The Act of God Defense for Marine Terminals, Wharves and Warehouses

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I. Introduction

In view of the most recent storm events of Hurricanes Harvey, Irma and Maria, it is appropriate to review the Act of God defense. This article examines the Act of God defense in the context of the duties of marine terminal operators and wharves on the inland lakes and rivers. It is generally true that courts are reluctant to apply the defense in complete exoneration of a claim unless the storm or event is truly unprecedented and there were no reasonable measures that could be taken by the terminal to prevent or lessen the damage. The defendant must carry a heavy burden in order to prevail. The particular circumstances of the weather event, the normal weather for that region and time of year, and the information, time and resources available to the defendant to prevent or lessen the damage are all relevant to the determination of whether it can obtain exoneration from fault on the basis of this defense.

II. The Duties of the Terminal and Wharfinger

Cargoes on the inland rivers systems are typically carried by unmanned barges that are moved by means of tugs, or push boats, with groups of barges lashed together. The barges are placed alongside wharves adjacent to shippers and receivers of goods, or marine terminals which store, load and unload cargo by means of cranes, clamshells, conveyors and other machinery. The crew of the tug will usually tie off the barges to the dock, sometimes with the assistance of shore personnel employed by the dock owner, and then depart, leaving the barges in the care, custody and control of the owner and operator of the dock.

Delivery of barges to the exclusive care, custody and control of a terminal or dock creates a bailment relationship. *United Barge Co. v. Notre Dame Fleeting & Towing Service, Inc.*, 568 F.2d 599, 1978 AMC 1163 (8th Cir. 1978). The bailee of the barges and their cargos has the duty to be free from negligence and to exercise reasonable care over the barges while they are in its exclusive care, custody and control. *Riverway v. Trumbull River Service*, 674 F.2d 1146, 1150, 1983 AMC 858 (7th Cir. 1982); *Material Service Corp. v. Commonwealth Edison Co.*, 1990 AMC 2807, 2815 (N.D. Ill., 1990). General principles of bailment have repeatedly been applied to bailments of barges. "[A] prima facie presumption of negligence on the part of the bailee arises from the bailor's proof that the bailed article was delivered in good condition and was returned damaged." *Richmond Sand & Gravel Corp. v. Tidewater Construction Corp.*, 170 F.2d 392 (4th Cir. 1948). The nature of the presumption was well defined in that decision:

> The presumption does not … cast upon the bailee the ultimate burden of proving how the damage occurred. It is a rebuttable presumption whose sole effect is to shift to the bailee the burden of proceeding with the evidence. There are, in general, two ways in which the bailee may rebut this presumption. He may show either how the disaster occurred and that this was in no way attributable to his negligence, or that he exercised the requisite care in all that he did with respect to the bailed article so that, regardless of how the accident in fact transpired, it could not have been caused by any negligence on his part.

Id. at 393-94.

The Court in *United Barge* stated a similar principle:

> When a barge is delivered to a bailee in good condition but is returned damaged, an inference arises that the bailee is responsible for the damage caused. Once the bailment relationship is established and the bailor proves the vessel is seaworthy when delivered, the bailee will be found liable for the damage to the vessel unless he comes forward with evidence that the damage resulted from causes or circumstance other than from his own negligence.

1978 AMC at 1165 (citing cases). See also, *Mid-America Transportation Company v. St. Louis Barge Fleeting Service, Inc.*, 229 F.Supp 409 (E.D. Mo. 1964) (applying the presumption to bailee of barge, and finding the presumption unrebutted by any evidence

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from the bailee that the barge was damaged in some way other than by bailee's negligence, entering judgment in favor of plaintiff).

A wharfinger owes a duty to exercise reasonable diligence to provide a safe berth and to avoid damage to vessels using its facilities. See, *Smith v. Burnett,* 173 U.S. 430, 433 (1898); *Bunge Corporation v. M/V Furness Bridge,* 558 F.2d 790 (5th Cir. 1977), cert. den., 434 U.S. 924 (1978). A wharfinger of barges owes this duty whether or not it is a bailee. For instance, in *John I. Hay, Co. v. The Allen B. Wood,* 121 F.Supp. 704 (E.D.La., 1954), a dock operator was found negligent for failing to use all available methods to prevent damage to barges moored at its dock. The court held, the dock operator/wharfinger, "*whether or not a bailee,* was negligent in failing to take available remedial measures to safeguard the Hay barges when its employees became aware that the vessels were not adequately secured." *Id.* at 708 *(emphasis added)*.

