A Discussion of the “Act of God” Defense in Cargo Claims
When and Whether it Should be Asserted

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I. INTRODUCTION/TOPICS FOR DISCUSSION

A. What is the “Act of God” defense?
   1. Definitions
   2. Statutory and Common Law Bases for the Defense
      a. Common Law (Carmack)
      b. Statutory (COGSA, Harter Act, Montreal Convention)
3. History of the “Act of God” Defense

4. What, Exactly, is an “Act of God?”
   a. Meteorological/Weather Events
   b. Geologic Events
   c. Power Outages
   d. Actions of Animals
   e. Onset of Sudden Medical Emergency (Drivers)
   f. Power Outages
B. Under What Circumstances will the Act of God defense be successful?

1. Trends

2. Cases

C. What are the Problems/Pitfalls Associates with Asserting the Defense?

1. Pure Contributory Negligence issue

2. Very Fact Intensive and Expensive Analysis
D. Strategies/Recommendations

E. Trends

F. Conclusion
II. WHAT IS THE “ACT OF GOD” DEFENSE?

A. What it is: An Affirmative Defense

B. What it is not: A Free Pass

C. Definitions:

An “Act of God,” is generally defined as:

“A sudden, unexpected, and unavoidable manifestation of the forces of nature.”
III. STATUTORY/COMMON LAW BASIS FOR THE “ACT OF GOD” DEFENSE

A. Federal and state law hold that a shipper cannot recover cargo damages against a carrier if an “Act of God” caused the damage or loss or delay.

B. The “Act of God” defense is available to carriers of all modes of transportation.

1. Ocean (Act of God or “Perils of the Sea”)
2. Air

3. Motor Truck

4. Rail

C. What is the basis for the Act of God defense for the different modes of transport?

1. For Ocean Carriers

“[n]either the carrier nor the ship shall be responsible for loss or damage arising or resulting from … (d) Act of God”


“[n]either the vessel, hoer owner or owners, characters, agent or master [shall] be held liable for losses arising from … acts of God.”
2. For Air Carriers

3. For Surface Carriers (Motor Truck and Rail)


b. There is nothing written in Carmack that specifically states that the motor or rail carrier can avail itself of the Act of God defense.

c. It is not specifically enumerated or stated.
d. What, then, is the basis?

1. Common Law (the United States Supreme Court)


   “The Carmack Amendment codifies the common law rule that a carrier, though not an absolute insurer, is liable for damage to goods transported by it unless it can show that the damage was caused by . . . (a) the Act of God.”,
IV. HISTORY/ORIGINS OF THE “ACT OF GOD” DEFENSE

A. Specific origins are not known.

B. English courts have used the phrase in property cases and commercial cases for over 500 years. See, Shelley’s Case, 76 Eng. Rep. 199 (1579-1581)

C. In transportation cases for about 200 years in England. The Rule was, simply, that any “act as could not happen by intervention of man, as storms, lightning, and tempests.” A tempest is defined as a “violent commotion or occurrence,” or a “violent, windy storm.”
D. American courts adopted the English “Act of God” rule


F. As transportation law developed in the modern age, the present manifestation of the rule was developed.
V. WHAT, EXACTLY, IS AN “ACT OF GOD,” AND WHEN CAN IT BE SUCCESSFULLY ASSERTED?

A. Factors that Determine Whether the Defense can be Successfully Asserted

1. The severity of the natural occurrence
   a. The “worse” the “better”
   b. However, the bigger the occurrence the more chances for human intervention
2. The reasonable predictability of the natural occurrence

a. Technology is making this difficult

b. Sandy’s slow trek up the eastern seaboard in 2012

c. More time to prepare, relocate, elevate, secure
3. The lack of human agency in the loss
   a. Must not be man-made
   b. Truly an act or event beyond man’s control

4. The reasonableness of precautions taken by the defendant
   a. What is reasonable under the circumstances?
b. Prior occurrences?

c. Is the warehouse in a flood plain?

To be successful in an Act of God defense, a carrier must show “that the damage from the natural event could not have been prevented by the exercise of reasonable care by the carrier or bailee.” *Mamiye Bros. v. Barber S.S. Lines, Inc.*, 241 F.Supp. 99, 107 (S.D.N.Y. 1965).
VI. HOW HAVE THE COURTS ADDRESSED THE DEFENSE?

