"Act of God" Defense Exonerates Warehouseman in Sandy Claim

Super Storm Sandy made landfall on October 29, 2012, near Brigantine, New Jersey, after a prolonged and menacing trek up the eastern seaboard of the United States. Upon making landfall, its effects were catastrophic and widespread making it the most expensive natural disaster in the history of the United States.

Most affected by Sandy's wrath was the New York and New Jersey metro area, almost all of which is adjacent or very near to tidal waters, rivers and estuaries. Since the region is home to some of the largest ports in the country, there are many warehouses and container terminals that sit on or near these bodies of water. Sandy caused significant flood damage to dozens of warehouses and port facilities.

Predictably, a surge of litigation arose following Sandy, as shippers and cargo interests sought to recover losses from those warehousemen and port operators entrusted with storing their goods. In many cases, household goods shippers, whose claims under their homeowner's policies were denied because of flood exclusions, sued the warehousemen as a last resort. In other cases, sophisticated shippers and cargo interests (and their subrogated insurers) sought to recover by arguing that the warehousemen and port operators could have and should have done more to prevent damage from Sandy.

In response to these claims, the warehousemen and port operators argued that they acted reasonably under the circumstances (i.e., they were free of negligence), and that Sandy was an "Act of God" so catastrophic in nature that they were exonerated of all liability.

Historically, courts have been reluctant to exonerate carriers or warehousemen under the "Act of God" defense. Whether asserted under state law, or the Carmack Amendment (49 U.S.C. 14706) or the Carriage of Goods by Sea Act ("COGSA")(46 U.S.C. 1300), the fact-intensive nature of the defense and the completeness of the defense often makes it difficult to convince the court that the defense should be applied. However, a recent ruling from the United States District Court for the Southern District of New York has given hope to warehousemen and port operators seeking exoneration.

In *Lord & Taylor LLC v. Zim Integrated Shipping Services, Ltd. and New York Container Terminal, Inc.*, 2015 U.S. Dist. LEXIS 75868 (2015), the United States District Court for the Southern District of New York held that Sandy was "legally an Act of God that absolve[d] [defendants] of liability for [p]laintiff's loss." In this case, Lord & Taylor contracted with Zim Integrated Shipping Services (Zim) to ship cartons of goods from Hong Kong to New York. On October 27, 2012, the cartons were unloaded and stored at the New York Container Terminal (NYCT). Sandy struck two days later and a number of plaintiff's cartons were damaged.

Before trial, the parties stipulated that COGSA governed the case. For an Act of God defense to prevail under COGSA, the carrier must show that "the damage from the natural event could not have been prevented by the exercise of reasonable care by the carrier …" Furthermore, "a hurricane that causes unexpected and unforeseeable devastation with unprecedented wind velocity, tidal rise, and upriver tidal surge, is a classic case of an 'Act of God.'" In light of this, the court sought to determine two factors: (1) whether the weather conditions were foreseeable and (2) whether Zim or NYCT could have taken any reasonable precautions in light of the foreseeable weather conditions.

After review and analysis of weather reports in the week leading up to Sandy, the court determined that the severity of Sandy was not reasonably foreseeable to defendants until October 28, 2012 at 2 a.m. It was at this time that the National Hurricane Center (NHC) provided the "critical information" needed to determine foreseeability. Specifically, the NHC issued an updated storm surge prediction of 5 to 10 feet. This report was the first prediction wherein the storm surge estimate exceeded the height of the terminal bulkhead (8

feet). Given this, the court determined it was at this time it became foreseeable that Sandy could potentially flood the terminal.

In light of this, the court looked to determine whether there were any reasonable precautions the defendants could have undertaken. While the burden of proof rests with the carriers to show there were no alternative, reasonable options available, the plaintiff's experts put forth five proposed actions the defendants could have carried out including delayed discharge of the cargo from the ship, declined to accept laden containers or arranged to load laden containers onto other container vessels to ride out the storm; provided cargo owners with the option to collect laden containers on October 27-28; placed laden containers above empty containers or on road chassis; placed laden containers on rail cars in the intermodal facility area; and deployed makeshift floor barriers.

The court determined that none were reasonable in light of the delayed foreseeability of the severity of the storm. In fact, the court determined that there was nothing the defendants could have done at all.

Comment: There are two lessons to be learned from the *Lord & Taylor* ruling. One is that the Act of God defense can be applied successfully, but it will take a storm like Sandy, with its massive force and extreme unpredictability, in order to prevail. Second, any defendant seeking to argue the defense should know the costs associated with expert testimony regarding weather are significant. In light of the recent string of judicial rejections of the Act of God defense following Hurricane Katrina and the Nashville-area floods, the Court's ruling in the *Lord & Taylor* case gives defense attorneys a glimmer of hope that the defense will ultimately survive.

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