In *Hay,* a number of barges were moored together at a private wharf operated by Bisso Towboat Company, the wharfinger. When a tug, the Milne Bay, removed one of the barges, its crew failed to adequately resecure the barges that were to remain at the wharf. The wharfinger's employees noticed the inadequate mooring, but were not able to board the barges. The wharfinger subsequently took no action and later that evening the barges broke loose and caused damage. The barge owner sued the wharfinger for damage to its barges. In determining whether wharfinger was negligent, the court analyzed the available alternative actions which the wharfinger might have taken to prevent the loss of the barges.

Ultimately finding the wharfinger negligent, the court considered that Bisso had two tugs in the area that could have safely shifted the barges, or more adequately secured them, "in half an hour." *Id.* at 707. The court also noted that Bisso was aware that Hay and The Milne Bay's owner had offices in the city and could easily have been contacted. Further, the wharfinger knew that The Milne Bay was returning to the wharf later that day and could have requested that her crew remedy their error in securing the barges. Bisso's failure to take any of these precautions was negligence and a proximate cause of the damage. Accordingly, it was held liable.

The cases also establish that a terminal operator has a duty to take prompt action to protect an unmanned vessel under its care from foreseeable dangers. Failure to do so, in light of foreseeable weather conditions was found to be negligence in *Conners Marine Co., Inc. v. Besson & Co.,* 94 F.2d 572, 1938 AMC 735 (2nd Cir. 1938). In that case, an unmanned scow tied up at an exposed berth was struck by a passing ice floe. The terminal operator's unloading procedures made it necessary for scows being delivered to be left at the exposed end of a pier, where they would wait until the dock operator would winch them into the loading berth. *Id.* at 572. A scow was delivered on Christmas Eve, while the river was largely frozen over. *Id.* at 573. The scow remained there for three days, until a thaw caused the river ice to break up. At that point, the dock operator tried to move the scow to safety, but the scow was struck and damaged by a large ice floe during the transfer. *Id.* The wharf owner's delay in taking action to protect the barge was found to be negligent, since it was foreseeable that a thaw might occur. *Id.*

The determination of whether a marine terminal or wharfinger is negligent is usually guided by the traditional common law standards. In fact, the well-known "Learned Hand" standard of measuring negligence, as laid down by Judge Learned Hand in *United States v. Carroll Towing Co.,* 159 F. 2d 169, 173 (2nd Cir. 1947), originated in a maritime case. Under Hand's formula, a defendant is negligent if the burden (cost) of the precautions he could have taken to avoid the accident ("B") is less than the loss that the accident could reasonably be anticipated to cause ("L"), discounted (*i.e.* multiplied) by the probability ("P") that the accident would occur unless the precautions were taken. Therefore, a party is negligent where "B<PL." See, e.g., *United States Fidelity and Guaranty Co. v. Jadranska Slobodna Plovidba,* 1983 AMC 2473, 683 F. 2d 1022 (7th Cir. 1982); *Brotherhood Shipping Co., Ltd. v. St Paul Fire & Marine Ins. Co.,* 985 F. 2d 323, 1993 AMC 2729, 2734 (7th Cir. 1993)(J. Posner, "the formula shows that the cheaper it is to prevent an accident (low B), the more likely prevention is to be cost-justified and the failure to prevent therefore negligent. Negligence is especially likely to be found if B is low and both P and L (and therefore PL, the expected accident cost) are high.").

