. Chicago, Rock Island & Pacific R.R. Co.*, 481 F.2d 326 (8th Cir.), cert. [*458] denied, 414 U.S. 1040, 38 L. Ed. 2d 330, 94 S. Ct. 540 (1973).

In *Fulton*, the Eighth Circuit held that a Missouri longarm jurisdiction statute afforded

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000425

89 F.3d 452, *, 1996 U.S. App. LEXIS 17496, **

in personam jurisdiction over a carrier named as a defendant in a lawsuit under the Carmack Amendment. The court reasoned that although the statute authorized jurisdiction over parties who committed [**17] tortious acts within the state of Missouri, it was not limited to causes of action sounding in tort but rather to any causes of action arising out of tortious acts. *481 F.2d at 332*. In fact, the court expressly declined to characterize the claim for relief under the Carmack Amendment as sounding in tort for the purpose of its holding:

Clearly then the cause of action under Carmack need not be characterized as tort to come within [the purview of the state statute] so long as it arises from the commission of a tortious act. It is true, of course, that the preemption of common law claims against carriers makes the tortious act relied on here not actionable as a common law tort

481 F.2d at 333 (internal quotes omitted). The court went on to state in dicta that even if the statute were strictly limited to actions sounding in tort, "the nature of the carrier's duty under the Carmack Amendment sounds in negligence" because it involved the carrier's breach of the duty of care imposed by statute. *Id.*

We do not fully agree with this *dicta*, but it is unnecessary for us to detail our divergent view because the circumstances of the case before us do not implicate [**18] *Fulton's* precatory discussion. There is nothing in the record to indicate--and no party has suggested--that North American is liable for breach of any duty, whether extracontractual or otherwise. Nor shall we venture an opinion on what circumstances might result in a carrier being liable under a negligence theory for a breach of

a duty implied either by the Carmack Amendment or by the terms of a contract.

We recognize that carriers may be liable to shippers in tort for incidental harms associated with the loss or damage of cargo. *See, e.g., Mesta v. Allied Van Lines Int'l, Inc., 695 F. Supp. 63, 65 (D. Mass. 1988)* (finding that a carrier may be liable to a shipper under statute prohibiting deceptive trade practices in addition to liability under Carmack Amendment); *Sokhaus v. Mayflower Transit, Inc., 691 F. Supp. 1578, 1581 (D. Mass. 1988)* (same); *Starmakers Publ. Corp. v. Acme Fast Freight, Inc., 615 F. Supp. 787, 791 (S.D.N.Y. 1985)* (stating that a bailor can recover from a bailee in tort if claim for relief does not depend upon existence of a contract). However, these cases involved a separate and independently actionable harm to the shipper as distinct from the [**19] loss of, or damage to, the goods. In *Mesta* and *Sokhaus*, the harm was the carrier's failure to provide the shipper with information required by state law. In *Starmakers*, the harm was the carrier's breach of an extracontractual duty. There is no evidence in the record of an independently actionable harm suffered by Brown and Williamson other than the loss of the cigarettes.

Our holding today is consistent with the Illinois Supreme Court's seminal analysis of the Contribution Act in *Doyle v. Rhodes, 101 Ill. 2d 1, 461 N.E.2d 382, 77 Ill. Dec. 759 (Ill. 1984)*. In *Doyle*, the thirdparty plaintiff sued the third party defendant, the plaintiff's employer, for contribution arising from an injury the plaintiff sustained at work. The employer argued that since the plaintiff employee's only remedy against the employer lay under the Illinois worker's compensation law, it was not liable to the employee in tort and there could be no contribution. *461 N.E.2d at 384*. The Illinois Supreme Court disagreed by stating that the employer would have to plead the worker's compensation act as an

affirmative defense; if it waived that defense, it would in fact be liable in tort. *Id. at 388-89.*

North American's liability was premised [**20] on the Carmack Amendment, which was a part of its contract with Brown and Williamson. Brown and Williamson was foreclosed from suing in tort by the terms of the Carmack Amendment, which preempts the field formerly occupied by common law theories of liability. There was no need for North American to plead the contract as a [*459] basis for limited liability, for the contract defined both its liability and Brown and Williamson's right to relief. Accordingly, North American was not subject to liability in tort, and the Contribution Act does not apply.

