

>> MAY IT PLEASE THE COURT.
MARA HATFIELD WITH BARNHART
AND CHIPLEY.

ON BEHALF OF THE PLAINTIFF IN
THE APPELLANT PETITIONER IVANA
MLINAR.

WITH ME IS JACK SCOLA OF OUR
FIRM AND MICHELLE MAHONEY.
IN PREPARE FORGE TODAY'S ORAL
ARGUMENT I HAD THE OPPORTUNITY
TO REVIEW THE PRESS RELEASE
SUMMARY DESCRIBING THE FACTS
THAT GIVE RISE TO THE MATTER
THAT IS BEFORE THE COURT TODAY.

I WANTED TO NOTICE A FEW
SIGNIFICANT INACCURACIES ABOUT
THOSE PARTICULAR FACTS.

THE SUMMARY STATES THAT MISS
MLINAR, PAID TO SHIP TWO OIL
PAINTINGS TO NEW YORK.

THAT IS TRUE.

SHE ALSO PAID FOR A TRACKING
NUMBER FROM UPS THAT WAS
COMPLETELY USELESS.

IT WAS A FALSE, IT WAS A
DESEPARATE TESTIFY PRODUCT.
SHE SUED UPS AND OTHERS ALLEGING
A SCHEME TODESIGN TO PROFIT
FROM GOODS STOLEN DURING THE
SHIPPING PROCESS.

THAT IS TRUE.

BUT SHE ALSO ALLEGES THAT THAT
SCHEME BEGAN WELL BEFORE SHE
EVER BROUGHT HER PRODUCT TO UPS
TO SHIP.

SHE ALSO ALLEGES THAT THE SCHEME
INCLUDED THE DEFRAUDING OF MISS
MLINAR AND SEVERAL OTHER
CUSTOMERS BY REFUSING ANY
CARMACK LIABILITY TO THOSE
CUSTOMERS.

THE SUMMARY STATES THAT UPS
ARGUED THAT A PROVISION OF
FEDERAL LAW IN PLACE FOR MORE
THAN A CENTURY SHIELDED IT FROM
MISS MLINAR'S SUIT.

UPS HAS ARGUED THAT.

UPS IS WRONG.

THE VERY LAW THAT IT IS NOW
CLAIMING AS ITS DEFENSE IS THE

CARMACK AMENDMENT.

FIRST, THAT'S A DEFENSE AND IT IS THE BURDEN OF THE DEFENDANT TO PROVE THAT THAT DEFENSE IS AVAILABLE TO IT.

SECOND, UPS IS NOT ABLE TO PROVE THAT IN THIS CASE BECAUSE OF THE VERY SCHEME THAT MISS MLINAR ALLEGES SHE WAS A VICTIM OF IS UPS'S DENIAL OF THAT DEFENSE OF THE LIABILITY THAT THAT DEFENSE WOULD STRICTLY PLACE UPON THE DEFENDANT UPS, FROM EVER ATTACHING TO ANY RELATIONSHIP BETWEEN MISS MLINAR AND UPS.

>> JUST, THAT LAST STATEMENT COULD YOU-- YOU LOST ME THERE. WHAT ARE YOU, ARE YOU ALLEGING THAT THE TARIFF DID NOT APPLY TO YOUR CLIENT?

THAT THAT'S WHY THAT AMENDMENT DOES NOT APPLY IN THE FIRST PLACE?

>> YES, YES, THANK YOU, JUSTICE. WE ARE, WHAT MISS MLINAR IS ALLEGING THAT WHILE CARMACK HAS BEEN IN PLACE FOR 100 YEARS EVERY SINGLE COURT THAT HAS LOOKED AT CARMACK AND CARMACK ITSELF FROM 1913 UNTIL 2013 FROM U.S. SUPREME COURT TO EVERY CIRCUIT COURT HAS STATED THAT CARMACK APPLIES IF THERE IS A VALID TARIFF RELATED TO THAT SHIPPING ENGAGEMENT.

>> SO WHAT THEY'RE-- WHAT UPS IS SAYING THAT EVEN THOUGH YOU BRING YOUR GOODS TO A UPS AUTHORIZED PLACE, AND THINK YOU'RE DEALING WITH UPS WITH THE SHIPPING PLACE BEING SORT OF THEIR AGENT, THAT IN THOSE SITUATIONS A PERSON CAN NOT LOOK TO WHERE YOUR GOODS ARE LOST OR DAMAGED, CAN NOT LOOK TO UPS? IS THAT WHAT--

>> THAT IS EXACTLY WHAT UPS SAYS AND IN ORDER TO MAINTAIN THEIR AFFIRMATIVE DEFENSE THEY ATTACHED TARIFFS TO THEIR MOTION

TO DISMISS.

TARIFF 1090 STATES, BY THE WAY, IF YOU ARE A THIRD-PARTY CUSTOMER, THESE TARIFFS DON'T APPLY TO YOU.

>> WELL BUT THE, TARIFF WOULD APPLY TO THE RELATIONSHIP BETWEEN, WHAT IS THE THIRD PARTY HERE PAK SHIP.

>> PAK MAIL.

>> PAK MAIL AND UPS.

THAT IS WHO THEY WERE DEALING WITH.

AGAIN, YOU GOT DIFFERENT ISSUES HERE BUT JUST TO BE CLEAR, THE TARIFF WOULD APPLY TO THAT RELATIONSHIP, WOULDN'T IT?

>> YES.

THE SAME EXCLUSION THAT SAYS THAT THIS DOES NOT APPLY TO THE CUSTOMER, IVAN GNAW MLINAR, TO THIRD PARTY CUSTOMERS, APPLIES TO THIRD PARTY TARIFF.

THE THIRD PARTY ENTITY.

THE PROBLEM THAT CARMACK SAYS THE CARRIER, THE CARMACK THE STATUTE TODAY EVEN AFTER ALL THIS TIME, THE CARRIER, THE FINAL CARRIER WHO ACTUALLIES DELIVERS THE PRODUCT HAS TO HAVE LIABILITY TO THE PERSON WHO SHOULD BE ABLE TO MAKE THE RECOVERY.

>> SO BECAUSE THERE WAS AN INTERMEDIARY HERE, THAT RELATIONSHIP DOES NOT EXIST, IS THAT THEIR ARGUMENT?

>> UPS IS CLAIMING THAT PAK MAIL IS AN INTERMEDIARY OF THE PROBLEM IS AN INTERMEDIARY HAS TO BE SOMEBODY WHO CAN NEGOTIATE A TARIFF AND A BILL OF LADING ON YOUR BEHALF AND THIS TARIFF, THIS, THAT SAYS IT WON'T APPLY TO ANY THIRD PARTY, IS PRECONCEIVED.

THERE IS NO WAY THAT PAK MAIL CAN COME ALONG AND NEGOTIATE SOMETHING DIFFERENT FOR MISS MLINAR.

IF AN INTERMEDIARY, SUCH AS THE INTERMEDIARY IN THE KIRBY CASE, U.S. SUPREME COURT KIRBY CASE, THERE IS NO PROVISION IN THAT TARIFF, WHICH THE U.S. SUPREME COURT SAID WAS OKAY BECAUSE THE INTERMEDIARY WHO WAS ACTING AS AGENT FOR THE SHIPPER IN THAT INSTANCE NEGOTIATED THAT TARIFF, IN THAT INSTANCE THERE WAS NO BLOCKADE BETWEEN THE SHIPPER AND THE CARRIER.

SO EVEN IF THERE'S AN INTERMEDIARY IN THE PROCESS, IF THE SHIPPER REALIZES THAT THEIR SHIPMENT ISN'T THERE AND THEY CALL TO TRACK IT DOWN BECAUSE THEY HAVE BEEN DELIVERED AND PURCHASED A TRACKING NUMBER, THEY'RE NOT TOLD, OH, WE'RE NOT DEALING WITH YOU.