Brotherhood Shipping Co., Ltd. v. St. Paul Fire & Marine Insurance Co., 985 F.2d 323, 1993 A.M.C. 2729 (7th Cir. 1993) is instructive on these principles. In *Brotherhood Shipping,* a ship moored within the Port of Milwaukee was damaged when its lines snapped during a storm. *Id.* at 324. The vessel owner sued the Port, alleging, inter alia, that the Port was negligent for failing to warn of a particular berth's vulnerability to storms out of the north. The Port of Milwaukee's design includes several berths directly exposed to wave action coming from the north through a gap in the breakwater. The harbor master had received notice that a strong northeast storm was coming at three o'clock, but failed to notify the ship's captain until two hours later, at which point there were no tug captains in the harbor available to assist ships in distress. By the time a tug captain returned to the harbor, the weather was too severe to move the vessel. *Id.* at 328-29.

The trial court granted the Port's motion for summary judgment, finding that the Port was not negligent in any way. The Seventh Circuit reversed,

applying the traditional maritime standard of measuring negligence as laid down by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F. 2d 169, 173 (2nd Cir. 1947), as noted above. Applying the test, the Seventh Circuit found there was evidence to support a finding that the Port was negligent, as the cost of giving vessels moored at the "bad slips" prompt notice of dangerous weather was low in comparison with the probability of magnitude of potential loss. *Id.* at 329.

III. The Act of God Defense — Proving That the Storm Event Was Extraordinary, Unforeseeable, and Irresistibly Violent, and That There Was No Contributing Human Negligence on Defendant's Part

A terminal, wharf or marine warehouse seeking to defend against loss or damage to cargo and vessels under its care, custody and control based on the Act of God defense carries the burden of proof on the issue and must clear a high evidentiary hurdle. First, it must establish that the event was unforeseeable, to the extent it was extraordinary, or if foreseeable, that its operation was irresistible:

> What is needful is that the causes of the event shall have been so far beyond what could reasonably be foreseen, or, if they might have been foreseen, shall have been so far irresistible that no foresight or endeavor of man, reasonably to be expected, would have prevented their operation.

Mayime Bros. v. Barber S.S. Lines, Inc., 241 F. Supp. 99, 108 (S.D.N.Y. 1961), aff'd., 360 F.2d 774 (2d Cir. 1966). As the Eleventh Circuit has stated, the Act of God defense "applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them." *Warrior & Gulf Navigation Co. v. United States*, 864 F.2d 1550 (11th Cir. 1989).

The defendant also bears the burden of proving it was free from fault—that no human negligence on its part contributed to the losses. The United States Supreme Court long ago established the heavy burden a defendant bears in order to avail itself of the "Act of God" defense. In *THE MAJESTIC*, 166 U.S. 375, 386, 17 S.Ct. 597 (1897), the Supreme Court stated that the Act of God defense was "limited, as we conceive, to causes in which no man has any agency whatever." "An essential element of this defense is that the damage from the natural event could not have been prevented by the exercise of reasonable care by the [defendant] … To relieve a defendant from responsibility, it is incumbent on him to prove that due diligence and proper skill were used to avoid the damage and that it was unavoidable." *Skandia Ins. Co., Ltd. v. Star Shipping*, 173 F. Supp. 2d 1228, 1241 (S.D. Ala. 2001). *See also, Mayime*, 241 F. Supp. at 108 ("It is not enough for the [party asserting the defense] to show that he loss arose from natural, as distinguished from human, causes, and to leave it to the other side to show that there was some want of precaution or care on his part; he must himself show affirmatively that the causes were such that no reasonable amount of precaution and care would have enabled him to avoid or guard against them.")(Emphasis added); *Levatino Co., Inc. v. American President Lines*, 1964 AMC 2087, 2089 (2nd Cir. 1964)("An Act of God will insulate a carrier from liability only if there is no contributing human negligence.").[1]

The *Skandia* Court aptly summarized the burden of proof which the defendant asserting this defense bears:

> [R]egardless of the type of heavy weather, it is certain that human negligence as a contributing cause defeats any claim to the 'Act of God' immunity, because an 'Act of God' is not only one which causes damage, but one as to which reasonable precautions and/or the exercise of reasonable care by the defendant, could not have prevented the damage from the natural event.
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> Indeed, an 'Act of God' will insulate a defendant from liability only if there is no contributing human negligence and the defendant has the burden of establishing that weather conditions encountered constituted an uncontrollable and unforeseeable cause by 'Act of God.'
>
> Indeed, the federal courts' 'weathered' experience with this defense has produced one crucial principle: if a defendant has sufficient warning and reasonable means to take proper action to guard against, prevent, or mitigate the dangers posed by the hurricane but fails to do so, then the defendant is responsible for the loss …
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> In sum, the burden of proving an 'Act of God' defense rests upon the party asserting it … in that they must not only assert "Act of god," but they must also establish lack of fault in order to be exonerated from liability.

