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The Perfect Storm: The Parameters of a Successful "Act Of God" Defense in Freight Claims

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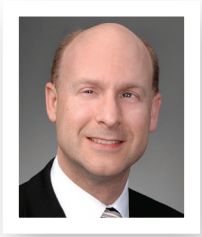

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I. Introduction

Federal and state law have long established that a shipper cannot prevail in a freight claim against a carrier if an "Act of God" caused the freight damage, loss, or delay in question. This "Act of God" defense is available to carriers of all modes in both domestic and international transportation. For instance, the U.S. Congress expressly included the "Act of God" defense in the plain text of the Carriage of Goods by Sea Act. See 46 U.S.C. § 1304(2)(d) ("[N]either the carrier nor the ship shall be responsible for loss or damage arising or resulting from … (d) Act of God."). Likewise, the defense is found in the express language of the Harter Act. See 46 U.S.C. § 192 ("[n]either the vessel, her owner or owners, charterers, agent, or master [shall] be held liable for losses arising from … acts of God."). With respect to surface transportation, the United States Supreme Court has unequivocally held that the defense may be raised by a surface carrier under the Carmack Amendment, even though the defense does not appear in the plain language of the statute. *Missouri Pacific Railroad Company v. Elmore & Stahl*, 84 S.Ct. 1142 (1964) (the Carmack Amendment "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 ….") citing *Chesapeake & O. Ry. Co. v. A. F. Thompson Mfg. Co.*, 46 S.Ct. 318, 319-20 (1926). Finally, while the text of the Warsaw Convention does not contain any express reference to the "Act of God" defense, the Convention nonetheless essentially provides for the defense by permitting an air carrier to exempt itself from liability upon a demonstration that it took all reasonable steps to avoid the damage.

Although the "Act of God" defense is universally available in freight claims litigation, the defense is used with relative infrequency. One reason for this fact is the simple reality that an "Act of God" is, by definition, an unusual occurrence. However, an additional reason why the defense appears to be increasingly marginalized in practice is that events that may have once been perceived as "Acts of God" are now often perceived to be acts of man. Notwithstanding the foregoing, one should not hastily disregard the defense as a relic of a past age. The modern world still presents sufficient context for a robust application of this defense. This article examines the defense in application and, in doing so, illustrates some practical strategies for employing the defense.

II. What Constitutes An "Act of God"?

An "Act of God" is generally defined as a sudden, unexpected, and unavoidable manifestation of the forces of nature. However, the exact origins of the "Act of God" defense are from far clear. For nearly 500 years, English courts have used this phrase to describe a defense that is available in a wide variety of legal disputes. See, e.g., *Shelley's Case*, 76 Eng. Rep. 199 (1579-1581); *Coggs v. Bernard*, 92 Eng. Rep. 107 (1703). The defense has been raised in the transportation context alone for well over 200 years. One early transportation case in which the defense was raised is *Forward v. Pittard*, 99 Eng. Rep. 953 (1785). In this case, which involved damage to goods by a fire for which the carrier was not to blame, Lord Mansfield stated:

> It is laid down that [a carrier] is liable for every accident, except by the act of God, or the King's enemies. Now what is the act of God? I consider it to mean something in opposition to the act of man: for every thing is the act of God that happens by His permission; every thing, by this knowledge.

> But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the King's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests.

Id. at 956-57. American courts adopted the English rule much as they did with respect to much of English common law. *Forward* was cited as authority as early as the 1802 case of *Hodgson v. Dexter*, 12 F.Cas. 283 (C.C. D.C. 1802). The case was cited by at least 1851 in a freight claims case as well. See *The Duchess of Ulster*, 24 F. Cas. 32 (D.C. N.Y. 1851) (steamboat raised "Act of God" defense in action brought by shipper to recover for goods lost when steamboat sunk in a river during a storm).

