

Paradigm

INTERNATIONAL SOCIETY OF PRIMERUS LAW FIRMS

FALL 2013

Finding the Best Lawyer for You

*Helping Clients Find the Right Lawyer:
Innovation in Client Service*

Current Legal Topics:

*North America • Europe, Middle East & Africa
Latin America & Caribbean • Asia Pacific*





Ronald J. Kitto

Risk Assessment in Maritime Activity and the Law of Bailment

The recent hurricane activity in Southeast Louisiana has given parties that deposit cargo with marine terminal operators an opportunity to better define the extent to which terminal operators must protect the cargo in their care from damage in the wake of approaching storms. *AJC International, Inc. (“AJC”) v. New Orleans Cold Storage and Warehouse Company, Limited (“NOCS”)*, Civil Action No. 09-7519 in the United States District Court for the Eastern District of Louisiana is one such case. Although the case may initially appear to be of limited applicability, bailment principles under Louisiana law are generally consistent with those of other jurisdictions. So in that regard, the case provides instructional value to anyone who may deposit goods or equipment for storage with a bailee.

The facts in *AJC v. NOCS* are straightforward. In the summer of 2008, AJC delivered cargo to NOCS for cold storage pending overseas shipment.¹ At the time, NOCS’s cold storage warehouse was located in eastern New Orleans on

the north bank of the Mississippi River Gulf Outlet/Gulf Intracoastal Waterway (“MRGO/GIWW”). NOCS accepted the shipment which consisted of thousands of cartons of frozen chicken stacked on wooden pallets seven or eight cartons high and shrink wrapped. NOCS stacked the wooden pallets on the floor of the warehouse’s freezer one on top of the other several tiers high.

On September 1, 2008, while the cargo was still being stored in the warehouse, Hurricane Gustav passed to the south and west of New Orleans, and made landfall along the Louisiana coast in Terrebonne Parish.² The warehouse lost power, and approximately one foot of water entered from the rising MRGO/GIWW. As a result of the loss of power and flooding, the bottom three or four layers of cartons on the bottom tier of pallets (which remained on the floor) became thawed and wetted rendering the frozen chicken unfit for consumption.

At trial, the Court found that AJC established a *prima facie* case that the goods were delivered but not returned

to AJC in the same condition when delivered. Thus, the burden shifted to NOCS to prove that it exercised reasonable care.³

NOCS presented witnesses who testified that the company took precautions to protect cargo in its care from damage associated with hurricanes. The company reinforced the warehouse structure after it was rebuilt following Hurricane Katrina, and in the days leading up to the approach of Gustav, barricaded the warehouse overhead doors to prevent them from being blown out by heavy wind. NOCS also made arrangements to ensure that any loss of power could be restored in order to maintain freezer temperature to prevent thawing. However, there was no evidence that NOCS tried to protect the cargo from flood waters.

The Court noted that the warehouse was located outside of any hurricane protection floodwall or levee system and had sustained catastrophic damage both from wind and flooding during Hurricane


Ronald J. Kitto is an associate in the Admiralty Practice Group. He is licensed to practice law in all federal and state courts in Louisiana, and was co-trial counsel to AJC International, Inc. in this case.

Montgomery Barnett, L.L.P.
3300 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163
504.585.7917 Phone
504.585.7688 Fax
rkitto@monbar.com
www.monbar.com

Katrina. Consequently, the Court explained that NOCS was fully aware of the risks to AJC's cargo from rising waters. Although NOCS took some reasonable precautions to protect the cargo primarily from wind, NOCS failed to take any precautions with respect to protecting the cargo from flood waters, a known and foreseeable risk. Accordingly, the Court ruled that AJC was entitled to recover for the damage sustained to its cargo.

Following *AJC v. NOCS*, it is now clearer that bailees, including marine terminal operators, should assess all risks that goods in their care may be exposed, particularly during the approach of tropical storm systems, and

incorporate reasonable precautions into their preparedness plans in order to protect the goods from those risks.

Also instructive in this case for the practitioner is the recognition of the shifting burden of proof. Although a plaintiff such as AJC generally carries the burden of proof in civil litigation, under the law of bailment, AJC was only required to establish a *prima facie* case of liability on the part of NOCS. It was then NOCS's burden to prove by a preponderance of the evidence that it exercised reasonable care to protect the cargo in its care. Having failed to carry its burden of proof, NOCS was found liable. 

- 1 It was undisputed that the relationship between NOCS and AJC was one of bailment. The relationship of a warehouseman toward his customer is that of a compensated depositary [under Louisiana Civil Code art. 2926, et seq.]. See, e.g., *Colgin v. Security Storage & Van Co.*, 208 La. 173 (La. 1945). Under Louisiana law, it is well-settled that a warehouseman/bailee, such as NOCS, has a duty to use such care in regard to goods under its care as a reasonably careful owner of similar goods would exercise, and is bound to fulfill its obligations with the same diligence and prudence in caring for the things under its care that it uses for its own property. See, *Cook & Co. v. Gulf Shippside Storage Corp.*, 177 F.Supp. 869, 870 (E.D.La.1959), affirmed 276 F.2d 707 (5th Cir. 1960); Also see, *Acme Steel Co. v. A. J. Warehouse, Inc.*, 212 So.2d 271 (La.App. 4th Cir.1968); *Folger Coffee Co. v. M/V Medi Sun*, 492 F.Supp. 988, 992 (E.D.La.1980); La. Civ. Code Art. 2930.
- 2 It was undisputed that Hurricane Gustav for the purposes of this case was not an unforeseen or unexpected event as to constitute a *cas fortuit ou force majeure* under Louisiana law.
- 3 See e.g., *Cook & Co. v. Gulf Shippside Storage Corp.*, 177 F.Supp. 869, 870 (E.D.La.1959), affirmed 276 F.2d 707 (5th Cir. 1960); Also see, *Handyman Show, Inc. v. Emmis Television Broadcasting, L.P.*, 2008 WL 4401364 *4 (E.D.La. Sept. 24, 2008) (citing *Nat'l Auto. Ins. Co. v. Champ's New Orleans Collision Ctr.*, 06-1144, p. 3 (La.App. 4th Cir. 2/28/2007), 954 So.2d 197, 199; *Harper v. Brown & Root, Inc.*, 391 So.2d 1170, 1173 (La.1980).