173 F. Supp 2d at 1241-42. (Citations omitted).

The case law establishes that where a party has notice of the intensity and severity of an approaching storm and an opportunity to protect the property in its care, even the strongest of storms have been held insufficient grounds for the Act of God defense. For instance, in *Moran Transportation Corp. v. New York Trap Rock Corp.*, 194 F. Supp. 599 (S.D.N.Y. 1961), Hurricane Hazel was held not to be an "Act of God" to relieve a

wharfinger of liability for unmanned scows moored at his terminal. The court noted that "[Hurricane Hazel] was neither so sudden nor so violent that Trap Rock's experienced men who had [at least] twenty-four hours warning could not have taken precautions against it." *Id.* at 602. This holding emphasizes the requirement that a storm must be so severe and unexpected that no precautions could be taken to safeguard the scows.

Similarly, in *Compania de Navigacion Porto Ronco, S.A. v. S.S. American Oriole,* 474 F. Supp. 22, 1977 AMC 467 (E.D.La. 1976), a storm with winds of 50-60 mph struck a New Orleans terminal, causing damage to an unmanned barge moored at the dock. The court held that the dock operator could not relieve himself of liability using the Act of God defense. *Id.* at 28. Noting the severe storm and high winds, the court held:

> [The shipyard operator] has failed to establish its defense of … Act of God. Although there is ample evidence that the … facility experienced substantial wind gusts contemporaneously with the breakaway, the weather … was not so catastrophic as to preclude effective precautionary measures in securing the *American Oriole*.

(*Id.* at 28). See also, *Bunge Corporation v. Freeport Marine Repair, Inc.,* 240 F.3d 919, 926 (11th Cir. 2001)(approving the district's finding that 85 mph and 103.5 mph were not of such force that no reasonable preparations could have prevented the [ship] from breaking free of her moorings); *Union Pac. R.R., Co. Heartland Barge Management, LLC,* 2006 LEXIS 75797 (S.D. Tex. 2006)(dock owner's Act of God defense rejected after trial, the court finding the dock owner to be the bailee of the barges that broke away during tropical storm Allison, and as such, it had the responsibility to monitor the weather and prepare its facilities and barges moored there in every way possible, and it did not have an adequate number of trained and experienced personnel to attend to the barges, nor did take reasonable precautions, leaving the barges unattended and without adjustment of lines which could have prevented breakaway).

In the more recent case of *Ispat Inland, Inc. v. American Commercial Barge Line Co.,* 2003 A.M.C. 370 (N.D. Ind. 2002), the court denied cross-motions for summary judgment on the issue of the Act of God defense filed by the cargo and barge owners, which sought recovery for the loss of cargo and sunken barges, and by the defendant marine terminal, which had care and custody of the barges at the time of loss. The case involved the sinking of seven barges fully loaded with cargoes of magnesium oxide and coke during a heavy storm on Lake Michigan. The barges had been delivered by the barge line to the marine terminal in Burns Harbor, Indiana, and in the days following delivery, a winter storm swept through northwest Indiana, causing heavy seas within the harbor, resulting in the sinking of all of the barges and the loss of the cargoes. *Id.* at 371. The court reviewed Act of God precedents under maritime law and common law and summarized the factors usually considered by courts to 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 property; and 4) the reasonableness of any precautions." 2003 A.M.C. at 380-81 (citing cases).