A. Meteorological Acts of God

1. Hurricanes, tornados, blizzards, floods, lightning, tsunami

   a. Pure events

   b. Man cannot create the occurrence
B. Hurricanes

1. Most frequent source of defense being applied

2. Bigger the storm, the better the chance

   a. Hurricane Camille
   

   Key: The massive power of the storm
b. Hurricane Georges


Key: No prior flooding in the area and the substance and poor quality of forecasting of the storm’s path

c. Hurricane Sandy

COGSA claim, flooded warehouse.

3. Same storm – different result – different facts

Judge Robreno denied defendant’s motion for summary judgment for the loss of paper based upon an Act of God defense.

He said that the evidence did not establish that Defendant could not have undertaken some task to prevent, or at least mitigate, the damage, particularly in light of Plaintiff’s evidence that Defendant had several days’ warning.
Judge Robreno cited plaintiff’s contentions that defendant could have taken several steps to mitigate its damages, including: (1) procuring flood insurance; (2) moving the paper onto “racks” and off of the floor; or, most troubling, (3) “taking the materials off site.”

4. Other Rejections of the Defense

Hurricane Opal

a. Bunge Corp. v. Freeport Maine Repair, Inc., 240 F.3d 919, 926 (11th Cir. 2001)
Court of Appeals affirmed the rejection of an Act of God defense. Reasonable preparations were available to the defendant vessel owner to prevent damage caused by Hurricane Opal.

C. Floods


Summary judgment denied on an Act of God defense based on conclusion that carrier could have taken measures to avoid damage caused by 2010 floods in Nashville, Tennessee.
D. Tornados


E. What about non-named storms?

1. Fact intensive analysis

*American International Insurance Co. v. Vessel SS Fortaleza*, 446 F.Supp. 221 (D.P.R. 1978) (Storm so ferocious that is qualified as an Act of God)
2. Factors:

   a. Duration

   b. Size of the vessel

   c. Wave intervals

   d. Other considerations

3. No “mechanical test”

Automobiles in a warehouse destroyed by a windstorm.

F. What about Rain?

1. *Noritake Co., Inc. v. M/V Hellenic Champion*, 627 F.2d 724 (5th Cir. 1980)

   15% forecast of rain in Houston, 13 inches fell in one day. Cardboard cartons of dinnerware

2. Bad weather by itself won’t do it

Delay in delivery of perishable fruit due to heavy rain not an Act of God, since rainfall not unusual amount for the area


Freezing temps on pier not an Act of God


Cargo stolen during a storm is not from an Act of God
G. Snow and Blizzards / Avalanches / Ice Storms


2. *Klakis v. Nationwide Leisure Corp.*, 42 NYS 2d 521 (NY 1979); Air tour operator blamed snow on delays to trip and prevailed.

3. *Marjan International Corp. v. V.K. Putman, Inc.* 1993 WL 541204 (SDNY 1993); Not applicable where only a few inches of snow and high wind caused delay to rug delivery. Key was foreseeability.
4. *Topping v. Great Northern R. Co.*, 142 P. 425 (1914); Avalanche that delayed rail shipment an Act of God since it occurred where no event had ever previously occurred


These are older cases when forecasts were not nearly as good.

H. Wildfires

1. Depends on how the fire started; Was it arson?
No, where a deliberately started backfire.

*Chancellor Media Whiteco Outdoor v. Dept. of Transp.*, 795 So. 2d 991 (Fla. 2001).

2. Was the fire controllable?


H. Geologic Events (Volcanic Eruptions, Earthquakes, Tsunami)

*Scott Timber Company v. United States*, 333 F.3d 1358 (Fed. Cir. 2003);
Was the listing of a species of bird as endangered, making a tract of timber unmarketable, an Act of God? No, said the Court. A volcanic blast, said the Court, would be such an Act of God.

Mount St. Helen’s, for example. However, there is always a notice issue.

Earthquakes

J.C. Penney Co., Inc. v. McLean Trucking Co., 349 N.Y.S. 2d 677 (1973); Bridge collapse not an Act of God because the carrier offered no evidence to suggest that the quake caused the collapse.
Dissent: Noted that despite the ruling, earthquakes are still Acts of God.