The judgment of the district court is REVERSED, and this case is REMANDED for further proceedings.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 50 2008 CA 036246XXXXMB
AH

IVANA VIDOVIC MLINAR,
Plaintiff/Defendant

vs.

UNITED PARCEL SERVICE INC.,
Defendant/Appellee

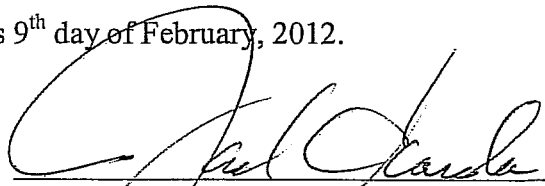
PAK MAIL OF WELLINGTON, INC.,
RECOVERY MANAGEMENT CORP. d/b/a
CARGO LARGO and AARON ANDERSON,
Defendants,

NOTICE OF APPEAL OF FINAL ORDER DISMISSING CLAIMS AGAINST UPS

Plaintiff/Appellant appeals to the Fourth District Court of Appeals the order of this court rendered January 30, 2012. The nature of the order is a final order granting Defendant/Appellant UPS's motion to dismiss, with prejudice, all the claims alleged against it upon the following findings

1. All claims alleged against UPS are precluded by the Carmack amendment; and,
2. The claim for profiting by criminal activity fails to provide the requisite specificity.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel on the attached list, this 9th day of February, 2012.



Jack Scarola, (Florida Bar No.: 169440)

jsx@searcylaw.com

Searcy Denney Scarola Barnhart & Shipley,
P.A.

2139 Palm Beach Lakes Boulevard

West Palm Beach, Florida 33409

Phone: (561) 686-6300

Fax: (561) 383-9451

Attorneys for Plaintiff

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000428

Ivana Mlinar v. UPS, et al
Case No.: 50 2008 CA 036246XXXXMB AH
Notice of Appeal of Order Dismissing Claims Against UPS
Page 2 of 2

COUNSEL LIST

Ms. Shannon M. Mahoney, Esquire
Law Offices of Shannon M. Mahoney, P.A.
Attorney For: Ivana Mlinar
315 11th Street
West Palm Beach, FL 33401
Phone: (561) 659-4414
Fax: (561) 659-6991

David R. Gutwein, Esquire
Hamilton, Miller & Birthisel, LLP
Attorney For: United Parcel Service Inc.
150 SE 2nd Avenue, Suite 1200
Miami, FL 33131
Phone: (305) 379-3686
Fax: (305) 379-3690

Ms. Angela Adams, Esquire
Ms. Melissa A. Davis, Esquire
Alston & Bird, LLP
Attorney For: United Parcel Service Inc.
1201 W. Peachtree Street NW
Atlanta, GA 30309
Phone: (404) 881-7000
Fax: (404) 253-8434

Jeffrey Blaker, Esquire
Conroy, Simberg, Ganon, Krevans, Abel,
Lurvey, Morrow & Schefer, P.A.
1801 Centre Park Drive East, Suite 200
West Palm Beach, FL 33401
Phone: (561)-697-8088
Fax: (561)-697-8664
Attorneys for Recovery Management
Corporation d/b/a Cargo Largo

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000430

2. This Court further finds that Plaintiff's claim for Profiting by Criminal Activity (Count II) fails to provide the requisite level of specificity.
3. Plaintiff, Ivana Vidovic Mlinar's claims are hereby dismissed *with prejudice* as to Defendant, United Parcel Service, Co.
4. This Court shall reserve jurisdiction to determine entitlement to attorney's fees and costs.

DONE AND ORDERED in Palm Beach County, Florida this _____ day of _____, 2012.

