CLIENT ALERTS & INSIGHTS

Warehousing Update: The Issues Hiding in Plain Sight

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For services that are, by their nature, designed to be stationary, warehousing operations welcome intertwined movements of a variety of areas of law. Warehousing law is primarily concerned with storage, handling and associated activities. Fundamentally, warehousing is classified as a "bailment" under common law, where a service provider gives reasonable care to items in its possession and control given to it by others without the passage of title. However, the issues that arise between the common law of bailment and the ancillary legal frameworks that govern warehouse operations are often in direct conflict and require technical and meticulous attention.

Liability Generally

We'll start where issues most commonly arise: liability for loss and damage to the products in storage. Transportation, logistics and warehousing activities are often so intertwined that it can be difficult to determine where a well-established service provider's transportation obligations end and warehousing obligations begin, particularly where value-add services are in play. However, that distinction is critical because the liability regimes associated with transportation and warehousing are fundamentally different.

Certain traditional transportation-oriented services are often sold as part of a mature warehousing services portfolio, depending on the customer base. Crossdocking is a warehousing function and unregulated, but from a legal perspective it is often viewed as "storage in transit" and subject to the carrier's liability in the first instance. Consolidation and deconsolidation are often required in the intermodal space as well as at regional distribution centers, which again may be viewed as "storage in transit" depending on the circumstances of the movement. Yard management and yard storage may also be offered where dry vans and tanks receive yard space or where the service is in fact managing a customer's yard. Typically, liability for this service is viewed in a transportation lens and is often outside of the United States Department of Transportation's safety jurisdiction.

The line between a covered claim, acceptance of liability and a clear indication of when loss occurred is often razor thin. Depositors and warehouse operators alike must take note of the liability regimes that govern each type of service that may be ancillary to core storage services.

Real Estate

While some warehousemen will own the land and building on/in which the warehouse services are performed, many will lease such space. In addition to warehousing considerations, from a real estate perspective, warehouse operators typically need to consider how the property is zoned to make sure the intended use complies with local laws. They must also be mindful of local building codes and safety regulations, such as fire safety, accessibility and structural integrity. Compliance with environmental laws is also crucial to avoid liability associated with dangerous goods/hazardous materials that may be stored on the property.

2025 has seen an influx of depositors rethinking or renegotiating their critical supply chain partners. When depositors proverbially pull the contract "out of the drawer" to determine exit rights, they are sometimes faced with the reality that a warehouse operator's performance of the warehouse services is contingent on lease or other property interests. Termination fees or walk-in rights aside, depositors may not be able to simply draw down inventory in order to exit a relationship with their warehouse operators. These issues are compounded when the depositor holds the property interest in the facility where warehouse services are performed. The close intersection of real estate and general warehousing law tends to make more dedicated warehouse relationships all the more sticky.

Insurance

Not every warehousing contract contains fulsome obligations to maintain each and every type of insurance coverage for expected losses. The availability of insurance is of course just one piece of effective risk management. But there are certain insurance policies that can drive mutual benefit to a depositor and a warehouse operator in the face of infrequent, but potentially catastrophic, claims. Common types of insurance held by warehousemen include:

- **Property Insurance:** This would cover damage to the warehouse structure, equipment and inventory due to events like fire, theft or vandalism.
- **General Liability Insurance:** This would protect against claims of bodily injury or property damage that may occur on the premises, covering legal costs and settlements.
- **Warehousemen's Liability Insurance:** This would protect warehouse operators against claims arising from damage to or loss of goods stored in their facilities.
- **Workers' Compensation Insurance:** Required in most states and provinces, this insurance covers medical expenses and lost wages for employees injured on the job.
- **Business Interruption Insurance:** This would assist with financial support if the business operations are disrupted due to a covered event, helping to cover lost income and ongoing expenses.
- **Environmental Liability Insurance:** This insurance may be necessary if the warehouse handles hazardous materials or dangerous goods, protecting against claims related to pollution or environmental damage.

- **Cyber Liability Insurance:** This insurance is becoming more common as warehouses increasingly rely on technology. This coverage can protect against data breaches and cyberattacks.

Corporate Finance/Lien Rights

Unless waived, a warehouse operator will typically have a specific statutory lien against the bailor on the goods covered by a warehouse receipt or storage agreement under the state commercial code where the facility and goods are located. Warehouse operators may utilize their lien rights as security for the payment on the account, entitling the warehouse operator to withhold release of goods or potentially sell goods on delinquent accounts, when enforced correctly.

A warehouse operator's customers may have credit facilities with various lenders to assist with the operation of their businesses. Those lenders will often obtain a general security agreement in their favor, with the customer's assets and inventory that are stored by the warehouse forming part of the lender's collateral, among other assets. There is often tension between the lender's collateral rights and the warehousemen's lien rights, resulting in the warehouse and the lender negotiating lien subordination agreements, such as bailee waivers, in order to allow the lender priority over the collateral assets. Negotiation of those agreements may be a condition to a depositor inking the warehouse agreement. Warehouse operators are best advised to consult legal counsel and consider fully any rights and remedies associated with the presence of the third-party lender.

Regulated Goods

Compared to other transportation and logistics-based services, warehousing and the storage of a third party's goods is significantly less regulated. There is no universal federal or state license or permit required for the performance of warehousing services (traditional storage and handling), but the warehousing of highly regulated commodities may carry a requirement to obtain a specialized license or permit, mostly from agencies within the jurisdiction where the facility is located. Operators should be aware that storage of goods such as alcohol, hazardous materials, aerosols or flammable/combustible materials, pharmaceuticals, food and drink, bonded merchandise, and other highly regulated goods typically involve greater regulatory oversight.

But what happens if a warehouse operator must enforce its lien against a delinquent depositor and decides to sell regulated goods? The short answer is: It depends on the commodity. Warehouse operators may be restricted from enforcing their lien rights against regulated goods on account of the fact that ultimate sale is not achievable absent a specific license or registration from the federal or a state government. Warehouse operators can confront such a contingency through knowledge and verification of the goods stored and a proactive contracting approach.

Outlook

Our goal in drafting and negotiating warehousing agreements for depositors or warehouse operators is always to avoid surprises. Even when disputes arise, depositors and warehouse operators need experienced legal counsel who understand that a multitude areas of law will often intersect. In those circumstances, it is valuable for a depositor or warehouse operator to know that its counsel has the team and expertise across a variety of practice areas to effectively drive outcomes.

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