As transportation law matured in the United States, carriers, freight forwarders, and others inevitably came to raise the "Act of God" defense as a stock affirmative defense when answering a civil freight claim complaint. A review of the body of law that has developed around the "Act of God" defense reveals that the defense succeeds or fails based on several factors. These factors generally include:

1. the severity of the natural occurrence causing the damage;
2. the reasonable predictability of this natural occurrence;
3. the lack of human agency in the damage to the freight; and
4. the reasonableness of any precautions taken by the defendant.

See, e.g., *Ispat Inland, Inc. v. American Commercial Barge Line Company*, 2002 WL 32098290, *8 (N.D. Ind. 2002) (denying carrier's motion for summary judgment because many questions of fact existed as to whether a storm in question constituted an "Act of God"). Notwithstanding the fact-specific nature of the inquiry, one can draw conclusions about the vitality of the defense by reviewing the cases in which the "Act of God" defense has been raised.

III. Meteorological Events As "Acts of God"

The quintessential example of a successful "Act of God" defense arises in the context of weather: hurricanes, tornadoes, blizzards, floods, lightning storms, etc. These are generally considered to be "pure" events of nature. For instance, no amount of human ingenuity (or diabolical cunning) has yet succeeded in creating a hurricane, causing a tornado, or generating a blizzard. As a result, extraordinarily severe weather has often given rise to a valid "Act of God" defense. However, determining whether or not the defense is available in a particular case demands a much more nuanced analysis.

a. *Hurricanes and Warm Weather Precipitation*

Of all severe weather phenomenon, the hurricane distinguishes itself as perhaps the most intimidating of natural disasters. A hurricane can extend at any given time over hundreds of miles, contain winds upwards of 150 miles per hour, and deposit enormous amounts of precipitation in a very short period of time. One need only think of storms such as Hurricane Mitch, which killed more than 9,000 people in October 1998, to recall the truly devastating scope of a hurricane. Property damage, including damage to freight, accompanies every hurricane. Not surprisingly, the "Act of God" defense has been most heavily litigated in this context.

The Most Powerful Storms

The case of In the *Matter of the Complaint and Petition of International Marine Development Corp.*, 328 F.Supp. 1316 (S.D. Miss. 1971) describes one of the clearest examples of a successful "Act of God" defense in the transportation arena. In this case, a variety of plaintiffs made claims for property damage and catastrophic personal injuries caused by Hurricane Camille. The court described the singular nature of the storm:

> Hurricane Camille, which was the greatest natural disaster in the history of the North American continent and caused more devastation and destruction to the Mississippi Gulf Coast and to the North American continent than any hurricane of record, with unprecedented wind velocity in excess of 200 miles per hour, a tide rise of 30 feet or more, and a tidal surge of at least 22 feet, is the most classic case and striking example of what is characterized as an Act of God. This freak of nature was of sufficient velocity and destructiveness to overcome all reasonable preparations ….

Id. at 1330. As a result, the court found that none of the claimants established liability as against the various defendants. The defendants prevailed as a matter of law on the facts at hand. In other words, the unique characteristics of this storm made this an easy case.

Similarly, in 1998, Hurricane Georges struck Mississippi, Alabama, and other nearby areas, causing a wide variety of property damage. In *Skandia Insurance Co., Ltd. v. Star Shipping*, 173 F.Supp.3d 1228 (S.D. Ala. 2001), a shipper brought a freight claim relating to several containerized, large rolls of paper that it owned, which were damaged by the hurricane's floods. The court found that Hurricane George was a storm of such matchlessness and magnitude that it constituted an "Act of God":

> Notably, hurricanes, such as Hurricane Georges, are considered in law to be an "Act of God." Even though storms that are usual for waters and the time of year are not "Acts of God," 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."

Id. at 1239-40. The court found that the defendants in the case were protected by the "Act of God" defense in that they could not have prevented the loss with the application of reasonable foresight. *Id.* at 1252. The court gave particular significance to the timing and substance of weather advisories and the lack of prior floods in the geographic area. *Id.* at 1252-53. It should likewise come as no surprise that tornadoes often satisfy many of the factors relevant to a successful "Act of God" defense. See generally *Westvaco Corporation v. United States*, 639 F.2d 700, 717 n. 61 (noting that a tornado could constitute an "Act of God" despite "devilish antics").