SIGNED & DATED
JAN 30 2012
JUDGE LUCY CHERNOW BROWN

HON. LUCY CHERNOW BROWN
Circuit Court Judge

cc: EVAN S. GUTWEIN, ESQ.
DAVID R. HEFFERNAN, ESQ.
Hamilton, Miller & Birthisel, LLP
150 Southeast Second Avenue
Suite 1200
Miami, FL 33131

JACK SCAROLA, ESQ.
Searcy Denney Scarola
Barnhart & Shipley
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409

JAMES M. ECKHART, ESQ.
Conroy Simberg Gannon Krevans
Abel Lurvey Morrow & Schefer, P.A.
1301 Centrepark Drive E, Suite 200
West Palm Beach, Florida 33401

SHANNON M. MAHONEY, ESQ.
Law Offices of Shannon M. Mahoney, P.A.
315 11th Street
West Palm Beach, Florida 33401

PAKMAIL OF WELLINGTON, INC.
c/o Registered Agent: Linda A. Ramos
13833 Wellington Trace, Suite E4
Wellington, Florida 33414

430

2. This Court further finds that Plaintiff's claim for Profiting by Criminal Activity (Count II) fails to provide the requisite level of specificity.
3. Plaintiff, Ivana Vidovic Mlinar's claims are hereby dismissed *with prejudice* as to Defendant, United Parcel Service, Co.
4. This Court shall reserve jurisdiction to determine entitlement to attorney's fees and costs.

DONE AND ORDERED in Palm Beach County, Florida _____ day of _____, 2012.

SIGNED & DATED
JAN 30 2012
JUDGE LUCY CHERNOW BROWN

HON. LUCY CHERNOW BROWN
Circuit Court Judge

cc: **EVAN S. GUTWEIN, ESQ.**
DAVID R. HEFFERNAN, ESQ.
Hamilton, Miller & Birthisel, LLP
150 Southeast Second Avenue
Suite 1200
Miami, FL 33131

JACK SCAROLA, ESQ.
Searcy Denney Scarola
Barnhart & Shipley
2139 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33409

JAMES M. ECKHART, ESQ.
Conroy Simberg Gannon Krevans
Abel Lurvey Morrow & Schefer, P.A.
1801 Centrepark Drive E, Suite 200
West Palm Beach, Florida 33401

SHANNON M. MAHONEY, ESQ.
Law Offices of Shannon M. Mahoney, P.A.
315 11th Street
West Palm Beach, Florida 33401

PAKMAIL OF WELLINGTON, INC.
c/o Registered Agent: Linda A. Ramos
13833 Wellington Trace, Suite E4
Wellington, Florida 33414

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000433

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 50 2008 CA 036246XXXXMB
AH

IVANA VIDOVIC MLINAR,

Plaintiff,

vs.

UNITED PARCEL SERVICE INC., PAK
MAIL OF WELLINGTON, INC.,
RECOVERY MANAGEMENT CORP. d/b/a
CARGO LARGO and AARON ANDERSON,

Defendant,

**DIRECTIONS TO CLERK TO INCLUDE
ONLY CERTAIN ITEMS IN ORIGINAL RECORD ON APPEAL**

Plaintiff/Appellant, Ivana Vidovic Mlinar, directs the Clerk to include only the following items in the original records for the appeal as described in rule 9.200(a)(1):

1. Those filings indicated on the following list, which has been excerpted from the on-line trial docket for this matter and includes the court docket entry numbers:

1	CMP - COMPLAINT	
Filing Date:	20-NOV-2008	
Filing Party:	MLINAR, IVANA VIDOVIC	
12	ANAD/ANSWER AFFIRMATIVE DEFENSES	&
Filing Date:	21-JAN-2009	
Filing Party:	UNITED PARCEL SERVICE CO,	
32	CMP - COMPLAINT	AMENDED
Filing Date:	26-MAR-2009	
Filing Party:	MLINAR, IVANA VIDOVIC	

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000434

Ivana Mlinar v. UPS, et al
 Case No.: 50 2008 CA 036246XXXXMB AH
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 Page 2 of 6

