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Faster Than Now! The Final Word, On the Final Mile

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We have found that more and more of our clients are involved in e-commerce fulfillment, distribution and last-mile services. We handle sophisticated issues in this sector every single day, including drafting and negotiating contracts for last-mile delivery service providers, counseling on development of operational structures with value-added service providers, drafting warehouse fulfillment contracts that support those operations, and ensuring that those models for the last mile do not run afoul of regulatory authorities. Litigation unfortunately *does* ensue and will only grow in prevalence as more and more logistics service providers enter the last-mile market. The facts and circumstances of these cases are new and interesting due to the dramatic evolution in delivery models and consumer preferences!

We have decided to start a feature in each issue of *InterConnect* devoted to case law, statutory and regulatory developments relating to e-commerce fulfillment, distribution and last-mile delivery issues.

Trip and Fall

A recent manifestation of last-mile delivery litigation was *Muzzarelli v. United Parcel Service, Inc.*[2017 WL 2786456, 2017 U.S. Dist. LEXIS 99395 (C.D. Ill. June 27, 2017)]. In that case, Plaintiff Muzzarelli brought a personal injury claim arising from a fall that she had when she tripped over a package delivered to her home by UPS. She then filed a common law negligence lawsuit against UPS in state court. UPS removed the case to federal court and filed a motion for summary judgment, asserting Federal Preemption of plaintiff's claims, and also a defense that plaintiff could not recover because the "risk" was "open and obvious."

Muzzarelli, however, had not alleged damage to the goods that were shipped in interstate commerce. In fact, she did not allege that the package was damaged *at all*. Instead, she claimed that UPS was negligent in the *actual placement of the package on the porch,* which caused her to suffer personal injuries. Consequently, her claim was not preempted by the federal Carmack Amendment because it arose from a "separate and distinct ground from *the loss of, or the damage to, the goods* that were shipped."

UPS also argued that the package was an "open and obvious danger" and, that therefore, it should not be liable for any physical harm caused by the package's porch placement. However, the court found that an open and obvious danger is a defense to premises liability, which is inapplicable because the plaintiff's complaint asserted an ordinary negligence claim.

Lessons Learned

In our litigious society, with millions of packages being delivered to the doorsteps of consumers every day (and more on the way), cases such as this will continue to arise. A better course than defending these cases successfully *is to not have a claim brought at all.* To that effect, certain simple preventive measures can be taken when executing last-mile delivery operations:

1. *Training and instruction* to last mile delivery drivers on package placement can be included in instructional training videos to those drivers. Obviously, care should be taken to ensure that employment status is maintained through any such training exercise.

2. *Cautions regarding video surveillance*. Drivers should also be made aware that many houses, residences, and apartment buildings now have video surveillance cameras throughout the property that often capture delivery providers' actions on the proverbial customer doorstep. These videos can not only implicate the last-mile service provider but also impugn the driver who leaves the package at the doorstep in cavalier fashion.

3. *Contracting limitations and online service terms*. This is the era of rapid-fire transactions. However, certain terms and conditions may be placed on last-mile providers' websites, or in their contract with shippers, to help obviate or limit any such liability, by contract.

Watching the Horizon

We are confident that service providers, consumers and the courts will quickly adjust to new "point and click" realities. The challenge is, and has always been, adapting archaic laws and industry norms to new economic interests and systems. We will continue to keep you apprised of these developments to help avoid getting tripped up!

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