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Less Powerful Storms

A storm does not have to rise to the level of a hurricane or be of continental or historic significance in order for it to constitute an "Act of God." Rather, the specific features of any storm can be sufficient to raise that storm to the level of an "Act of God." In *American International Insurance Co. v. Vessel SS Fortaleza*, 446 F.Supp. 221 (D. P.R. 1978), the district court analyzed whether a storm that struck a vessel en route to Puerto Rico constituted an "Act of God." The court started its analysis by noting that not all "heavy weather" encountered by a vessel can be classified as an "Act of God." *Id.* at 225. The court cautioned against a mechanical approach in which one simply measures the force of the winds or the height of the waves to see if a storm amounts to an "Act of God." The court identified a number of additional factors that must be reviewed in assessing a storm: (1) the duration of the storm, (2) the size of the vessel, (3) the wave intervals, (4) crossing seas, (5) structural damage, and (6) "other" unidentified considerations. *Id.* at 226. The court found that the storm in question, which involved winds of "full storm force" and "unusually short" wave intervals, constituted an "Act of God."

The court in *Compania de Vapores Insco, S.A. v. Missouri Pacific Railroad Company*, 232 F.2d 657 (5th Cir. 1956), similarly eschewed any mechanical test as to what type of storm may constitute an "Act of God" for purposes of establishing a freight claim defense:

> Almost any inclemency of weather causing property damage is an "act of God" in a limited sense, so that the problem is not solved by simply relying upon the conflicting testimony of experts … From a realistic standpoint, we think decision in this type controversy should turn not upon technical, meteorological definitions, but upon the issue of whether the disturbance causing the damage, by whatever term it is described, is of such unanticipated force and severity as would fairly preclude charging a carrier with responsibility for damage occasioned by its failure to guard against it ….

Id. at 660. The *Compania de Vapores* case involved a freight claim for damage to automobiles which had been stored in a warehouse prior to a severe windstorm. The court found that the windstorm was either "a small tornado" or "a line squall with tornadic characteristics" and, therefore, was an "Act of God" such that a shipper could not prevail for the damage caused to the automobiles. The court also noted that the carrier had not negligently maintained the warehouse.

A like analysis of the "Act of God" defense is found in *Mamiye Brothers v. Barber Steamship Lines*, 360 F.2d 774 (2nd Cir. 1965), where the Second Circuit Court of Appeals affirmed the successful application of the defense in the context of cargo damage from Hurricane Donna. Hurricane Donna struck New York harbor on September 12, 1960, and raised the water level to such an extent as to cover the floor of certain piers. Hurricane Donna had formed several hundred miles east of Puerto Rico and had not been regarded as posing any immediate threat to the northeastern United States. *Id.* at 778. Indeed, even when the hurricane changed its trajectory and began to accelerate, the weather bureau did not make alarming news of the event. The hurricane then unexpectedly hugged the Atlantic Coast and began moving up towards New York. Less than a day before the storm hit New York, the weather bureau began warning that the hurricane might strike and might create some high water. However, when the storm finally struck, it was far more severe than anticipated. The court found that the event constituted an "Act of God":

> In appraising the operator's conduct, it is necessary to resist the strong human temptation to review action by looking backward 'with the wisdom born of the event.' . . The extraordinary circumstances that developed here were thus quite different ….

Id. at 780. In other words, once again, the focus of the defense must be upon the very specific facts that were available at the time that the claim arose. Litigants (and courts) must not apply 40/40 hindsight in determining whether or not the damage or loss truly resulted from an "Act of God."

Simple Rain

Even a storm far less severe than the foregoing events can constitute an "Act of God." For instance, the case of *Noritake Co., Inc. v. M/V Hellenic Champion*, 627 F.2d 724 (5th Cir. 1980), involved the following Texas weather system:

> On June 15, 1976, the Port of Houston area experienced severe, flash flooding from heavy rains. Though the weather bureau had predicted only a 15% chance of rain that day, the port area received some thirteen inches of rain within a few hours, while a local airport received less than two inches.