33	MOT - MOTION	TO AMEND COMPLAINT BY INTERLINEATION
Filing Date:	26-MAR-2009	
Filing Party:	MLINAR, IVANA VIDOVIC	
122	MFSJ - MOTION FOR SUMMARY JUDGMENT	
Filing Date:	20-MAY-2011	
Filing Party:	UNITED PARCEL SERVICE	
124	MCON - MOTION FOR CONTINUANCE	TO SEPTEMBER/OCTOBER TRIAL DOCKET
Filing Date:	27-MAY-2011	
Filing Party:	MLINAR, IVANA VIDOVIC	
128	ORD - ORDER	ON PLAINTIFF'S MOTION FOR CONTINUANCE IS GRANTED RESET JAN 2012
Filing Date:	15-JUN-2011 19-	
Filing Party:	LBROWN	
143	AGOR - AGREED ORDER	CANCELLING HEARING-ON AUG 12 2011 4
Filing Date:	02-AUG-2011	
Filing Party:	LBROWN	
137	MCMP - MOTION TO COMPEL	RECOVERY MANAGEMENT TO PRODUCE WITNESSES FOR DEPOSITION
Filing Date:	19-JUL-2011	
Filing Party:	MLINAR, IVANA VIDOVIC	

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000435

Ivana Mlinar v. UPS, et al
 Case No.: 50 2008 CA 036246XXXXMB AH
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 Page 3 of 6

145	ORD - ORDER	THE PLT HAS THE RIGHT TO DEPOSE LOUIS D. PAK...
Filing Date:		09-AUG-2011
Filing Party:		DTD 8/8/11 L BROWN
146	MOT - MOTION	TO AMEND COMPLAINT-WITH THE PROPOSED SECOND AMENDED COMPLAINT ATTACHED
Filing Date:		25-AUG-2011
Filing Party:		MLINAR, IVANA VIDOVIC
150	MOT - MOTION	FOR LEAVE TO FILE SECOND AMENDED COMPLAINT
Filing Date:		29-SEP-2011
Filing Party:		MLINAR, IVANA VIDOVIC
148* Number is out of order on docket.	ORD - ORDER	ON PLAINTIFF'S UNOPPOSED MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT: GRANTED.
Filing Date:		30-SEP-2011
Filing Party:		L BROWN
156	ANS - ANSWER	TO SECOND AMENDED COMPLAINT
Filing Date:		19-OCT-2011
Filing Party:		RECOVERY MANAGEMENT SERVICES LLC DBA CARGO
162	MDIS - MOTION TO DISMISS	PLAINTIFF'S SECOND AMENDED COMPLAINT
Filing Date: 08-NOV-2011		
Filing Party: UNITED PARCEL SERVICE CO,		

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000436

Ivana Mlinar v. UPS, et al
 Case No.: 50 2008 CA 036246XXXXMB AH
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 Page 4 of 6

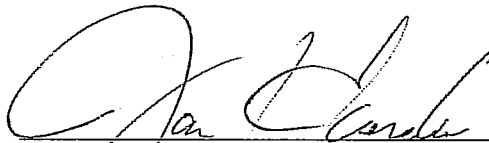
168	MEMO - MEMORANDUM	(WITH ATTACHMENTS) CLK FILE LBROWN	
Filing Date: 18-JAN-2012			
Filing Party: MLINAR, IVANA VIDOVIC			
169	NOF - NOTICE OF FILING	SUPPLEMENTAL AUTHORITY	
Filing Date: 25-JAN-2012			
Filing Party: UNITED PARCEL SERVICE CO,			
170	NOF - NOTICE OF FILING	CITED INFORMATION	
Filing Date: 25-JAN-2012			
Filing Party: MLINAR, IVANA VIDOVIC			
171	ODIS - ORDER OF DISMISSAL	Book 024991 - Page 01342	FINAL AS TO UPS CO.
Filing Date: 30-JAN-2012			
Filing Party: L BROWN			
173	NOA - NOTICE OF APPEAL	Book 025018 - Page 01726	OF FINAL ORDER DISMISSING CLAIMS AGAINST UPS
Filing Date:		10-FEB-2012	
Filing Party:		MLINAR, IVANA VIDOVIC	

Ivana Mlinar v. UPS, et al
Case No.: 50 2008 CA 036246XXXXMB AH
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Page 5 of 6

STATEMENT OF JUDICIAL ACTS TO BE REVIEWED

- a. Docket Number 173, Order On UPS's Motion to Dismiss, rendered January 30, 2012.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel on the attached list, this 21st day of February, 2012.