WE REFUSE TO DEAL WITH YOU. AND IN THIS PARTICULAR INSTANCE, NOT ONLY DOES UPS NOT TREAT PAK MAIL AS AN INTERMEDIARY, IT DID NOT TREAT IVANA MLINAR AS THE SHIPPER.

SO ON THE ONE HAND WHEN IVANA WENT TO MAKE HER CLAIM AND HAVE HER PACKAGE FOUND AND USED THE TRACKING NUMBER THAT SHE BOUGHT, WHICH IS BASIS OF THE FRAUDULENT DECEPTIVE TRADE RACK TIS CLAIM IN THIS CASE, WE'RE TOLD, WE'RE NOT LOOKING FOR YOUR PACKAGE. YOU CALL PAK MAIL WHEN IT OPENS ON MONDAY, THEY MAYBE HELP YOU FIND YOUR PACKAGE.

THERE IS ABSOLUTELY NO EVIDENCE THERE WAS EVER ANY ATTEMPT ON THE PART OF UPS TO LOOK FOR THE PACKAGE FOR PAK MAIL EITHER.

AND THERE IS NO EVIDENCE THAT UPS AND THERE IS NO ABSOLUTELY NO ALLEGATION ON THE PART OF THE PLAINTIFF OR IN THE MOTION TO DISMISS THAT UPS ACKNOWLEDGED ANY LIABILITY TO PAK MAIL.

>> IF WE GOT PAST THAT, WHICH IS THAT THE TARIFF APPLIED, THE

ISSUE OF-- THERE IS TWOFOLDS
HERE AS FAR AS WHAT COULD
HAPPEN.

PAK MAIL COULD HAVE, IT GOT
THERE WITHOUT ANYTHING IN THERE
BUT LET'S ASSUME HYPOTHETICALLY
THAT PAK MAIL NEVER ENDED
UP SHIPPING IT AND ENDED UP
STEALING IT AND GIVING IT TO
SOMEONE ELSE, BUT IN THE NORMAL
COURSE OF THINGS IT HAD GOTTEN
TO WHERE IT GOT WITH NOTHING IN
THE PACKAGE AND UPS HAD TALKED
TO YOUR CLIENT AND SAID, OKAY,
WE'LL LOOK FOR IT, AND THEY
CAN'T FIND IT, AND IT TURNS OUT
THAT IT, THEN IT TURNED OUT IT
HAS BEEN STOLEN BY ANOTHER
PERSON, WOULD YOU AGREE UNDER
THOSE CIRCUMSTANCES THAT THE
CARMACK AMENDMENT WOULD APPLY TO
LIMIT THE LIABILITY?

IN OTHER WORDS IT'S BECAUSE IT'S
IN THE COURSE OF THE SHIPPING
EXCEPTION WHICH IS VERY BROAD,
SO IS IT THE INTENT-- IS IT,
ASSUMING THAT THE TARIFF
APPLIES, IS IT THE INTENTIONAL
NATURE OF WHAT YOU'RE ALLEGING
THAT THEY ACTUALLY CONSPIRED
THROUGH, I'M NOT SURE EXACTLY
WHAT YOU'RE GOING TO BE ABLE TO
PROVE BUT THAT THEY CONSPIRED TO
CONVERT PAINTINGS AND OTHER
SIMILAR, SIMILAR OBJECTS THAT
HAVE VALUE?

SO COULD YOU, IN OTHER WORDS,
I'M HAVING TROUBLE SEPARATING
THE FACT THAT THEY DIDN'T
RESPOND TO, WELL, HOW DOES THAT
NOT FIT INTO THE CARMACK
AMENDMENT IF THE LOSS OCCURRED
IN THE PROCESS OF THE SHIPPING
AND DELIVERY?

>> THERE'S THREE POINTS RAISED
BY YOUR HONOR.

THE FIRST IS THAT CARMACK IS A
DEFENSE THAT WOULD LIMIT THE
LIABILITY TO A DECLARED ITEM IF
THE TARIFF THAT WOULD LIMIT THE

LIABILITY IS A VALID TARIFF.
BECAUSE UPS IS A TARIFF IN PLACE
THAT SAYS, WE OWE NOTHING HERE,
TO IVANA MLINAR, THAT TARIFF
CAN'T APPLY TO HER.

THE TARIFF THAT WOULD LIMIT THE
LIABILITY BETWEEN UPS AND PAK
MAIL CAN NOT APPLY TO MISS
MLINAR BECAUSE THERE IS, CARMACK
DOES NOT ALLOW A SITUATION WHERE
A CARRIER SAYS, NO LIABILITY.
SO THEN YOU HAVE THE QUESTION
OF, OKAY, ARE WE GOING UNDER A
CARMACK CLAIM BUT IF THERE'S
JUST NO LIMITATION OF LIABILITY?
MISS MLINAR CAN CLAIM THE FULL
VALUE--

>> IF THE TARIFF DOESN'T APPLY
BUT LET'S ASSUME, OBVIOUSLY THE
FOUR DISTRICT FOUND THAT IT DID
APPLY.

>> THAT IS OUR BIGGEST ISSUE
WITH THE ERROR WE THINK THE
FOURTH DCA HAD IN ITS OPINION IT
DIDN'T LOOK WHETHER THE TARIFF
APPLIED OR NOT.

IT DIDN'T LOOK WHETHER ISSUE
WHETHER THE AFFIRMATIVE DEFENSE
WAS MET TO LIMIT THE CLAIM.
THE ISSUE THE FOURTH DCA DID
LOOK AT, WAS, IS THIS CLAIM
BASED ON THE FACTS AS THEY ARE
ALLEGED COMPLETELY REMOVED FROM
CARMACK'S SCOPE ALL TOGETHER?
SO WHETHER THE TARIFF IS VALID
FOR PURPOSES OF LIMITING THE
CLAIM IS ONE ESHOO.

WHETHER WE ARE SUPPOSED TO EVEN
LOOK AT THE TARIFF AS IT RELATES
TO ALL OF THESE CLAIMS IS A
WHOLE OTHER ISSUE.

AND THE DEFENDANT IS GOING TO
SAY, WELL IN 100 YEARS OF CASE
LAW, NEARLY EVERY SINGLE TIME
ALL OF THE COURTS, BE THEY THE
SUPREME COURT OF THE STATES OR
BE THEY SURE CUT COURTS HAVE
FOUND IT IS ALMOST IMPOSSIBLE TO
GET OUT OF CARMACK PREEMPTION.
THIS IS THE CASE WHERE IT IS

NOT.

THIS IS THE CASE WHERE EVEN HAD THIS SCHEME ARRIVED, ARISED AND PAK MAIL AND UPS AND CARGO LARGO AFTER TWO YEARS FIND THE PRODUCT AND GIVE IT BACK TO MISS MLINAR, SO HER CLAIM IS NOT ABOUT THE LOSS OR DAMAGE TO HER PAINTINGS, IN FACT SHE HAS HER PAINTINGS BACK.

>> HOW DID SHE GET THE PAINTINGS BACK.

>> THE GENTLEMAN BOTTOM THEM AS A LOT OF GOOD IN CARGO LARGO SURRENDERED PAINTINGS.

>> WITHOUT CONSIDERATION? DID SHE HAVE TO PAY HIM TO GET THEM BACK.

>> HE WAS A DEFENDANT IN THE ACTION.

>> SEW GAVE THEM BACK.

>> THE ALLEGATION THIS IS, YOUR ALLEGATION THIS IS A CONSPIRACY AMONG ALL THESE PARTIES AND CARGO LARGO TO TAKE THESE GOODS, FIND THEM, NOT GIVE THEM BACK TO THE RIGHTFUL OWNER.

THAT'S YOUR CLAIM.

>> YES.

