


Transportation Type

by John E. Anderson Sr. and Colin Ferguson

2013 Case Law Review Under the Carmack Amendment

The Carmack Amendment provides a uniform system of liability for loss and damage to property in interstate transportation. As will be discussed below, case law from 2013 reminds us that both shippers and carriers need to be cognizant of the requirements and consequences of the Carmack Amendment.

Carmack Amendment—Shipper Beware

The recent case of *Mlinar v. UPS*[1] applied the pre-emptive effect of the Carmack Amendment to the detriment of the shipper. In *Mlinar*, the plaintiff appealed a final order dismissing all of her claims against the shipper on the grounds that the claims were pre-empted by the Carmack Amendment.

Mlinar was an artist who created two valuable oil paintings. Mlinar's husband took the paintings to a third-party retailer, Pak Mail, to be shipped via UPS to New York, but the container was empty when it arrived at its intended destination. The paintings had been removed from the container. Mlinar reported the loss to UPS and Pak Mail. Months later, Pak Mail offered Mlinar $100 for the missing contents of the package.

At some point, UPS sold the paintings to its lost goods contractor, Cargo Largo, who later auctioned the paintings. An individual named Aaron Anderson purchased one of the paintings at the auction. About two years after Mlinar lost possession of the paintings, she received a telephone call from Anderson, who informed her he had just purchased one of the paintings at the auction sale. Anderson inquired into the value of the painting, and Mlinar informed him that it had been appraised to be worth $20,000. Anderson also informed Mlinar that the other painting was auctioned in the same lot, but he did not know the identity of the purchaser. Anderson placed a listing online offering to sell the painting and even offering to introduce the buyer to Mlinar. Anderson eventually acquired the other painting as well, and then placed advertisements online in which he offered to sell or trade both paintings, and again offered to introduce the buyer to Mlinar.

Based upon the above facts, Mlinar filed suit against UPS, Pak Mail, Cargo Largo, and Anderson. Mlinar asserted four claims in her complaint: conversion, profiting by criminal activity, unauthorized publication of name or likeness, and a claim under Florida's deceptive and unfair trade practices act. The trial court dismissed all of Mlinar's claims against UPS, ruling that the claims were pre-empted by the Carmack Amendment.

On appeal, the court discussed the pre-emptive effect of the Carmack Amendment. It commented that the amendment pre-emption included all losses resulting from a failure to discharge a carrier's duty as to any part of the agreed transportation. It noted that a cause of action not within the ambit of the pre-emptive scope of the Carmack Amendment was a rare exception.[2] Further, it held that the proper test for whether the claims were pre-empted by Carmack was whether they were based on conduct separate and distinct from the delivery, loss of, or damage to goods. "In other words, separate and distinct conduct rather than injury must exist for a claim to fall outside the pre-emptive scope of the Carmack Amendment."[3]

The appellate court analyzed each of the claims against UPS. First, it held that the claim for conversion was pre-empted because it was predicated upon UPS's failure to deliver Mlinar's goods. Second, Mlinar's claim against UPS for unauthorized use of her name or likeness was pre-empted, as courts have held that claims of slander or damage to reputation are pre-empted by the Carmack Amendment. Finally, the appellate court held that the remaining two claims against UPS also were pre-empted, as the claims of fraud and deceptive conduct were related to the formation of a shipping contract or closely related to the performance of the contract. All of the plaintiff's claims against UPS, therefore, were held to be pre-empted by the Carmack Amendment. Accordingly, the appellate court affirmed the trial court's dismissal of all claims against UPS.

Carmack Amendment—Carrier Beware

In the case of *ABB, Inc. v. CSX Transp. Inc.*,[4] rail carrier CSX Transportation Inc. (CSX) transported an electrical transformer worth approximately $1.3 million from shipper ABB Inc.'s (ABB)

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plant in Missouri to a customer in Pennsylvania. ABB filed a complaint in district court alleging the transformer was damaged in transit and that CSX was liable for more than $550,000, the full amount of the damage. CSX denied liability and contended that even if the court found it liable, the parties had agreed in the bill of lading (BOL) to limit CSX's liability to a maximum of $25,000.