Id. at 726. Severe flooding of this nature, while unusual, is presumably far more widespread throughout the country than cataclysmic hurricane damage. The shipper in *Noritake* sued for damage to 152 cardboard cartons of dinner sets that were damaged in a flooded warehouse. The trial court found that the storm system constituted an "Act of God" and the Fifth Circuit affirmed:

> The district court found that the damage could not have been prevented by reasonable care and foresight because this amount of sudden rainfall and flooding sufficiently surpassed what might normally be expected by way of summer thunderstorms that it rose to the level of an act of God within the meaning of COGSA. There is ample support in the record for this finding.

Id. at 728. In other words, while the court's blessing of the district court's decision was somewhat lacking in enthusiasm, the case clearly demonstrates that one does not need to encounter a hurricane, tornado, or storm of epic proportions to raise a successful "Act of God" defense. Of course, the ease with which one can establish the defense obviously increases to the extent that the storm in question can be demonstrated as truly exceptional.

Notwithstanding the foregoing, one must keep in mind that detrimental weather conditions alone will not give rise to an "Act of God." See *Southern Pacific Company v. Loden*, 508 P.2d 347 (Ariz. 1973) (carrier could not establish

"Act of God" defense for delay in delivering perishable produce because rainstorm in question was not shown to be totally unforeseeable or greater than other rainfalls in the region); *British West Indies Produce, Inc.*, 353 F.Supp. 548 (S.D. N.Y. 1973) (freezing temperatures on New York pier did not constitute an "Act of God" as charterer was negligent in placing shipment on exposed and unheated pier without adequate protection); *Security Insurance Company of Hartford v. Old Dominion Freight Line, Inc.*, 2003 WL 22004895 (S.D. N.Y. 2003) (freight is not lost due to an "Act of God" merely because it was stolen during a storm).

Trends

A carrier's ability to establish the "Act of God" defense in the context of heavy weather may in fact diminish over time. Notwithstanding jokes about the weatherman's inability to predict rain, meteorologists have indeed made steady progress in their ability to understand climate patterns and unusual weather phenomenon. As a result, carriers are often now charged with knowledge (both actual and constructive) of storms and weather patterns that might once have been unpredictable. For instance, in *National Starch & Chemical Company v. M/V "Monchegorsk"*, 2000 WL 1132043 (S.D. N.Y. 2000), a shipper shipped a large quantity of starch products from Thailand to Maine. While the products were being loaded into a Cyprian cargo vessel's various holds simultaneously, rain began to fall. Many of the bags became wet and, in fact, water was found pooling on top of many of them. In the course of litigating the freight claim that followed, the defendants raised the defense that the damage was caused by an "Act of God." The court rejected this theory:

> I do not accept that this rain damage was an unavoidable act of God. Kniazev testified that he knew the cargo was susceptible to rain. He also knew that it was the rainy season in Thailand. Despite this the cargo was loaded at night, when it was much harder to see an impending rainstorm from the cloud formations; this was the main method for detecting an incoming rainstorm. He also chose to load two hatches simultaneously, something with Captain Ngarm testified was risky during rainy season.

Id. at *6 (emphasis added). In short, the carrier could not rely on an "Act of God" defense because it was or should have been aware of the weather risks native to the region.

Likewise, in *Louis Dreyfus Corp. v. M/V "MSC Floriana"*, 1998 WL 474092 (S.D. N.Y. 1998), a shipper made arrangements to have five containers full of 1600 bags of coffee delivered from Mombasa to New Orleans. While the containers were sitting in a terminal container yard, a northeast wind blowing at approximately 20 miles per hour pushed brackish water from an industrial channel inland and backed up the drainage system, flooding part of the yard. As a result, the various defendants in question claimed that the damage was caused by an "Act of God." The terminal's superintendent testified that he had never seen such a condition in the yard during the seven and a half years that he worked in the yard. However, the court rejected the defense, noting that the defendants failed to establish that a 20 mile per hour wind is particularly unusual or unexpected in that area. *Id.* at *1. See also *C. Itoh & Co. (America) v. M/V Hans Leonhardt*, 719 F. Supp. 479 (E.D. La. 1989) (carrier failed to establish that water damage to cargo resulted from "Act of God" because, among other things, carrier failed to establish that vessel was seaworthy and carrier could have reasonably guarded against storms).