>> AND I WANT TO KNOW, YOU'RE SAYING IN 100 YEARS, THEY'RE SAYING 100 YEARS, WHERE DOES THE IDEA THAT THE CARMACK AMENDMENT WAS INTENDED TO INCLUDE CONDUCT THAT'S INTENTIONAL AS OPPOSED NEGLIGENT DESTRUCTION OR THEFT OF PROPERTY?

WHERE ARE THE CASES, IS THERE, ARE THERE DISPUTES ABOUT THAT? WHAT IS YOUR BEST CASE THAT SAYS NO INTENTIONAL CONVERSION IS OUTSIDE OF THE SCOPE OF THE CARMACK AMENDMENT?

>> THE SMITH VERSUS UPS 11th CIRCUIT CASE WHICH FOUND IN THAT INSTANCE THERE WAS NOT INTENTIONAL CONDUCT OUTSIDE OF THE COURSE OF SHIPPING BUT THERE COULD BE SUCH A CASE.

AND THAT'S THE THING ABOUT THE

CASE LAW OVER TIME.
THEY HAVE NEVER BEEN PRESENTED
WITH FACTS IN EVIDENCE.
THAT IS AN IMPORTANT THING.
ALL OF THESE CASES WE'RE TALKING
ABOUT ARE SUMMARY JUDGMENT CASES
BECAUSE THE CASES WERE ALLOWED
TO PROCEED TO PUT ON EVIDENCE.
IF YOU ALLEGED, DEPENDING UPON
WHICH COURT YOU'RE IN, IF IT IS
FEDERAL IF YOU ALLEGE
SPECIFICALLY ENOUGH AND IF IT IS
STATE IF YOU ALLEGE, THAT THERE
WAS CONSPIRACY GOING ON.
THE SCHEME WAS DESIGNED TO
PROFIT THE CARRIER, THAT CLAIM
SURVIVES PREEMPTION UNTIL IT IS
PROVES THOSE FACTS ARE NOT
SUFFICIENT AT TRIAL.
WE'VE NOT BEEN ALLOWED THAT HERE
BUT WE HAVE CERTAINLY ALLEGED
THIS WAS A CONSPIRACY TO STEAL
THESE PARTICULAR PAINTINGS.
THERE IS THE AIR PRODUCTS CASE
WHICH WAS A CASE AGAINST UPS
UNDER VERY SIMILAR FACTS BUT THE
PROBLEM IN THAT CASE, ALTHOUGH
IT WENT TO EVIDENCE, WAS THAT
THE DISTRICT COURT SAYS, YOU
KNOW, AT THE END OF THE DAY YOU
DIDN'T PROVE THAT THE, IT WAS
ANYTHING MORE THAN THE LEFT HAND
NOT KNOWING WHAT THE RIGHT HAND
WAS DOING.
YOU DIDN'T SHOW ME HOW UPS WAS
GOING TO PROFIT.
YOU DIDN'T SHOW ME THEY ACTUALLY
EVEN PURPOSELY TOOK THE PRODUCT.
HERE THEY ALLEGED THAT THE TWO
WAS ARRIVED AT DESTINATION,
SLICED OPEN, PAINTINGS WERE
PULLED OUT AND SOLD TWO YEARS
LATER AS A UPS GOOD.
>> HOW DID UPS KNOW WHO WHOSE
PAINTING THEY WERE?
>> IT'S ALLEGED IN THE FINAL
COUNTERCLAIM AFTER DISCOVERY IN
THIS CASE, MISS MLINAR HAD BEEN
DIRECTED TO GO TO PAK MAIL
BECAUSE SHE HAD BEEN SHIPPING

VIA UPS.

>> I MEAN ONCE THIS PACKAGE WAS,
THE PACKAGE WAS OPENED, THE TWO
PAINTINGS WERE LOST, AND UPS
IN-- UPS FACILITIES THEY WERE
OBVIOUSLY FOUND BECAUSE THEY
GAVE THEM TO LARGO TO SELL.
BUT, WAS THERE ANY INDICATION ON
THE PAINTINGS WHOSE PAINTING
THEY WERE?

>> YES, YES, YOUR HONOR.
THANK YOU.

>> ALL RIGHT.

>> THE, THEY KNEW ABOUT IT IN
TWO-WAYS.

FIRST OF ALL, IT WAS MISS
MLINAR'S PAINTINGS.

SO HER NAME AND IDENTITY WAS ON
THE FRONT.

AND SHE HAD PASTED ON THE BACK
WHO SHE WAS, THE DIMENSIONS OF
THE PAINTING, WHAT THE PAINTING
WAS.

WHAT HAPPENS IN THIS PARTICULAR
SCHEME--

>> WAS THERE AN ADDRESS ON
THERE?

>> HER ADDRESS WAS NOT ON THERE,
SHE DID WHEN SHE GOT BACK TO PAK
MAIL SHE FILLED ALL OF THAT OUT.
SHE THOUGHT UPS HAD HER ADDRESS
BECAUSE WHEN SHE BROUGHT HER
MATERIALS TO PAK MAIL TO BE
SHIPPED, SHE LEFT THEM THEIR
INFORMATION.

SHE HAD NO IDEA THAT IS NOT
INFORMATION--

>> ONCE IT IS SEPARATED FROM THE
PACKING GOODS, HOW DID THEY, HOW
COULD THEY HAVE KNOWN THAT?

>> IN THE SAME WAY THEY WERE
ABLE TO KNOW IT WAS IVANA
MLINAR'S VIDOVIC PAINTING TO
SELL AS SUCH.

THEY WENT ONLINE AND FOUND EXACT
SAME INFORMATION THAT COULD HAVE
BROUGHT HER BACK HER PAINTING.
INSTEAD THEY USED IT TO SELL THE
PAINTING.

>> THIS NOT ONE OF THE

SITUATIONS WHERE THE RIGHT HAND
DIDN'T KNOW WHAT THE LEFT HAND
WAS DOING, IT WASN'T AN
EMPLOYEE?

ADMINISTRATION THEMSELVES HAD TO
GIVE THOSE PAINTINGS TO LARGO,
DID THEY NOT?

>> YES, YOUR HONOR.

IT IS A COMPLEX SCHEME BUT WHAT
WE DISCOVERED AND WHAT WE
ALLEGED IS THAT UPS HAD A LOST
GOODS DIVISION FOR SOME TIME AND
AT SOME POINT IT DECIDED, WHY
ARE WE PAYING ALL OF OUR
EMPLOYEES TO SIT THERE AND COMB
THROUGH OUR SHIPPING LISTS AND
OUR LOST GOODS LIST AND COMPARE
IT TO WHAT IS COMING UP AS A LOT
OF GOOD.

CARGO LARGO, YOU'RE ONE OF TWO
OVERGOODS SELLER.

IF YOU WANT TO CONTINUE BEING
OUR OVERGOODS SELLER YOU WILL
TAKE OVER THAT LOST GOODS PART
AND DO IT FOR NO MORE
CONVERSATION THAN BEING ABLE TO
SELL THE GOODS.

WHAT WE'LL DO IS, WE'LL GUARANTY
YOU MORE PRODUCT.

SO AT THE SAME TIME THIS
HAPPENS, UPS HAS ALL THESE
THIRD-PARTY RETAILERS.

THEY'RE GUARANTEED MORE PRODUCT
BECAUSE THINGS ARE GETTING TAKEN
FROM THEIR PACKAGING AND GETTING
TO CARGO LARGO.

THERE IS NO WAY THAT CARGO
LARGO, A, WANTS TO FIND THE
OWNER.

NOW IT HAS A PAINTING IT CAN
SELL ON THE CHEAP AND B, IS
GOING TO.

BECAUSE MISS MLINAR HAS NO IDEA
ALTHOUGH SHE HAS GIVEN THEM HER
ADDRESS AND GIVEN THEM A
TRACKING NUMBER, NONE OF THAT IS
AVAILABLE BECAUSE SHE IS NOT
ACTUALLY A UPS CUSTOMER.

