CONTRIBUTED CONTENT & PRESENTATIONS

An Act of God Carve-Out Survives in Cargo Litigation, in The High Tech Era

MARCH 21, 2024

Authors: Eric L. Zalud, Lauryn T. Robinson

Courts have clearly established that a shipper cannot prevail in a freight claim against a carrier if an "Act of God" caused the freight loss or damage. The Act of God defense is an original, and one of the most battle-scarred, defenses in any Carmack Amendment claim for freight loss and/or damage. It was intended to be asserted in shipment schematics involving severe, natural phenomena such as earthquakes, tsunamis, hurricanes, avalanches, volcanic eruptions, and the like. As predictive meteorological, seismic, and volcanological technology has exponentially improved, however, these natural, and sometimes devastating, events have become easier and easier to predict-and to plan to avoid-for motor and rail carriers. Consequently, as Carmack/Act of God jurisprudence has evolved, the overall defense is less and less likely to be adopted and endorsed by the courts. Nonetheless, one last remaining vestige of the Act of God defense to a Carmack Amendment complaint seems to live on, even in this era of high-tech meteorological and seismic predictive analysis. That category of the Act of God defense is the "high winds defense." Recent case authority, and practical, empirical data and policymaking, leads to the conclusion that this defense can still be asserted successfully by motor and rail carriers in appropriately turbulent meteorological circumstances.

So, the Act of God standard is *still* a viable defense in certain situations related to high winds-and across several various modes of transport and storage. While weather forecasting technology has significantly developed over the years, the Act of God defense does not turn "upon technical, meteorological definitions, but upon the issue of whether the disturbance causing the damage . . . is of such unanticipated force and severity as would fairly preclude charging a carrier with responsibility for [the] damage." *See g.n. Cornish ex rel. St. Paul Fire & Marine Ins. Co. v. Renaissance Hotel Operating Co.*, No. 8:06-CV-1722-T-27EAJ, 2008 WL 1743861, *6 (M.D. Fla. 2008).

The Carmack Amendment applies to motor carriers involved in interstate transport. In most circumstances, the Carmack Amendment renders the carrier strictly liable for damage to the cargo being transported. However, *inter alia*, high winds and windstorms are a recognized condition that falls within the Act of God exception to carrier Carmack liability. *See American International Insurance Co. v. Vessel SS Fortaleza*, 446 F.Supp. 221 (D. P.R. 1978); *Compania de Vapores Insco, S.A. v. Missouri Pacific Railroad Company,* 232 F.2d 657 (5th Cir. 1956). The general standard is:

(1) whether the winds were expected;

(2) whether the winds were controllable; and

(3) whether human negligence significantly caused the damage.

Even if only *some*

of these factors are satisfied, the Act of God defense may still apply. For example, in *Cornish ex rel. St. Paul Fire & Marine Ins. Co. v. Renaissance Hotel Operating Co.*, the court considered whether high winds from a hurricane passing in a neighboring city qualified as an Act of God. The defendant knew about the nearby tropical storm, but the district court still found that the winds were an Act of God because they were stronger than expected. As a result, the court found that the winds were "uncontrollable and unforeseeable," and any damage caused by human negligence was rebutted by the windstorm.

When evaluating this issue, courts consider various factors to determine whether the high winds qualified as an Act of God (and a commensurate viable COGSA defense), including (1) the duration of the storm, (2) the size of the vessel, (3) the wave intervals, (4) crossing seas, (5) structural damage to the vessel, and (6) "other" unidentified considerations. Further, the courts also caution 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 analysis, then, is non-formulaic and considers not only the extant meteorological realities but also the nuances of the particular shipment, including vessel size, seaworthiness, and other aspects of the unique capabilities and characteristics of the carrier.

When actually litigating an Act of God defense case involving alleged high winds, there is much more to do than simply assert the defense and cite to the above referenced body of case law. Often, meteorological experts are required to analyze factors such as the (past tense) forecast of expected weather conditions on the day of the accident, speed statistics related to high winds, prior incidents on the particular stretch of highway or waterway, and vehicle height, weight, and spatial configuration. These cases often, consequently, require expert analysis, consult, and testimony.

In reviewing high winds exception cases, though, it becomes clear that the high winds defense is not one to be asserted lightly. If it *is* to be asserted, there will invariably be expert testimony, expert reports, and expert consult on meteorological conditions and other related factors. The assertion of the defense, or countering it, will also require discovery tools, such as subpoenas to local news and weather agencies, newspapers, and surrounding property owners, and also Public Records Act/FOIA requests to local, state, and federal meteorological governmental agencies. It is probably a defense that will be difficult to prevail upon on summary judgment, in light of these variable meteorological and expert-related factors. However, courts currently *do* recognize it, and in the proper situation, it can be asserted and prevailed upon. So when defending, keep the wind at your back!

Eric L. Zalud is a partner and Co-Chair of Benesch's Transportation & Logistics Practice Group and may be reached at (216) 363-4178 and ezalud@beneschlaw.com.

Lauryn T. Robinson is an associate in Benesch's Transportation & Logistics Practice Group and may be reached at (216) 363-6110 or lrobinson@beneschlaw.com.