With increasing use of satellite imagery and further developments in human understanding of the manner in which hurricanes and other storms form, move, and grow (and the means by which human activity contributes to weather), one can reasonably expect that these long-standing "Acts of God" may—at some speculative point in the future—become somewhat more predictable. Accordingly, carriers and others involved in the movement of freight will likely be held to a higher standard when asserting the "Act of God" defense. However, one can likewise expect that even as technology and science advance, the art of predicting and charting such events will never be performed with mathematical certainty. Any suggestion that man will "conquer" nature in any such sense is simply hubris. As a result, the "Act of God" defense will certainly survive, even if diminished.

b. *Winter Storms*

As with warm-weather precipitation, a snowstorm, blizzard, or even an avalanche can constitute an "Act of God." Indeed, the defense succeeded in *Zizzo v. Railway Express Agency, Inc.*, 131 F.Supp. 326 (D. Mass. 1955). In *Zizzo*, a shipper brought an action against an express company for damage to two barrels of fresh fish that the express company supposedly failed to deliver within a reasonable time from Boston to St. Louis and Detroit. The express company defended the action on the basis that unusually cold and snowy weather precluded timely delivery. The accumulation of snow, and freezing of switches, delayed the movement of cars at a railyard. The cold weather also made it difficult for the train in question to maintain a sufficient head of steam. A blizzard of rain and snow hit part of the route as well. The court agreed that these factors all supported a successful "Act of God" defense:

> This extreme weather existed not just at certain points but along the whole route of the shipments. It consisted in a combination of severe cold, snow storms, and accumulation of snow on the ground of unusual severity even for winter weather, in many cases to the extent of setting new records for cold or snow accumulation. It was not a foreseeable adverse weather condition which it was the defendant's duty to guard against, but a condition of such unusual severity as to be considered an act of God.

Id. at 328. Likewise, in *Klakis v. Nationwide Leisure Corporation*, 422 N.Y.S.2d 521 (N.Y. 1979), purchasers of a chartered tour vacation sued an air carrier and others for fraud after various aspects of the trip were delayed. The defendants asserted that a significant snowstorm had created the delay in New York and, therefore, constituted an "Act of God." The court agreed:

> Capitol relies on the claim of Act of God, to wit, the snow storm that struck the Metropolitan area shortly prior to the scheduled departure. This issue involves information which is not exclusively within the possession of Capitol but is available to all the parties herein. The

> fact of the catastrophic snow storm and its interruption of air traffic is a matter of universal notoriety and may be judicially noted ….

Id. at 523-24. In other words, the court did not even require the parties to submit evidence regarding the various typical factors relevant to an "Act of God" analysis because the court found the merit in this defense to be self-evident as a matter of law. See also *Chicago, Burlington & Quincy Railroad Co. v. Edward Hines Lumber Co.*, 320 F.Supp. 194 (N.D. Ill. 1970) (railroad could not recover demurrage against shipper because snowstorm of unprecedented severity constituted an "Act of God" excusing shipper from liability).

However, in *Marjan International Corp. v. V.K. Putman, Inc.*, 1993 WL 541204 (S.D. N.Y. 1993), the defense was rejected. In this case, a shipper brought an action to recover delay damages in connection with a shipment of handmade Oriental rugs. The shipper needed the rugs to arrive in Tacoma on a certain date for purposes of an auction. However, the motor carrier in question arrived late because cold weather (which affected the truck's operation) and "a few inches" of snow had slowed his travel. *Id.* at *12. As a result, the carrier asserted an "Act of God" defense. The court rejected the defense under the facts of the case but noted that, under different circumstances, the defense might prevail:

> Snow storms may be an Act of God. However, not every unusually strong wind, snowfall, or rainstorm constitutes an Act of God merely by virtue of its greater than usual intensity. Rather, the issue turns on whether the storm condition could reasonably have been anticipated or foreseen.