SO THE ONLY WAY THAT THIS
SCHEME, WHICH, ADMITTEDLY IS

COMPLICATED SCHEME AND IS NOT AN EVERYDAY OCCURRENCE WHICH IS WHY, GETTING AROUND CARMACK PREEMPTION IS NOT AN EVERYDAY OCCURRENCE BUT YOU HAVE A VERY COMPLICATED SCHEME PREDICATED ON THE FACT THAT UPS IS NOT RECOGNIZING THESE SHIPPERS AND BY NOT RECOGNIZING--

>> ISN'T THERE AN ADDITIONAL ELEMENT HERE, TELL ME IF I'M WRONG, THAT YOU'RE ACTUALLY ALLEGING THAT UPS INTENTIONALLY CONVERTED THE PROPERTY?

I MEAN THEY STOLE THE?

>> YES.

THEY STOLE THIS--

>> THEY HAD SOMEONE SLICE OPEN THE CONTAINER, AND THEY TOOK IT OUT SO THAT THEY COULD GIVE IT TO, COULD GO THROUGH THIS PROCESS?

>> YES, YOUR HONOR.

>> THAT YOU'RE TALKING ABOUT.

>> THERE IS SIMPLY NO OTHER EXPLANATION FOR A PACKAGE--

>> THAT IS AN ALLEGATION BASED ON AN INFERENCE FROM ALL THE CIRCUMSTANCES?

>> YES.

IT IS AN EXPRESS ALLEGATION. UNTIL THAT EXPRESS ALLEGATION IS PROVEN WRONG ON A MOTION TO DISMISS WE GET AROUND CARMACK.

>> NOW YOU KNOW, YOU'RE COMPLAIN SAYS THAT-- YOUR COMPLAINT SAYS THAT UPS PAINTING, THE PAINTINGS HAD A LABEL ON THE BACK WHICH IDENTIFIED ARTIST AND HER ADDRESS?

>> THEN IT HAD HER ADDRESS ON IT.

I BELIEVE, ALTHOUGH I MAY BE WRONG, IT HAD HER, THE DIMENSIONS OF THE PAINTING, HER NAME, AND THE CITY AND STATE WHERE SHE LIVES.

I'M NOT SURE THAT IT HAD HER STREET NUMBER.

BUT SHE HAS, SHE HAS A FOR LACK

OF A BETTER WORD, A LABEL THAT SHE ADHERES TO THE BACK OF CANVASS.

>> OKAY.

>> IT IS SO THAT, YOU KNOW, IF SOMEBODY GOES TO FIND HER PAINTING 100 YEARS LATER--

>> THEY KNOW--

>> WHO IT WAS.

>> BUT, AGAIN, THIS IS KIND AFTER SIDE ISSUE BECAUSE OF YOUR ALLEGATION OF THIS INTENTIONAL CONVERSION.

BUT, THE FACT THAT THERE'S A, THE ARTIST'S LABEL AND NAME IS ON A PAINTING DOESN'T MEAN THAT THE ARTIST STILL OWNS THE PAINTING.

I MEAN SHE HAS GOT ALL KIND OF PAINTINGS OUT THERE I ASSUME WOULD HAVE THESE LABELS ON THEM BUT THEY'RE NOT HER PROPERTY ANYMORE, SHE SOLD THEM.

SHE IS IN THE BUSINESS OF SELLING PAINTINGS, RIGHT?

>> YES, YES, YOUR HONOR AND, IF UPS FINDS AN iPad, IT IS NOT GOING TO SEND THAT BACK TO APPLE.

BUT UPS DOES HAVE, THEY, PART OF THE SCHEME THAT THEY HAVE WORKED OUT WITH CARGO LARGO IS THEY HAVE PREFERRED CUSTOMERS WHERE THEY WILL SEND THOSE SHIPMENTS BACK TO THAT PARTICULAR MAKER. AND, IF IT'S NOT A PREFERRED MANUFACTURER WHERE THEY WILL NOT SEND IT BACK TO THAT PARTICULAR MAKER, WHAT CARGO LARGO IS SUPPOSED TO DO, IS SEARCH THE PERSONAL INFORMATION THAT'S AVAILABLE AND CROSS REFERENCE THAT, RESEARCH THAT INDIVIDUAL, AND GIVE THAT INDIVIDUAL A CALL.

THERE IS A SCRIPT THAT THEY'RE SUPPOSED TO CALL.

CARGO LARGO CALLS SOMEBODY UP, SAYS, HI, I'M A UPS EMPLOYEE AND WE'VE NOTICED YOUR NAME ON A

PACKAGE.

IS IT YOURS?

COULD IT BE YOURS?

AND THEN THEY, PRESUMABLY I
GUESS YOU WOULD HAVE TO PRODUCE
SOME SORT OF EVIDENCE SHOWING,
YES, I SHIPPED THAT.

BUT THE VERY SAME WAY THAT THEY
SOLD THIS ITEM, THEY COULD HAVE
TRACKED IVANA MLINAR DOWN.

THEY FOUND THE ART GALLERY SHE
WAS SELLING STUFF THROUGH, THAT
SHE HAD BEEN SHIPPING REGULAR TO
BY UPS.

>> IS PART OF YOUR ALLEGATION
THEY HAD THIS PROCESS THEY'RE
SUPPOSED TO GO THROUGH THAT IS
KIND OF A SHAM?

THAT UPS HAD WITH THEM, SO THEY,
THEY TELL THEM DO THIS BUT WE
KNOW THEY'RE NOT SO WE CAN
PROFIT THIS, IS THAT RIGHT?

>> YES.

IT IS NOT ACCIDENTAL THAT THE
PROCESS WASN'T OBSERVED.
THE PROCESS WAS OBSERVED HERE.
IT WAS OBSERVED FOR AN ENTIRE
DIFFERENT PURPOSE, THE PURPOSE
OF PROFITING, THE PURPOSE OF
SELLING THE GOOD, RATHER THAN
GETTING THE GOOD BACK TO THE
LOCATION.

IF IT WERE THE ONE HAND NOT
KNOWING WHAT THE OTHER HAND WERE
DOING THEY WOULD NOT HAVE DONE
THE PROCESS.

>> IN CASE LAW THERE IS
REFERENCE TO THE SAVINGS CLAUSE
OF CARMACK AMENDMENT.

I DON'T THINK YOU MADE ARGUMENT
ABOUT.

THAT DOES THAT HAVE ANYTHING TO
DO WITH THIS CASE?

>> I'M FEELING LITTLE BIT LIKE
THE BLIND SQUIRREL.

>> WE'LL LEAVE IT AT THAT.

I MAY BE IN THAT CATEGORY.

WE'LL LEAVE IT AT THAT.

>> SO ASSUMING, ABOUT DECIDING
THAT ALL OF THESE OTHER, THE

THREE OF YOU ARGUMENTS ABOUT THE CRIMINAL, THE CONVERSION, THE, AND THE ONE THAT MIGHT SURVIVE, WOULD BE THE MISAPPLICATION OF THE IDENTITY, THAT, THE FACT THAT THEY KNEW WHO THIS PERSON WAS, AND THEY, IN FACT GAVE IT TO LARGO TO SELL, THAT COULD POSSIBLY BE A SAVING GRACE, ASSUMING EVERYTHING THAT FELL UNDER CARMACK?

THIS WOULD BE COMPLETELY OUTSIDE OF THE SHIPPING PORTION?

>> YES BECAUSE THE, THE POINT OF THAT CLAIM REALLY IS, UPS ASK TRYING TO MAINTAIN IF IT COMES INTO CONTACT WITH SOMETHING FROM SHIPPING IT'S IMMUNE TO ANYTHING IT COULD DO.

EVEN IF THE PAINTING EVENTUALLY WOUND UP IN NEWYORK ON TIME AND SHE COULD SELL NET A SHOW, THEY COULD HAVE MANAGED IN THE MEANTIME TO TAKE A PERFECT PRINT OF IT AND SELL IT AS HER GOOD. YOU CAN'T DO THAT.

