

# MARITIME LAW

## Risk Assessment in Maritime Liability

by Ronald J. Kitto

The recent hurricane activity in Southeast Louisiana has given parties who deposit cargo with marine terminal operators an opportunity to better define the extent to which the terminal operator must protect the cargo from damage in the wake of an approaching storm. *AJC International, Inc. ("AJC") v. New Orleans Cold Storage and Warehouse Company, Limited ("NOCS")*, USDC, EDLA, Civil Action No. 09-7519, is one such case.

The facts in *AJC v. NOCS* were fairly straightforward. In the summer of 2008, AJC delivered cargo to NOCS for cold storage pending overseas shipment.<sup>1</sup> NOCS's cold storage warehouse is located in eastern New Orleans on the north bank of the Mississippi River Gulf Outlet/Gulf Intra-coastal Waterway ("MRGO/GIWW"). NOCS accepted the shipment, which consisted of thousands of cartons of frozen chicken that were stacked on wooden pallets seven or eight cartons high and shrink wrapped. NOCS stacked the wooden pallets on the floors of the warehouse's freezers 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.<sup>2</sup> 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 which rendered the frozen chicken unfit for consumption.

At trial, Judge Carl Barbier found that AJC established a *prima facie* case that the goods were delivered but not returned to AJC in the same condition as when delivered. Thus, the burden shifted to NOCS to prove that it exercised reasonable care.<sup>3</sup>

NOCS presented witnesses who testified that the company took did take 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 the approach of Gustav, barricaded the warehouse overhead doors to prevent them from being blown out by heavy winds. 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 sustained catastrophic damage both from wind and flooding during Hurricane Katrina. Consequently, 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.

Following *AJC v. NOCS*, it is now clearer that a marine terminal operator

should assess all risks that cargo in its care may be exposed to during the approach of hurricanes and incorporate reasonable precautions into their preparedness plans in order to protect the cargo from those risks. ■

### FOOTNOTES

1. It was undisputed that the relationship between NOCS and AJC was one of bailment. The relationship of warehouseman toward his customer is that of compensated depository [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; *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*, E.D.La.1980, 492 F.Supp. 988, 992; La. Civ. Code Art. 2930.

2. It was also undisputed that Hurricane Gustav was not an unforeseen or unexpected event as to constitute a *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; *Also see, Handyman Show, Inc. v. Emmis Television Broadcasting*, L.P. 2008 WL 4401364 \*4 (E.D.La.) (citing *Nat'l Auto. Ins. Co. v. Champ's New Orleans Collision Cir.*, 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).

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