Id. The court contrasted the facts of its case with a variety of cases in which the defense was validly raised. See, e.g., *Topping v. Great Northern R. Co.*, 142 P.425 (1914), *aff'd*, 151 P. 775 (1915) (avalanche of snow during storm of unprecedented violence in place where no avalanche had ever occurred held to be "Act of God"); *Ward v. Chicago, St. P.M. & O. Ry. Co.*, 137 N.W. 995 (Neb. 1912) (blizzard constituted an "Act of God"); *Black v. Chicago, B & Q.R. Co.*, 46 N.W. 428 (Neb. 1890) (blizzard of extraordinary strength and violence obstructing movement of train held to be an "Act of God"). But see *Levatino Company v. American President Lines, Ltd.*, 337 F.2d 729 (2nd Cir. 1964) (affirming that ocean carrier could not raise "Act of God" defense in freight claim despite unprecedented 17 inch snowstorm because carrier discharged chestnuts onto an unheated pier).

In short, a blizzard, avalanche, or even a less severe snowstorm or winter cold can, under the right circumstances, constitute an "Act of God."

c. *Wildfires*

Another event having significant enough magnitude to constitute an "Act of God" is a wildfire. Such fires may be started by natural means when, for instance, lightning strikes. In a non-transportation context, the court in *State v. Olsen*, 299 N.W.2d 632 (Wis. 1980) held that under a particular state statute, a wildfire could constitute a "natural physical force." *Id.* at 634. However, the court also noted that because a wildfire could just as easily stem from human error (or an evil motive) as from an "Act of God", one must consider the origins of the wildfire and whether the wildfire was controllable. *Id.* at 635. Compare *Oberg v. Department of Natural Resources*, 787 P.2d 918 (Wash. 1990) (J. Dore, dissenting) (describing a Washington wildfire as an "Act of God" because even after it had been contained, a 30-mile per hour windstorm intervened and caused an explosion which drove firefighters from the property in question) with *Chancellor Media Whiteco Outdoor v. Department of Transportation*, 795 So.2d 991, 999 (Fla. 2001) (a wildfire that originated as a deliberately started backfire "was no act of God."). As the devastating and extensive wildfires in Colorado and California have demonstrated in recent years, such events certainly can be the work of man rather than an "Act of God." A successful defense in this context necessarily requires a great deal of complex factual investigation to establish the true "cause" of the wildfire in question.

IV. Geologic Activities As "Acts of God"

Nature manifests itself through geologic activities as well as meteorological activities. For instance, volcanic eruptions, though considerably rare, can constitute "Acts of God" as well. In *Scott Timber Company v. United States*, 333 F.3d 1358 (Fed. Cir. 2003), a dispute over logging in a forest containing the endangered "marbled murrelet", the government argued that the listing of the bird on a threatened species list was tantamount to an "Act of God" because performance of the timber contract was supposedly now impossible. The court rejected this theory and contrasted it with a volcanic eruption that destroyed all of the timber on the land. *Id.* at 1366. The court held that the latter event, unlike the former, would constitute a true "Act of God." *Id.* One can certainly conceive of a situation where a volcano, such as Mount St. Helens, unexpectedly erupts and causes freight damage due to burning ash or, at the very least, results in delivery delay.

An earthquake is another geologic event that can cause freight to be damaged, lost, or delayed in transit. For instance, in J.*C. Penney Company, Inc. v. McLean Trucking Co.*, 349 N.Y.S.2d 677 (1973), a shipper brought an action against a motor carrier for damage to goods resulting from a bridge collapse. The motor carrier argued that the collapsing bridge constituted an "Act of God" but offered no evidence to suggest that an earthquake or other natural event was involved. As a result, the court rejected the defense. However, the dissent noted in its discussion that an earthquake would have historically constituted an "Act of God" for purposes of the Carmack Amendment. *Id.* at 680 (explaining that a railroad could defend a cargo claim in "where the roadbed was damaged by earthquake, sudden flood, or like natural catastrophe" because "[t]his is the act of God exception.").