ACCORDING TO UPS THEY COULD FIND J.D. SALINGER'S LONG LOST DIARY, QUICKLY PRINT IT ON THE FLY AND IT GOES TO WHERE IT GOES AND SELL IT AS A GOOD.

THERE IS NO WAY CARMACK WAS MEANT TO BE DEFENSE OF A THEFT OF INTELLECTUAL PROPERTY.

>> COUNSEL, NOT ONLY OUT OF TIME YOU USED OVER YOUR TIME.

>> OH, THANK YOU I WAS GOING TO RESERVE FOR REBUTTAL.

>> WAS TRYING TO WARN YOU.

>> OH, THANK YOU.

WE REQUEST THAT THE CLAIMS BE REMANDED FOR TRIAL, THANK YOU.

>> MAY IT PLEASE THE COURT. DATE HEFFERNAN ON BEHALF THE UNITEDPARCELSERVICES.

DAVID.

COUNSEL IS RIGHT AND WE DO HAVE TO GO BACK TO LOOK AT HISTORY OF THE CARMACK AMENDMENT BUT THE IMPORTANT THING HERE COUNSEL

KEEPS BRINGING IT UP AS AN IMMUNITY.

WHAT THE CIRCUIT COURT DID, WHAT THE TRIAL COURT DID AND WHAT THE FOURTH DIRECT COURT OF APPEALS DID WAS AFFIRM THE DISMISSAL OF THESE COMPLAINTS BECAUSE THEY WERE PREEMPTED BY FEDERAL LAW.

>> SO HERE'S MY FIRST QUESTION ON THAT.

IS IT CORRECT THAT WHEN SHE BROUGHT, SHE, THE PLAINTIFF, BROUGHT HER PAINTINGS TO PAK MAIL, AND GOT UPS TRACKING NUMBER, AND THEN WHEN SHE, THE, IT ARRIVED, THE PACKAGE ARRIVED WITH A CLEAR THEFT OF HER PAINTINGS, WHICH YOU AGREE WAS A CLEAR THEFT, THAT, AND SHE GOES TO-- AND SHE CALLS UPS, THEY GO, NOT MY PROBLEM, THEY DON'T SAY, HERE'S YOUR \$1000R WHATEVER THE VALUE WOULD BE, THEY GO, YOU CAN'T, YOU DON'T DEAL WITH US.

WE'RE NOT THE, WE'RE NOT, WE'RE NOT THE, YOU'RE NOT THE SHIPPER. WE'RE NOT THE SHIPPEE.

GO TO PAK MAIL, DID THAT HAPPEN?

>> IN THE ALLEGATIONS OF COURSE THAT'S WHAT OCCURRED.

>> OF COURSE, SO, ASSUMING AND THE TARIFF, WHICH IS IS ATTACHED DOES NOT-- EXCLUDES A THIRD PARTY LIKE THIS PLAINTIFF FROM THE SCOPE.

SO I'M HAVING A HARD TIME UNDERSTANDING IF CARMACK AS AN AFFIRMATIVE DEFENSE, AND YOU'VE GOT TO PROVE COVERAGE, IT APPLIES TO PREEMPT ANYTHING AS TO THESE, THESE THIRD-PARTY SITUATIONS.

YOU CAN'T HAVE IT BOTH WAYS. IN OTHER WORDS, YOU CAN'T HAVE IT BOTH WAYS.

YOU CAN'T SAY I'M NOT GOING TO DO ANYTHING FOR YOU AND ALSO BUT IF YOU KNOW, ANYWAY, ALL YOU ARE, IS LIMITED TO, YOU KNOW,

THE AMOUNT?

>> THOSE ARE THE THINGS I THINK WE HAVE TO KEEP SEPARATE, OKAY? BECAUSE THE TARIFF IN THE LIMITATION ARE SEPARATE ASPECTS. CONGRESS ENACTED THIS 100 YEARS OF COURTS HAVE FOLLOWED THIS TO SAY, WE NEED UNIFORM LIABILITY. IT ACTUALLY CREATES STRICT LIABILITY ON THE CARRIER SAYING IF IT IS LOST, YOU ARE RESPONSIBLE FOR THE ACTUAL LOSS AND THE DAMAGE.

HOWEVER, YOU CAN THEN LIMIT THAT LIABILITY.

WELL THE QUESTION THAT WAS POSED TO THE TRIAL COURT AND THE FOURTH DCA WAS WHETHER THESE CLAIMS ARE PREEMPTED.

FIRST AND FOREMOST, THEY NEVER GOT TO THE ISSUE.

COUNSEL'S RIGHT, IT WAS NEVER ADDRESSED BY THE FOURTH DISTRICT BECAUSE IT WASN'T A BASIS OF THE DISMISSAL.

IF THE CLAIMS ARE PREEMPTED, ALL IT SAYS THAT'S YOUR VEHICLE OF RECOVERY.

AND THE CARMACK AMENDMENT ADDRESSES AND SAYS THAT THE SHIPPER, OR THE OWNER, OKAY, IS DEFINED AS THE SHIPPER IN THAT CASE.

SO SHE HAS A CARMACK AMENDMENT CLAIM.

WHETHER IT IS THEN LIMITED OR NOT, WE'LL GET INTO SOME OF THESE CASES THAT TALK ABOUT IT, CONVERSION AND INTENTIONAL INTENT, MAY REMOVE THAT LIMITATION BUT THE CLAIMS ARE ALL STATE COURT CLAIMS AND THERE IS NO DISPUTE AND THAT HAS NEVER BEEN RAISED OTHERWISE.

THIS WAS NOT FILED AS A CLAIM UNDER THE CARMACK AMENDMENT.

AND THAT'S WHAT CONGRESS ENACTED.

THAT IS WHAT THE SUPREME COURT HAS FOLLOWED AND THAT IS WHAT

THE 11th CIRCUIT HAS
FOLLOWED.

>> LET ME ASK YOU HERE.
WE'RE TALKING ABOUT PREEMPTION.
WHAT KIND OF PREEMPTION?

>> IS THAT THE CAUSE OF
ACTION--

>> THERE ARE DIFFERENT
CATEGORIES PREEMPTION.
IT IS NOT EXPRESS PREEMPTION,
RIGHT?

WHAT IS IT?

>> IT IS EXPRESSLY PREEMPTED.
ALL OF THE CLAIMS--

>> WHERE DOES IT SAY THAT.

>> I THOUGHT, I READ IN SOME OF
THE CASE LAW THAT THE PREEMPTION
UNDER THE CARMACK AMENDMENT IS
IMPLIED FIELD PREEMPTION.

>> IT, THE STATE LAW CLAIMS ARE
PREEMPTED IF THEY ARISE FROM THE
CONDUCT AND RESULTING IN THE
DELIVERY OF LOST GOODS.

>> WE'RE HAVING TROUBLE
COMMUNICATING HERE.

>> OKAY.

>> I'M ASKING A VERY SIMPLE
QUESTION ABOUT THE TYPE OF
PREEMPTION.

WE'VE GOT DIFFERENT TYPES OF
FEDERAL PREEMPTION.

AND, AND, ONE IS EXPRESS.
ANOTHER IS IMPLIED FIELD
PREEMPTION.

IS THIS NOT IMPLIED FIELD
PREEMPTION WE'RE TALKING ABOUT
HERE?

>> IT WOULD BE, YOUR HONOR, THAT
THESE STATE LAW CLAIMS, IF THEY
ARISE UNDER THE OPERATIONS OF
THE DELIVERY OR LOSS OR DAMAGE
OF GOODS, THOSE CLAIMS ARE THEN,
THE STATE LAW CLAIMS ARE
PREEMPTED.

>> I UNDERSTAND.

I UNDERSTAND YOU'RE CLAIMING
PREEMPTION BUT YOU'RE NOT GOING
TO TAKE POSITION WHETHER IT IS
BASED ON IMPLIED FIELD
PREEMPTION OR NOT?

