



InterConnect

A TRANSPORTATION AND LOGISTICS NEWSLETTER

Vol. 1, Fall 2004

In This Issue...

- ◀ **Mother Nature Strikes Again**
- ◀ **Systems Thinking – The Key to Managing Your Supply Chain**
- ◀ **DOT Regulatory Developments**
- ◀ **Benesch Adds White Collar Criminal Practice Group**
- ◀ **On the Horizon**

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Mother Nature Strikes Again

by Marc Blubaugh

Note: A far more extensive analysis of this issue is found in Mr. Blubaugh's recently-published article, *The Perfect Storm: The Parameters of a Successful "Act of God" Defense in Freight Claims*. Please contact him for a copy.

The summer and fall of 2004 will long be remembered for their storms. Charley, Frances, Gaston, Ivan and others wreaked havoc in Florida and elsewhere. Charley alone is estimated to cost the insurance industry over \$7.4 billion in damage claims, making it the second-most costly storm in U.S. history behind Hurricane Andrew of 1992. Ivan's destruction may be even more severe. Freight claims are among these damage claims.

Federal and state law provide 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. An "Act of God" is generally defined as a sudden, unexpected, and unavoidable manifestation of the forces of nature. Whether a particular natural event constitutes an "Act of God" turns 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.

The quintessential example of a successful "Act of God" defense arises in the context of hurricanes. For instance, in

the case of *In the Matter of the Complaint and Petition of International Marine Development Corp.*, 328 F.Supp. 1316 (S.D. Miss. 1971), 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 con-

tinent and caused more devastation and destruction to the Mississippi Gulf Coast... than any hurricane of record, with unprecedented wind velocity in excess of 200 miles per hour, a tide rise of 30' or more, and a tidal surge of at least 22', 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..."

Continued on page 2

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Continued from page 1

Id. at 1330. As a result, the court found that none of the claimants could establish liability against the various defendants.

However, a storm does not have to rise to the level of a hurricane or be of continental significance in order for it to constitute an “Act of God.” Rather, the specific features of any storm can be sufficient to make it 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 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 case of *Noritake Co., Inc. v. M/V Hellenic Champion*, 627 F.2d 724 (5th Cir. 1980), involved an even more modest 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 13” of rain within a few hours, while a local airport received less than 2”.”

Id. at 726. 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 unexpected storm system constituted an “Act of God” and the Fifth Circuit affirmed.

“...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.”

Of course, one must keep in mind that all heavy weather conditions do not constitute “Acts of God.” See *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). Indeed, carriers are sometimes 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. The court rejected the defense that the rain was an “Act of God” because the carrier was or should have been aware of the weather risks native to the region. See also *Louis Dreyfus Corp. v. M/V “MSC Floriana”*, 1998 WL 474092 (S.D. N.Y. 1998) (carrier did not establish that

storm was “Act of God” because no persuasive evidence was introduced that 20 mile per hour wind is particularly unusual or unexpected in area).

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 in order to have a context by which to judge the significance of the particular event. As this year’s weather has shown, the future can hold any number of meteorological surprises.

For additional information on this topic, please contact Marc Blubaugh at 614.223.9382 or mblubaugh@bfca.com.

GUEST COLUMN

Systems Thinking - The Key to Managing Your Supply Chain

by Michael Regan

In his business classic *The Fifth Discipline*, Peter Senge talked about the importance of “Systems Thinking” as a critical business discipline. Systems thinking emphasizes “seeing interrelationships rather than linear cause-effect chains, and, seeing processes of change rather than snapshots.”

Based on what is happening in today’s transportation sector and its potential impact on your supply chain, systems thinking is critically important because it provides a framework for understanding practical business issues and underscores the need to see how things are interconnected. If a company doesn’t understand this interconnectivity, then it runs the risk of experiencing disruptions in its supply chain.

Presently, all signs indicate that the transportation infrastructure is very close to operating at full capacity. For example, in late June, when the independent truckers staged a strike with the goal of

disrupting the throughput of traffic at selected ports around the country, shipments were backed up for almost two weeks. At this writing (July 2004), ocean container ships staged at the port of LA are delayed by several days due to contract disputes by the organized labor groups responsible for cargo handling.