Jack Scarola, (Florida Bar No.: 169440)
jsx@searcylaw.com
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33409
Phone:(561) 686-6300
Fax: (561) 383-9451
Attorney for Plaintiff

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000438

Ivana Mlinar v. UPS, et al
Case No.: 50 2008 CA 036246XXXXMB AH
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Page 6 of 6

COUNSEL LIST

Ms. Shannon M. Mahoney, Esquire
Law Offices of Shannon M. Mahoney, P.A.
Attorney For: Ivana Mlinar
315 11th Street
West Palm Beach, FL 33401
Phone: (561) 659-4414
Fax: (561) 659-6991

Phone: (404) 881-7148
Fax: (404) 253-8524

David R. Gutwein, Esquire
Hamilton, Miller & Birthisel, LLP
Attorney For: United Parcel Service Inc.
150 SE 2nd Avenue, Suite 1200
Miami, FL 33131
Phone: (305) 379-3686
Fax: (305) 379-3690

Ms. Linda Ramos
Pak Mail of Wellington, Inc.
Attorney For: Pak Mail of Wellington, Inc.
13833 Wellington Trace, Suite E4
Wellington, FL 33414
Phone:
Fax:

Ms. Angela Adams, Esquire
Alston & Bird, LLP
Attorney For: United Parcel Service Inc.
1201 W. Peachtree Street NW
Atlanta, GA 30309
Phone: (404) 881-7000
Fax: (404) 253-8434

Jeffrey Blaker, Esquire
Conroy, Simberg, Ganon, Krevans, Abel,
Lurvey, Morrow & Schefer, P.A.
Attorney For: Recovery Management
Corporation d/b/a Cargo Largo
1801 Centre Park Drive East, Suite 200
West Palm Beach, FL 33401
Phone: (561) 697-8088
Fax: (561) 697-8664

Ms. Melissa A. Davis, Esquire
Alston & Bird
Attorney For: United Parcel Service Inc.
1201 West Peach Street, NW
Atlanta, GA 30309

COUNSEL LIST

Melissa A. Davis, Esquire
Alston & Bird
1201 West Peach Street, NW
Atlanta, GA 30309
Phone: (404)-881-7148
Fax: (404)-253-8524
Attorneys for United Parcel Service
Inc.

Angela Adams, Esquire
angela.adams@alston.com
Alston & Bird, LLP
1201 W. Peachtree Street NW
Atlanta, GA 30309
Phone: (404)-881-7000
Fax: (404)-253-8434
Attorneys for United Parcel Service
Inc.

David R. Gutwein, Esquire
egutwein@hamiltonmillerlaw.com
Hamilton, Miller & Birthisel, LLP
150 SE 2nd Avenue, Suite 1200
Miami, FL 33131
Phone: (305)-379-3686
Fax: (305)-379-3690
Attorneys for United Parcel Service
Inc.

Jeffrey Blaker, Esquire
jblaker@conroysimberg.com;
kmelbe@conroysimberg.com
Conroy, Simberg, Ganon, Krevans,
Abel, Lurvey, Morrow & Schefer,
P.A.
1801 Centre Park Drive East, Suite
200
West Palm Beach, FL 33401
Phone: (561) 697-8088
Fax: (561) 697-8664
Attorneys for Recovery Management
Corporation d/b/a Cargo Largo

Shannon M. Mahoney, Esquire
smmahoney@mahoneylegal.com
Law Offices of Shannon M.
Mahoney, P.A.
315 11th Street
West Palm Beach, FL 33401
Phone: (561)-659-4414
Fax: (561)-659-6991
Attorneys for Ivana Mlinar