>> WE HAVE NOT BRIEFED THAT,
YOUR HONOR.
I'M NOT SURE--
>> LET ME ASK YOU THIS.
LET ME APPROACH THIS?
A DIFFERENT WAY.
>> SURE.
>> THE NOTION IS THAT CONGRESS,
SOMEHOW, INTENDED TO CUT OFF ANY
CLAIMS LIKE THIS, RIGHT?
>> CORRECT.
>> THAT IS THE IDEA ABOUT THE
PREEMPTION.
>> LET'S FOCUS ON ONE CLAIM.
THE CLAIM OF CONVERSION.
TRUE CONVERSION, ESSENTIALLY
THEFT.
WHAT WOULD MAKE US REACH THE
CONCLUSION THAT THE CONGRESS IN
SETTING UP THIS REGULATORY
SCHEME INTENDED TO EXCLUDE STATE
LAW CLAIMS RELATED TO THEFT?
>> I THINK THE COURTS THAT HAVE
INTERPRETED THAT QUESTION ARE
WHAT THIS COURT SHOULD FOLLOW.
>> WHAT COULD YOU POINT ME TO IN
THE TEXT OF THE CARMACK
AMENDMENT THAT WOULD SUPPORT
SUCH AN INFERENCE, OF, OF
PREEMPTION THAT GOES TO THAT
EXTENT?
>> THERE IS VERY LITTLE
LEGISLATIVE HISTORY WITH THE
CARMACK AMENDMENT.
>> I'M NOT ASKING ABOUT.
THAT I SAID THE TEXT OF THE
CARMACK AMENDMENT.
>> I DON'T BELIEVE THE CARMACK
AMENDMENT ADDRESSES INTENT IN
ANY WAY, SHAPE OR FORM BUT I DO
BELIEVE--
>> WHAT ABOUT IN THE STRUCTURE
OF IT?
SOMETHING THAT WOULD HELP US
KNOW THAT IT IS MEANT TO BE THAT
INCLUSIVE?
>> WELL THE LANGUAGE OF THE
CARMACK AMENDMENT TALKS ABOUT
DAMAGE, LOSS OR NON-DELIVERY OF
GOODS.

IT DOESN'T DEFINE HOW THAT
NON-DELIVERY OCCURS.

WHETHER THAT IS THEFT, WHETHER
THAT IS INTENTIONAL, WHETHER
THAT'S TOTAL NEGLIGENCE BUT IT
TALKS ABOUT--

>> BUT IT JUST, IT JUST KIND OF,
IT SEEMS A STRETCH TO THINK,
THAT WHEN THE CONGRESS IS
SETTING UP THAT REGULATORY
SCHEME, THAT THEY HAVE IN MIND,
A SCHEME BY THE CARRIER, TO
STEAL THINGS FROM A SHIPPER.
I MEAN, AGAIN, I'M NOT SAYING
THAT HAPPENED.

>> I UNDERSTAND WHERE YOU TAKE
THE ALLEGATIONS.

>> BUT WE'VE GOT TO GO ON THESE
ALLEGATIONS AND IT MAY BE THEY
CAN NEVER PROVE THAT BUT IT
JUST, IS THERE ANYTHING YOU CAN
POINT ME TO THAT WOULD SUPPORT
THE CONCLUSION THAT THE CONGRESS
HAD IN MIND, INCLUDING THAT KIND
OF MISBEHAVIOR, CRIMINAL
CONDUCT, BY A SHIPPER WITHIN THE
SCOPE OF THIS REGULATORY SCHEME?
AND SOMEHOW, IF, IF THERE ARE
CLAIMS THAT ARE ALLOWED TO GO
AFTER A SHIPPER, FOR THAT KIND
OF MISCONDUCT, THAT WILL
INTERFERE WITH THE REGULATORY
SCHEME THAT THE CONGRESS HAS
ESTABLISHED?

>> AND AGAIN, YOUR HONOR, ALL I
CAN REFER YOU TO IS THE CASES
THAT HAVE INTERPRETED THAT.
WE FILED A SUPPLEMENTAL
AUTHORITY, THE CERTAIN
UNDERWRITERS CLAIM, WHICH
INVOLVED THE THEFT OF
\$150,000 IN COINS.
THOSE WERE THE ALLEGATIONS
AND THEFT OF STOLEN MATERIAL.
AIRCRAFT STOLE.

>> WHO LAST STOLE THE COINS.

>> THEY ALLEGED INTERNALLY THEY
WERE STOLEN BY THE SHIPPER.

>> THE SHIPPER'S EMPLOYEE?

>> THEY MENTIONED EMPLOYEES,

YOUR HONOR--

>> BUT NOT THE ADMINISTRATION,
THE MANAGEMENT?

>> I DON'T BELIEVE THE CASE SAID
ADMINISTRATION BUT THEY USED--

>> THAT'S A DIFFERENCE.

IF A SHIPPER HAS A BAD EMPLOYEE,
OBVIOUSLY WHO IS ACTING OUTSIDE
OF THE SCOPE OF HIS EMPLOYMENT
AND IS, STEALING FOR HIMSELF
THAT'S A DIFFERENT SORT OF ISSUE
THAN THE KIND OF ALLEGATION WE
HAVE HERE THAT UPS ITSELF STOLE
THESE PAINTINGS.

>> WELL I DON'T THINK THERE IS
AN ALLEGATION THAT THE
ADMINISTRATION OF UPS STOLE
THESE FOR THEIR OWN GOOD.
THEY HAVE ALLEGED THE
CONSPIRACY.

>> WHO SENT IT TO LARGO THEN?
THE EMPLOYEE?

>> ANY OVERGOODS, YOUR HONOR,
THAT ARE LOST, MEANING THEY'RE
SEPARATED FROM THE PACKAGE AND
THEY CAN NO LONGER--

>> I UNDERSTAND THAT AND I
FOLLOW THE CARMACK.

I UNDERSTAND THE PURPOSE OF IT
BUT THE PROBLEM IS WHEN, THESE
PAINTINGS COME OUTSIDE OF THE
CONTAINER, AND THEY DELIVERED
THE EMPTY BOX TO THE, THERE IS
NOTHING THERE, AND SHE GOES
THERE TO, THE SAME DAY TO UPS TO
TELL THEM, BECAUSE THEY HAPPEN
TO BE FLYING UP THERE, TO MEET
IT, AND, SHE TELLS THEM, THEY
SAY, WELL, LET ME GO TO CARMACK.
AND THEN ALL OF A SUDDEN YEARS
LATER, WHENEVER THE PAINTINGS
APPEAR, IT IS NOT LIKE THEY
SLIPPED BEHIND A DESK OR SLIPPED
BEHIND A CHAIR.

THEY ARE FOUND, EVEN INDEED WHEN
THEY RECOVERED THEM, ON THE BACK
IS HER NAME AND ADDRESS.

ALL YOU HAD TO DO WAS GOOGLE
HER.

THAT IS WHAT ANDERSON SAID HE

DID, ABLE TO CONTACT AND TALK TO HER.

>> RESPECTFULLY AS JUDGE KENNEDY POINTED OUT THAT DOESN'T MEAN SHE IS THE OWNER OR SHIPPER OF THIS GOOD OR ANYTHING ELSE.

>> WHAT DOES IT MEAN? SHOWED UP THERE FOR THEM TO GIVE TO CARMACK?

>> SHIPPING 16MILLION PACKAGES A TODAY I THINGS GET SEPARATED AND THERE IS NO WAY--

>> NO WAY UNLESS YOU LOOK ON THE BACK AND SEE HER NAME THERE. JUST TURN IT OVER, THERE IT IS, NAME AND ADDRESS.

THAT IS NOT REALLY A LOSS. THAT IS--

>> RESPECTFULLY THAT IDENTIFIES THE PAINTER, NOT THE OWNER.