There are additional signs that our transportation infrastructure is under significant strain. The Union Pacific Railroad sent a letter to its customers announcing an allocation system for specific shipments and limitations on car loadings. The Burlington Northern Railroad also implemented a daily quota for certain eastbound container moves from the port of LA.

You may disregard these events because you are not having much difficulty locating trucks and getting your freight moved - right now. And thankfully you do not have to rely on the railroads. When I meet satisfied shippers (whose numbers are dwindling by the day) my advice is: "Just wait!" The transportation infrastructure is integrated and things do not happen in a vacuum. The port disruption and the rail situation had an acute impact on the truckload sector. Systems thinking is critically important in understanding your options to avoid disruptions in your supply chain.

Recognize that if equipment is this tight during the supposedly "slow" summer months, the peak shipping months of September and October could prove to be very challenging. Although shippers may have contracts with their truckload carriers, those contracts don't mean much if the carriers aren't willing to provide equipment at the rates quoted in their contracts. In order to procure equipment, shippers may have to agree to higher rates than the rates quoted in the contract. Now might be a good time for shippers to consider new dedicated contract arrangements where service is guaranteed in exchange for volume and rate commitments.

Given today's marketplace, systems thinking and scenario planning are critically important disciplines that can help you stay on top of your supply chain options and control your costs.

Mike Regan is a member of the leadership team for Supply Chain Edge, an advisory firm specializing in helping companies improve profitability through supply chain excellence. Mike can be reached at mike.regan@supplychainedge.com.

DOT Regulatory Developments

by Robert Spira

The Department of Transportation's agencies having jurisdiction over motor carrier transportation continue to adopt new rules in response to mandates from the Congress. Recent additions to the Code of Federal Regulations adopted by the Federal Motor Carrier Safety Administration ("FMCSA") include rules on minimum training requirements for truck drivers and rules requiring hazardous materials carriers to obtain a special safety permit.

Entry Level Training

FMCSA and its predecessors have been working on standards for entry-level training of truck drivers for many years. The training will include instruction on (1) driver qualifications - medical standards and drug and alcohol testing, (2) driver hours of service limitations, (3) driver wellness - obesity, high blood pressure, and alcohol and drug abuse, and (4) whistle blower protection - the right of a driver to refuse to drive if there is an unsafe vehicle condition. The carrier will have 90 days to complete the training. Although the rule is in effect, enforcement will be subject to phase in provisions.

Safety Permits

FMCSA's national safety permit program applies to motor carriers operating in interstate or intrastate commerce. Carriers who haul radioactive materials, explosives, materials that are toxic by inhalation and certain others will be required to have a safety permit.

In order to obtain and keep a safety permit, a carrier must be registered as a hazardous materials carrier, have a "satisfactory" safety rating from FMCSA, and have a security program in place. A

satisfactory security program will include a security plan and security training as required by the Federal Motor Carrier Safety Regulations. In addition, the carrier must implement a system of communication between the carrier and the driver. A carrier may not receive or retain a safety permit if the carrier has a crash rate in the top 30% of the national average.

The rule became effective July 30, 2004. However, compliance will not be required until January 1, 2005.

When in Doubt - Put it off!

In contrast to the progress at FMCSA, the Research and Special Programs Administration ("RSPA") is delaying the effective dates of some of its more controversial and difficult rulemakings.

RSPA has decided to delay the adoption of a new Hazardous Materials Incident Reporting Form (Form DOT F 5800.1) and of the new rules (HM-223) defining the applicability of the hazardous materials regulations to loading, unloading and storage. In each case, the Agency felt that more time was needed to address the appeals and comments filed in opposition to the rules that had been adopted.

With respect to the new incident reporting form, RSPA was persuaded that the industry needed more time to allow the staff personnel who will be dealing with the form to become familiar with the form and with the new hazardous materials regulations. In addition, RSPA is proposing some correcting amendments.

Similarly, the effective date of new standards for determining responsibility for loading, unloading and storage activities was delayed so that RSPA can consider concerns as to whether the new rules are consistent with applicable hazardous materials regulations; OSHA, EPA and ATF regulations; and state and local regulations. In addition, RSPA wants to look at the relationship between the new rules and the DOT's new security regulations (HM-232).