The terminal contended that the storm was unprecedented and unforeseeable, given its swift onset, intensity and duration, such that it constituted an Act of God, exonerating the terminal from liability. The cargo owner and the barge line contended that the evidence showed that severe winter storms had occurred before in this region and port, and weather reports from the National Weather Service provided clear warnings of an impending severe storm, include "gale" warnings of high winds out of the north (particularly bad for Lake Michigan) with resulting 12 to 15 foot waves. They further contended that the evidence also showed that the superintendent for the terminal was aware the severe weather was coming at the time of the delivery of the barges, and he could have refused delivery. He was also aware of prior breakaways of barges in Burn Harbor during storms out of the north in years past, and had opportunity over the weekend to hire longshoremen to unload or lighten the barges, potentially saving the vessels and the cargo. *Id.* at 381-86. The court weighed all of these facts in detail and determined that multiple questions of fact precluded summary judgment for either party. *Id.* at 386-87. *See also, Fortis Corporate Insurance v. M/V Lake Ontario,* 2005 A.M.C. 811 (N.D. Ill. 2005)(rust damage to steel coils stored in a marine transit terminal in Burns Harbor, Indian; court denied summary judgment to terminal seeking to employ the Act of God defense, ruling that the terminal had not established that the weather was unforeseeable, and the fact finder could determine that it could have taken reasonable precautions).

In contrast, the case of *Hicks v. Tolchester Marina,* 1984 AMC 2027 (D.Md. 1984), provides an example of the type of storm which qualifies as an "Act of God" sufficient to relieve a terminal operator of liability. There, a defendant marina operator successfully established the defense where he proved that the damage to a yacht stored at his marina was caused by a "freak mini-burst" of 100-mph winds. *Id.* at 2032. In holding this storm constituted an "Act of God," the court here found that the storm that hit this marina was "an unprecedented occurrence." Multiple survivors testified that the storm was of "rare and unprecedented violence," with a burst of wind reaching 104 mph. All involved mariners described the storm as the most violent one they had ever experienced.

The terminal in *Skandia Ins. Co., Ltd. v. Star Shipping,* 173 F. Supp. 2d 1228 (S.D. Ala. 2001), also prevailed on the Act of God defense. There, the court based its ruling on the unforeseen nature of Hurricane Georges' landfall. The hurricane was forecasted to hit New Orleans, over 150 miles away from the terminal in *Skandia,* but veered northeast during the last twelve hours before landfall. Essential to the terminal operator's successful defense was the fact that it monitored the national Weather Service Reports and that these reports did not include severe flood warnings for the area of the terminal. *Id.* at 1248-1249. The key element of *Skandia's* holding is that the defendant must have no notice of or reasonable opportunity to prevent the damage caused by the storm. See also, *Lord & Taylor LLC v. Zim Integrated Shipping Services, Ltd.,* 2015 AMC 1762 (S.D.N.Y. 2015)(holding that the marine terminal and steamship line were entitled to the Act of God defense for damage resulting from Hurricane Sandy, given the unprecedented level of flooding never experienced in the 50 year operational history of the terminal, and finding no reasonable precautions could have been taken to prevent the damage); *Royal Beach Hotel, LLC. V. Crowley Liner Services, Inc.,* 2007 AMC 727 (S.D. Miss. 2007) (defendant container terminal was not liable because it was not required to take additional preventative measures when the force of Hurricane Katrina was unprecedented, and it could not have foreseen that trailers, chassis and containers would wash away and damage other property).

IV. Conclusion

The Act of God defense is a difficult defense upon which to prevail. It is highly fact intensive, and appears to be granted only in the most extreme examples of severe and unprecedented weather events, and even then, only when no reasonable precautions could have been foreseen and taken by the defendant to lessen or prevent the resulting damages. The circumstances presented by the seemingly unprecedented scope and scale of Hurricanes Harvey, Irma and Maria may present defendants with a viable Act of God defense.

Endnote

1 As these legal standards arise from the common law, inland warehouses seeking to employ the Act of God defense will face the same principles and standards of proof in order to prevail. See, e.g., *Phoenix Litho. Corp. v. Bind Rite Services, Inc.,* 27 F. Supp. 3d 636 (E.D. Pa. 2014)(applying Pennsylvania law, warehouse seeking exoneration based on Act of God for damage caused to material in warehouse during Hurricane Sandy is denied summary judgment on part of its defense because, given forecasts, a jury could find that it could have taken reasonable precautions to elevate the materials or move them offsite; however, the warehouse was exonerated from other damages relating to the inability of the warehouse to open for four months after the hurricane, as being the result of an Act of God).