>> CAN I GO BACK TO A QUESTION WHETHER IT IS COVERED WITHIN THE CARMACK AMENDMENT?

U.S. SUPREME COURT SAID IT WAS INTENDED TO EMBRACE ALL DAMAGES RESULTING FROM THE FAILURE TO DISCHARGE THE DUTY WITH RESPECT TO ANY PART OF THE TRANSPORTATION TO THE AGREED DESTINATION.

SO UNDER THAT, IF IT WERE, LOST OR STOLEN, WITHIN THE COURSE OF IT BEING TRANSPORTED, THAT THERE WOULD BE AN ART, GET OVER THIS TARIFF ISSUE WHICH I'M STILL, SORT OF HUNG UP ON, BUT, THAT YOU WOULD, THERE WOULD BE, IT WOULD BE WITHIN THE SCOPE OF THE CARMACK AMENDMENT.

BUT HERE THE ALLEGATION IS, THAT AFTER IT WAS STOLEN, AND THERE IS NO QUESTION, I THINK WE ALL AGREE SOMEONE STOLE IT, DO WE AGREE WITH THAT?

THAT IT IS CUT OPEN AND PAINTING--

>> CERTAINLY DIDN'T ARRIVE WHERE IT WAS INTENDED TO AND THE ALLEGATION WAS THAT THE TUBE WAS CUT OPEN.

>> IT WASN'T DAMAGED.

IT WAS GONE.

>> THERE IS NO QUESTION, IT DID NOT ARRIVE WHERE IT WAS INTENDED TO BE SHIPPED, ABSOLUTELY.

>> APPARENTLY THIS WAS JUST A ONCE IN A LIFETIME HAPPENING AS MR. ANDERSON APPARENTLY COULD TESTIFY TO.

SO NOW WE HAVE THOUGH THAT THE CONSPIRACY IS THAT AFTER IT'S QUOTE, LOST, OR STOLEN, WE'RE GOING TO NOT EVEN, WHEN THE PERSON WHO LOST OR STOLE THIS, SAID, WELL, THAT IS NOT OUR JOB. YOU'RE NOT THE SHIPPER.

SO, DON'T TALK TO US.

AND THEN THE CONSPIRACY IS, IN, TAKING THE GOODS AND INSTEAD OF TRYING TO BRING THEM BACK TO THE RIGHTFUL OWNER, THEY'RE SOLD AND IN AN ATTEMPT TO MAKE A PROFIT. NOW HOW IS THAT, THAT WOULD BE AFTER, THE QUOTE, DELIVERY.

SO IT IS, TO ME, AGAIN MAYBE GOES BACK TO WHAT JUSTICE CANADY IS SAYING WHAT THE CONGRESS COULD HAVE INTENDED 100 YEARS AGO.

THE IDEA THERE IS INTENTIONAL CONDUCT AFTER THE MISSED DELIVERY, THAT, FURTHER PREVENTS THE RIGHTFUL OWNER FROM OBTAINING THE PROPERTY, SEEMS SO OUTSIDE THE SCOPE OF WHAT CONGRESS COULD HAVE POSSIBLY INTENDED TO PROTECT CARRIERS FROM.

SO COULD YOU ANSWER THAT PART OF THE CONSPIRACY, NOT THE CONSPIRACY NECESSARILY TO STEAL, WHICH STILL SEEMS LIKE BUT, THE CONSPIRACY TO, AFTER IT'S STOLEN, TO, DO EVERYTHING TO PROVENT IT-- PREVENT IT FROM BEING EARNED TO ITS RIGHTFUL OWNER?

HOW COULD THAT BE ACCORDING TO ANY PUBLIC POLICY WE WANT TO ENCOURAGE?

>> I THINK WE AGAIN HAVE TO LOOK AT TWO SEPARATE ISSUES HERE. ONE IS PREEMPTION AND ONE IS LIMITATION OF LIABILITY. IN THE CERTAIN UNDERWRITERS CASE WE FILED SUPPLEMENT AUTHORITY THEY WENT TO CONVERSION TEST. >> IS THAT LLOYD'S CASE.

>> YES.

CERTAIN

UNDERWRITERS v. LLOYD'S OUT OF THE THIRD CIRCUIT.

IT WAS DECIDED IN AUGUST OF 2014.

BUT THAT DEALT WITH THE THEFT, LOST, STEALING OF THE COINS.

WHAT THE COURT SAID THERE IS, THAT THE PREEMPTION ASPECT IS NOT AFFECTED BY THE POTENTIAL LIMITATION OF LIABILITY.

THEY WENT TO THE INTENT THERE TO SAY, IF THESE ALLEGATIONS, YOU LOOK AT THESE INTENTIONS, ARE TRUE, CERTAINLY CONGRESS DIDN'T LOOK TO SHIELD THE CARRIER.

THE STRICT LIABILITY IS STILL THERE.

IT THEN BECOME AS QUESTION OF WHETHER THERE IS ANY LIMITATION OF LIABILITY, OR THEY ARE RESPONSIBLE FOR THE FULL VALUE. IN OTHER WORDS, THAT IS DECIDED ON THE BACK END.

THE REMEDY IS STILL THERE, BUT THEY'RE SAYING AGAIN, TO KEEP UNIVERSAL SCOPE THAT CONGRESS WANTED, THE CAUSE OF ACTION HAS TO BE FILED UNDER THE CARMACK AMENDMENT.

>> IT HAS TO BE FILED IN FEDERAL COURT?

>> NO.

>> SO THEN, BUT THIS COMPLAINT WAS DISMISSED.

IT WASN'T LIKE THERE WAS A RULING, WELL, IF YOU CAN PROVE THERE, THIS WILL BE NO LIMITATION OF LIABILITY.

SO HOW IS THAT-- WHAT, IF THAT'S CORRECT, IF LLOYD'S IS

CORRECT WAY TO LOOK AT IT, A CARMACK AMENDMENT BUT WITHOUT LIMITATION OF LIABILITY WHY WASN'T THE DISMISSAL IMPROPER?

>> BECAUSE NONE OF CAUSES OF ACTION, THEY WERE ALL STATE COURT CAUSES OF ACTION.

>> ARE YOU SAYING THAT A STATE COURT, IF THEY FALL OUTSIDE-- THIS IS OBVIOUSLY, I DON'T SEE WHERE THERE IS AN EXPRESS PREEMPTION.

IT'S NOT CONTAINED IN THE THERE SO IT HAS TO BE IMPLIED.

SO THEREFORE THERE ARE EXCEPTIONS, ARE THERE NOT.

>> THERE ARE EXCEPTIONS THE SMITH COURT OUT OF THE 11th HAS SAID THAT.

AND SEPARATE AND DISTINCT CONDUCT APART FROM THE DELIVERY, SHIPMENT, LOSS OR DAMAGE OF GOODS.

AND THE COURTS IN INTERPRETING THAT, HAVE SAID, THOSE TYPES OF CLAIMS ARE STILL PREEMPTED.

THE AIRPLANE PART WAS ALLEGED TO HAVE BEEN STOLEN AND WENT INTO OVERGOODS AND SOLD BY OVERGOODS TO PERSON WHO SHIPPED IT.

THERE WAS FBI INVESTIGATION DURING THAT FIND OUT WHAT WAS GOING ON AND UPS COULDN'T FIND THE PART DURING ANY OF.

THAT THEY SAID NO, EVEN IF THAT IS INTENSIONALLY STOLEN IT WILL BE PREEMPTED UNDER CARMACK.

THERE MAY NOT BE LIMITATION OF LIABILITY WHEN WE GET INTO THE TRUE CONVERSION TEST WHICH SOME OF THE COURTS IN MINORITY HELD BUT THAT DOESN'T GET US AWAY FROM PREEMPTION.

IT COULD HAVE BEEN FILED IN STATE COURT UNDER THE CARMACK AMENDMENT.