The effective date for each of these rules has now been set for January 1, 2005.

For additional information on this topic, please contact Bob Spira at 216.363.4413 or rspira@bfca.com.



Benesch Adds White Collar Criminal Practice Group

Heightened concern among businesspeople over criminal investigations and prosecution has led to the creation of Benesch's newest practice group: White Collar Criminal Defense.

The changing dynamics of law and enforcement actions in the post-Enron environment have increased anxiety levels and raised the stakes for individuals and corporations alike. Companies and professionals who previously had little cause for concern are increasingly being subpoenaed as witnesses or, worse yet, finding themselves the target of an investigation. Enforcement actions by the Securities and Exchange Commission, for example, reached a record high in 2003. Meanwhile, the U.S. Department of Justice and other agencies are aggressively pursuing prosecutions for healthcare fraud, mail fraud, bank fraud, tax evasion, bankruptcy fraud, immigrant violations, false statements, and other violations of federal statutes.

Typically, the probe seemingly comes out of nowhere and executives are not equipped to prepare a proper response or effective defense. Without counsel, they increase the risk to themselves and their companies.

Companies can, however, reduce their chances of a criminal investigation by reviewing their procedures for preventing fraudulent activity. A preventive assessment can help make sure that proper procedures are in place - and, just as importantly, that they are being followed and enforced.

Our white collar criminal defense practice is headed by Richard Lillie, a former assistant United States attorney and Cuyahoga County common pleas judge. Prior to joining Benesch, Lillie was in private practice, with a concentration on white collar criminal defense, for most of the past 16 years.

Gretchen Holderman has practiced law with Lillie since 1992. She has served as lead and associate trial counsel in numerous federal and state civil and criminal cases and has argued appeals in both the federal and state courts.

Lillie and Holderman have represented individual and corporate clients under investigation by federal agencies as well as various local and state law enforcement agencies. We are proud to have them as part of the Benesch team.

Are You Interested in Receiving Other Benesch Publications?

In addition to InterConnect, Benesch offers several other publications. To be added to the mailing list for any of the following, please contact Karen Masuga at 216.363.4409 or kmasuga@bfca.com. Also let us know of anyone you would like added to the InterConnect mailing list.

Benesch Business Bulletin - timely legal news and court decisions that may affect your business

China Insights - a publication for those doing business, or considering doing business, in China

Polymer Advisory - a publication dedicated to the polymer, plastics and packaging industries

On The Horizon

SAVE THE DATE

December 8, 2004 Cleveland, OH
Benesch's Transportation & Logistics Conference at The City Club of Cleveland. Look for details soon.

Marc Blubaugh published *The Perfect Storm: The Parameters of a Successful 'Act of God' Defense in Freight Claims* in the June 2004 edition of *CCH Federal Carriers Report*.

Marc Blubaugh published *Freight Claims Can Be Costly* in the June 11, 2004 edition of *Columbus Business First*.

The next issue of *The Transportation Lawyer* will include Q's and A's from the Committee on Motor Carrier Transportation by Robert Spira and *Taking Your Lumps! A Survey of Lumper Liability Issues* by Eric Zalud and Joe Gross.

October 3-6, 2004 Philadelphia, PA
Council of Logistics Management annual conference. Bob Spira will be attending.

October 6-8, 2004 Baltimore, MD
Trucking Industry Defense Association annual conference. Eric Zalud will be attending.

October 21, 2004 Cleveland, OH
"A CEO's Primer on Supply Chain Issues: What You Don't Know will Cost Your Company" breakfast seminar sponsored by Benesch and Supply Chain Edge.

October 23, 2004 Denver, CO
Transportation Lawyers Association Executive Committee meeting. Eric Zalud will be attending.

October 24-25, 2004 Denver, CO
Transportation Law Institute. Eric Zalud is authoring a paper and Marc Blubaugh will also be speaking on the dynamic status of third party and fourth party logistics providers.

November 13-16, 2004 San Antonio, TX
Transportation Intermediaries Association fall meeting. Bob Spira will be attending.

FOR MORE INFORMATION, PLEASE CONTACT OUR TRANSPORTATION AND LOGISTICS PRACTICE GROUP:

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