The BOL executed by ABB had incorporated by reference a $25,000 liability limitation contained in a separate price list used by CSX. It was a standard form used by ABB, and it included general shipping information as well as a product value of $1,384,000. The BOL did not include a price for the shipment or indicate the level of liability assumed by CSX for lost or damaged cargo. A space labeled "rate authority" was left blank by the ABB employee who filled out the form because, as he testified, he had been unable to get rate information from CSX and thus he would only learn the price of the shipment once he received an invoice. The BOL contained certification language providing in relevant part:

> " … every service to be performed hereunder shall be subject to all the terms and conditions the Uniform Domestic Straight Bill of Lading set forth … in Uniform Freight Classification in effect on date hereof, if this is a rail or rail-water shipment. …
>
> Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof, set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns."[5]

The CSX price list set forth numerous rules applicable to its transportation of machinery, such as procedures related to billing. One section labeled "price restrictions" included the following: "Carriers' maximum liability for lading loss or damage will not exceed $25,000 per shipment. Full liability coverage is only available by calling your sales representative for a specific quote."[6] A CSX employee testified in his deposition that the price list did not provide varying rates associated with different levels of liability, and that full liability required direct rate negotiation with the carrier. ABB employees testified that they were unaware of the existence of the price list.

The district court held that the parties had limited CSX's potential liability in the bill of lading to $25,000. The parties entered into a consent judgment, preserving ABB's right to appeal the district court's decision regarding liability limitation.

The Fourth Circuit noted that the Carmack Amendment imposed the burden of securing limited liability on the carrier, CSX, not on the shipper.[7] It held that in the absence of a clear, written agreement by the shipper, the carrier was subject to full liability for actual losses.[8] "A carrier cannot limit liability by implication. There must be an absolute, deliberate, and well-informed choice by the shipper."[9] Despite the fact that ABB, the shipper, prepared the BOL, the court held that the Carmack Amendment imposed full liability on the carriers, without regard to which party prepared the BOL.[10]

The Fourth Circuit disagreed with CSX's argument that the certification language in the BOL indicating that the terms and conditions included "in the classification or tariff which governs the transportation of this shipment" incorporated by reference the CSX price list document.[11] It noted that the BOL did not specifically reference that document, and if they followed CSX's reasoning, carriers could limit their liability using documents shippers never had notice of.[12] Since carriers are no longer required to publish their tariffs, shippers could no longer be charged with constructive knowledge of them.[13] The court commented that allowing reference to a general tariff without citing a specific rate authority or code would allow carriers to unilaterally change their limitation of liability at any time, unbeknownst to shippers.[14]

The court noted there was no indication that ABB was aware of the relevant CSX price list, and that, in their prior deals they had used varying price lists.[15] It also noted that CSX employees testified they often changed the price lists and declined to charge ABB with constructive notice.[16]

The Fourth Circuit held that the Carmack Amendment subjected CSX to full liability for the shipment, and that the parties did not modify CSX's level of liability by written agreement as permitted in the statute. The court therefore vacated the portion of the district court's judgment limiting CSX's liability. ⊙

Endnotes

[1]*Mlinar v. UPS*, 2013 Fla. App. LEXIS 19193 (Fla. Dist. Ct. App. 4th Dist. 2013).

[2]*Mlinar*, Fla App. LEXIS 19193 at 3, citing *Brightstar Int'l Corp. v. Minnteman Int'l*., 2011 WL 4686432 (N. D. Ill. 2011).

[3]*Id.* at 4, citing *Smith v. United Parcel Serv.,* 296 F.3d at 1249 (11th Cir. 2002).

[4]*ABB, Inc. v. CSX Transp., Inc.*, 721 F.3d 135 (4th Cir. 2013).

[5]721 F.3d at 140-141.

[6]721 F.3d at 141.

[7]721 F.3d at 142.

[8]*Id.*

[9]721 F.3d at 142, citing *Aero Automation Sys. v. Iscont Shipping*, 706 F.Supp. 413, 416 (D. Md. 1989).

[10]721 F.3d at 142.

[11]*Id.*

[12]721 F.3d at 143.

[13]*Id.*

[14]*Id.*

[15]721 F.3d at 144.

[16]*Id.*