Of course, geologic activities do not result exclusively from Mother Nature's whim. Human activities can have a bearing on some such events. For instance, oil exploration and drilling can affect the earth's fault lines. Likewise, colossal construction projects can change the dynamics of tectonic movement. One concern regarding the gargantuan Three Gorges Dam currently being constructed in China is that the massive, 400 mile long reservoir behind the dam straddles a possibly unstable fault line. Some seismologists have suggested that the

tremendous weight of the water may give rise to an earthquake which would utterly destroy much of the region and obviously eliminate the anticipated benefits of shipping goods from inland China. Therefore, as in the wildfire context, an event that appears to constitute an unpredictable natural act may ultimately turn out to be created at least in part by an act of man. If such causation can be established, the "Act of God" defense will likely fail.

V. Animal Activities As "Acts of God"

Animals, as creatures of nature, can sometimes give rise to a valid "Act of God" defense. For instance, a wild animal jumping in front of a truck carrying freight may, under certain circumstances, constitute an "Act of God" sufficient to defeat a freight claim. In *Miller v. Aaacon Auto Transport, Inc.*, 447 F.Supp. 1201 (S.D. Fla. 1978), a truck was delivering a 1971 Camero from San Francisco to Fort Lauderdale. En route, the truck fell into a canal and rendered the Camero essentially worthless. The driver alleged that he had swerved to avoid an unidentified animal on the road. The court did not find the driver's explanation credible. However, the court suggested that a motor carrier could establish a valid "Act of God" defense in this context if specific facts demonstrated that the event was sudden, unexpected, and unavoidable:

> Although in appropriate circumstances such an occurrence might be an "Act of God", the court finds that defendant's conclusions in this case beg the question. Defendant has offered no credible evidence to show that the appearance of the animal was a sudden unexpected occurrence under the circumstances and that the accident was unavoidable.

Id. at 1205. Of course, this defense is least likely to succeed when the animal in question is a domesticated animal. For instance, in *Franek v. Ferrin*, 1991 WL 257951 (Minn. App. 1991), a domesticated bull attacked the owner's neighbor. The owner asserted that the bull's attack was an unavoidable accident. The court rejected this theory. *Id.* at *2 ("An attack on a person by a domestic animal which is under the control of the animal's owner does not constitute 'an act of God.'").

VI. Human Illness As "Act of God"

Some courts have found that a sudden illness can, under the right circumstances, constitute an "Act of God" in the transportation context. In *Lewis v. Smith*, 517 S.E.2d 539 (Ga. 1999), a motorist brought a negligence action against a driver who crashed into her. The driver alleged that he had suddenly and unforeseeably lost consciousness. Under state law, both the trial court and the appellate court agreed with the driver:

> It follows that, where the driver of an automobile suffers an unforeseeable illness which causes him to suddenly lose consciousness and control of the automobile, the driver's loss of control is not negligent and he is not liable for any damages caused by the out-of-control automobile. … It also follows that, to establish an act of God defense based on illness producing a loss of consciousness, the driver must show that the loss of consciousness produced the accident without any contributing negligence on the part of the driver.

Id. at 540. See also *Hoggatt v. Melin*, 172 N.E.2d 389 (Ill. 1961) (evidence sustained finding that an automobile collision was the result of an "Act of God" because the driver suffered an unexpected and sudden coronary occlusion).