Other possible earthquake issues:

- Rail transit: Damaged roadbeds
- Motor: Flash floods

Earthquakes from Fracking—man made and no Act of God

What about coastal flooding from global warming? Is this man-made?

What about a levee break at a retention pond of wastewater?
I. Acts of Animals as Acts of God

*Miller v. Aacon Auto Transport, Inc.* 447 F. Supp. 1201 (S.D. Fla. 1978) Truck fell into canal. Driver said he swerved to avoid an animal. Carrier lost, but due to lack of proof. Court said that the defense could be applicable here with better proofs.

Deer strikes?

J. Sudden Medical Emergency Involving a Human Driver

What about a sudden medical emergency with a driver?
Demographics of driver population.
Is this an Act of God?
Sharp split among the Courts.

Yes, but not in cargo context:

*Lewis v. Smith*, 517 S.E. 2d 539 (Ga. 1999);
*Hoggatt v. Melin*, 172 N.E. 2d 839 (Ill. 1991)
No, in a maritime claim:


Key is foreseeability.

K. Power Failures

2003 Midwestern blackout
Caused massive stoppage of freight movement and delay claims
Not an Act of God, even when caused by a natural occurrence.
West Brothers, Inc. v. Resource Management Service, Inc., 214 So. 2d 431 (Ala. 1968); Hurricane caused power outages. Contributory negligence precluded win.

Same result in Lee v. Con. Ed. Co. of NY, 95 Misc. 2d 120 (NY 1978)

NYC blackout of 1977 (Summer of Sam); Even though the blackout was caused by lightning, “a loss cannot be attributed to an Act of God if it is the result of any person’s aid or interference.”
Same result in *Ransome v. Wisconsin Electric Power Co.*, 275 N.W. 2d 641 (Wisc. 1979); “Lightning strikes are a fairly frequent, foreseeable and recurring problem for one engaged in the distribution of power.”

Most power outages involve some human intervention or activity.

Maybe a meteor strike?
VII. STRATEGY FOR ANALYZING WHETHER TO ASSERT THE DEFENSE

A. Fact intensive analysis

B. Beware the post-Sandy Victim When Asserting (not always for HHG claims)

C. Expenses/Battle of Experts

NOTE: The Act of God defense is used relatively infrequently. Why?
An Act of God is, by definition, a rare event.

Events once perceived as Acts of God are now perceived to be acts of man.

Don’t be discouraged. Don’t treat the defense as an ancient relic.

Weather forecasts are improving, providing notice to carriers and warehousemen

Louis Dreyfus Corp. v M/V MSC Floriana, 1998 WL 474092 (SDNY 1998); 20 mph wind caused backup of brackish water into warehouse full of coffee. 20mph wind was foreseeable, so no Act of God.

Man is getting better at predicting nature, which gives man notice of nature’s wrath and path, but nature is getting more and more unpredictable.

So, while our ability to predict is getting better, weather is getting harder to predict. Result: Status quo.

Watch out for old cases, where forecasting was practically non-existent.
D. The Key Points for Asserting an Act of God defense

1. Qualifying for the Act of God exception is a two-prong test.
   
a. First, there must have been an Act of God that is the proximate cause of the loss. The term “Act of God” cannot be applied to a gust of wind or heavy rain; the defense typically is reserved for weather conditions of epic proportion – tornadoes, hurricanes, blizzards, hail the size of golf balls, etc.
b. The second prong of the defense, though, requires the carrier to show it was free from negligence.

2. The event must be severe

3. The event must be unpredicted

4. No human agency

5. Precautions must have been reasonable
The carrier can be held liable for freight claims if they “failed to act as a reasonable prudent person would under the circumstances and failed to take reasonable available means to avoid or minimize the loss resulting therefrom.”
VIII. TRENDS

A. Frequency and Severity of Massive Events Increasing

B. Opportunities to Assert the Defense Will Likely Increase as Events Increase

C. Just Be Careful When and Where you Make your Argument

D. Did the carrier or warehouseman take reasonable precautions? Is it free from negligence?
Sandbag?
Elevate?
Evacuate?
Relocate?
Reposition?
Buy more insurance?
What about the decision to locate a warehouse or terminal in a flood zone? Is this 1%?

E. 1% negligence is fatal to the defense. Do your homework.