>> I DON'T UNDERSTAND HOW YOU SAY TRUE CONVERSION DOESN'T GET YOU AWAY FROM PREEMPTION?

WHAT DOUGH MEAN BY THAT?

>> WELL THERE WERE SOME DECISIONS, YOUR HONOR, SAID TRUE CONVERSION, IN OTHER WORDS CONVERSION FOR YOUR OWN PROPERTY OR YOUR OWN USE--

>> WHAT IS ALLEGED HERE.

>> IT IS.

WHEN YOU THEN LOOK AT THE THIRD CIRCUIT OPINION THAT CAME OUT AND THE MAJORITY OF THE OPINIONS THAT TALK ABOUT TRUE CONVERSION THEY ALL GO TO THE LIMITATION OF LIABILITY.

AGAIN, TO KEEP POTENTIAL REDRESS, IF SOME OF THESE THINGS HAPPEN TO SAY, WELL WE CAN'T SHIELD A CARRIER AS THE COURT POINTED OUT TO SAY, WELL YOU HAVE CARMACK AMENDMENT.

NOW YOU CAN STEAL THINGS AND DO ANYTHING YOU WANT.

THEY'RE SAYING IF YOU STEAL FOR YOUR OWN GOOD, IT IS GOING TO FALL UNDER THE LIMITATION OF LIABLE ACTION.

THERE MAY BE NO LIMITATION.

YOU MAY BE ABLE TO RECOVER THE FULL VALUE, WHETHER THERE IS TARIFF OR NOT, IF THERE IS TRUE CONVERSION.

>> YOU CAN'T BE OFF ON OTHER STATE, YOU CAN'T BE OFF ON STATE CAUSES OF ACTION.

>> CORRECT.

>> THAT GOES BACK-- BUT AGAIN, THAT'S, THAT IS NOT REALLY PRE-- SO YOU'RE SAYING IT IS NOT PREEMPTED THEN?

IT IS NOT AN EXCEPTION FROM THE PREEMPTION.

>> CORRECT.

IT'S NOT.

THERE ARE, AND THE SMITH COURT POINTS IT OUT IF A UPS DRIVER ASSAULTS SOMEONE THAT IS CLEARLY NOT, THAT IS CONDUCT SEPARATE AND DISTINCT TO THE DELIVERY LOSS OR SHIPMENT OF GOODS.

>> BUT THIS IDEA THAT VOLUNTARY CONVERSION OR INTENTIONAL

CONVERSION IS THEN GOES TO
LIMITATION OF LIABILITY IS THAT
IN THE CARMACK, IT IS IN THE
STATUTE?

>> IT IS NOT.

>> WE GOT FEDERAL COURTS BECAUSE
THEY'RE DISTURBED WHAT IS GOING
ON REWRITING A STATUTE AS OPPOSE
TO SAYING YOU'RE JUST OUTSIDE
THE SCOPE OF THE STATUTE.

THAT IS, SORT OF SEEMS TO ME,
OH, WELL POLICY MUST BE THEY
WANTED IT TO BE WITHIN THE
CARMACK AMENDMENT BUT WE WON'T
HAVE A LIMITATION OF LIABILITY.
THAT IS JUST PURE REWRITING OF
STATUTE.

>> RESPECTFULLY JOBS BECAUSE IT
ADHERES TO TRUE INTENT OF
CONGRESS WHEN THEY WROTE THE
STATUTE WHICH IS NATIONAL
UNIFORM SCHEME OF LIABILITY
SAYING YOU ARE STRICTLY LIABLE
FOR THE LOSS OR DAMAGE OF THESE
GOODS.

>> I'M ONLY SMILING, WE'RE
TALKING ABOUT WHAT YEAR, 1916.

>> 1906.

1932 WITH CARRIERS.

>> RIGHT.

>> THERE ARE PLENTY OF DECISIONS
INCLUDING THE SMITH DECISION
TALKS ABOUT INTENTIONAL ACTS.
EVEN THOSE INTENTIONAL ACTS
WITHIN THE SCOPE, CONDUCT OF THE
DELIVERY OR LOSS OF FOODS, SMITH
WAS A CASE WHERE THEY REFUSED
TO--

>> HOW DOES SOMETHING GET STOLEN
GET TO BE LOST?

>> I'M NOT SURE THAT THE
DISTINCTION.

WHEN YOU LOOK--

>> YOU'RE NOT SURE THE
DISTINCTION?

>> WELL, WHEN YOU LOOK AT CASES,
OBVIOUSLY YOU COULD ALLEGE
NEGLIGENCE, THAT WOULD COVER
LOSS.

IF STOLEN IT IS INTENTIONAL ACT

YOU'RE ALLEGING.
THEY HAVE ALLEGED INTENTIONAL
ACTS HERE.

>> RIGHT.

>> SMITH AND OTHER CASES HAVE
TAKEN ALLEGATIONS OF INTENTIONAL
ACTS AND SAID THEY'RE PREEMPTED
BY CARMACK.

YOUR VEHICLE OF RECOVERY IS
UNDER THE CARMACK AMENDMENT,
OKAY?

NOT UNDER 50 STATE DIFFERENT
CAUSES OF ACTION BECAUSE AGAIN
FOR INTERSTATE COMMERCE TO WORK
YOU CAN'T HAVE CARRIERS SUBJECT
TO ALL--

>> I ASKED OPPOSING COUNSEL WHAT
SOME OF THE CASE LAW REFERS TO
AS THE SAVINGS CLAUSE OF THE
CARMACK AMENDMENT.

I WANT TO GIVE YOU AN
OPPORTUNITY TO ADDRESS THAT, IF
YOU WISH TO.

NOW I UNDERSTAND, AGAIN THIS IS
NOT SOMETHING THAT HAS BEEN
BRIEFED, BUT, IT SEEMS TO BE, I
MEAN IT IS IN THE CASE LAW.
THERE IS A REFERENCE TO IT.
IT IS 49 USC 15103 WHERE IT
SAYS, EXCEPT AS OTHERWISE
PROVIDED IN THIS PART THE
REMEDIES PROVIDED UNDER THIS
PART-- NOW IS THE CARMACK
AMENDMENT PART OF THE PART WE'RE
TALKING ABOUT HERE?

>> I BELIEVE IT IS.

>> OKAY.

THAT'S A KEY QUESTION.
THE REMEDY'S PROVIDED UNDER THIS
ARE IN ADDITION TO REMEDIES
EXISTING UNDER ANOTHER LAW OR
COMMON LAW.

I'M TRYING TO UNDERSTAND ALL
THIS IN LIGHT OF THAT.

>> YOU AND I BOTH.

I'M AWARE OF THE SAVINGS CLAUSE.
AND I THINK THAT'S WHAT THE
SMITH COURT HAS INTERPRETED IN
OTHER CASES, HAVE INTERPRETED TO
SAY, NOT EVERYTHING IS

PREEMPTED.

THERE ARE THINGS IN INTERSTATE SHIPPING THAT OBVIOUSLY WOULDN'T BE PREEMPTED.

THERE ARE SOME COURTS THAT HAVE HELD INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS NOT PREEMPTED.

IT IS MINORITY.

SMITH SAYS--

>> YOU KNOW WHEN THE SAVINGS CLAUSE WAS ADOPTED?

>> I DO NOT.

SEEING I'M VERY CLOSE TO BEING OUT OF TIME.

I WOULD RESPECTFULLY REQUEST THAT THIS COURT AFFIRM THE FOURTH DISTRICT'S OPINION, AFFIRMING TRIAL COURT THAT THESE CLAIMS WERE APPROPRIATELY DISMISSED AS THEY WERE PREEMPTED UNDER THE CARMACK AMENDMENT.

THANK YOU.

>> THANK YOU FOR YOUR ARGUMENTS. THE COURT WILL BE IN RECESS UNTIL 9:00 TOMORROW MORNING.

>> ALL RISE