However, other courts have reached a markedly different conclusion and have held that an illness, even if sudden, does not constitute an "Act of God." For instance, in the recent case of *Far Eastern Silo Corp. v. M/V Bayou Piquant*, 2001 WL 1457007 (E.D. La. 2000), an ocean vessel unsuccessfully argued that its captain's mental "blackout" was an "Act of God." The court recognized that this maritime defense was generally available but rejected applying it under the facts of the case, defining an "Act of "God" as a "natural necessity, (as winds and storms, which arise from natural causes) … [an] inevitable accident produced by irresistible physical cause." One can presume that establishing a successful "Act of God" defense based on an illness for purposes of a freight claim is definitely an uphill battle.

VII. Power Outages As "Act of God"

Power outages have, and will continue to be, events that give rise to freight claims. For instance, during the massive regional blackout that struck much of the Northeastern and Midwestern United States on August 14, 2003, traffic came to a grinding halt in many locations, certain terminal operations were suspended, and communication was spotty at best in several areas. A number of commentators initially described the enormous blackout as having the effect of a natural disaster of extraordinary scale. Indeed, the blackout triggered emergency responses from state and local governments just as a hurricane or tornado might do. Property insurers characterized the event as a catastrophe and are presumably managing claims related to the blackout very much like they would after a natural disaster.

Nevertheless, a power outage has not historically been recognized as an "Act of God", *even when* a natural disaster has played some role in the outage. For instance, in *West Brothers, Inc. v. Resource Management Service, Inc.*, 214 So.2d 431 (Ala. 1968), a motor carrier was late in delivering a shipment of pine seed due to a hurricane having knocked down all power lines and telephone lines near the terminal and having flooded the terminal itself. The court nonetheless held that the motor carrier could not avail itself of the "Act of God" defense in response to the freight claim made by the shipper since the court concluded that the carrier had not proven that it was wholly free of its own negligence. Likewise, after the 1977 New York blackout, electric utilities attempted to defend actions brought against them by raising the "Act of God" defense. In *Lee v. Consolidated Edison Co. of New York*, 95 Misc. 2d 120 (N.Y. 1977) *reversed on other grounds* at 98 Misc.2d 304 (N.Y. 1978), the court rejected this defense despite the fact that the blackout was caused in part by lightning:

> Although the chain of events which led to the blackout began with lightning, an "act of God", Con Ed. cannot avoid liability by claiming that an "act of God" caused the blackout. A loss cannot be attributed to an "act of God" if it is the result of any

> person's aid or interference, if concurrence of human agency is involved, or if the injury might have been avoided by human prudence and foresight.

Id. at 126-27. Other courts have treated electrical blackouts in a similar fashion. See, e.g., *Ransome v. Wisconsin Electric Power Co.*, 275 N.W.2d 641 (Wis. 1979) ("It is questionable whether lightning striking a utility pole could or should come within the Act of God doctrine" because, among other things, "lightning strikes are a fairly frequent, foreseeable, and recurring problem for one engaged in the generation and distribution of electricity."). Most power outages inevitably involve some human activity or negligence. For instance, various human causes have already been attributed to the enormous August 2003 blackout. However, one might succeed in raising this defense if one can confidently demonstrate that a particular power outage did not involve human activity or negligence.

VIII. Conclusion

Sudden, unexpected, and unavoidable manifestation of the forces of nature continue to occur throughout the world. Consequently, the "Act of God" defense remains a vital defense in freight claims involving all modes of transportation. Counsel defending freight claims must, as in any litigation, give due consideration to the significance of any facts that suggest that an "Act of God" (whether meteorological, geological, or otherwise) may have caused the claim in question. As the foregoing cases indicate, the successful application of the defense turns on the severity of the event, the reasonable predictability of the event, the lack of human agency in the event, and the reasonableness of the carrier's precautions. One must perform the necessary historical research as well in order to have a context by which to judge the significance of the particular event in question. Future developments in the application of this defense will undoubtedly occur as scientific understanding increases regarding the events that have historically constituted "Acts of God". However, as Albert Einstein once wrote:

> When the number of factors coming into play … is too large, scientific method in most cases fails. One need only think of the weather, in which the prediction even for a few days ahead is impossible.

In short, no matter how far science progresses, one can be certain that God will continue to serve up unforeseeable events.

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