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D. E. Murray

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LIABILITY OF WAREHOUSEMEN FOR LOSS AND DAMAGE TO GOODS: A COMPARATIVE VIEW

D. E. MURRAY*

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* Professor University of Miami School of Law. b. 1925. LL.B. (cum laude), 1949, Miami; LL.M., 1960; S.J.D., 1963, New York University.

As with a stage magician, a vanishing elephant is far more impressive and mysterious than a disappearing coin.¹

I. INTRODUCTION

Two thousand five hundred pounds of frozen shrimp mysteriously disappear from a cold storage warehouse.² The equivalent of 151 tank car loads of soy bean oil vanishes without a trace from storage tanks.³ Metal bars weighing 845 pounds magically disappear from a warehouse.⁴ Fires, rains, and floods destroy and damage other warehoused goods. Still other warehoused goods are stolen by burglars. In all of these loss cases, whether by mysterious or obvious causes, the bailor and the warehouse are concerned with the question of who will bear the loss. This article will explore the question of who bears the loss in the United States under the Uniform Commercial Code. Comparisons will then be made with the solutions presented under the laws of France, Italy, Spain, Argentina, Venezuela, Ecuador, Bolivia, Honduras, Paraguay, Chile, and El Salvador.

Section 7-204 of the Uniform Commercial Code (U.C.C.) sets out the warehouseman's basic duty to exercise reasonable care commensurate with the circumstances.⁵ If he does so, he will not

1. *Inland Metals Refining Co. v. Ceres Marine Terminals, Inc.* 557 F. Supp 344, 348 n. 6, 36 U.C.C. Rep. Serv. 266, 271 n. 6 (N.D. Ill. 1983).

2. *Sanfisket, Inc. v. Atlantic Cold Storage Corp.*, 347 So. 2d 647, 21 U.C.C. Rep. Serv. 1155 (Fla. 3d DCA 1977).

3. *Proctor & Gamble Distributing Co. v. Lawrence American Field Warehousing Corp.*, 16 N.Y.2d 344, 213 N.E.2d 873, 3 U.C.C. Rep. Serv. 157 (N.Y. 1965).

4. *I.C.C. Metals, Inc. v. Municipal Warehouse Co., Inc.*, 431 N.Y.S.2d 372, 409 N.E.2d 849, 29 U.C.C. Rep. Serv. 217 (N.Y. 1980).

5. U.C.C. § 7-204 (1978): Duty of Care; Contractual Limitation of Warehouseman's Liability:

(1) A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care.

(2) Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage, and setting forth a specific liability per article or item, or value per unit of weight, beyond which the warehouseman shall not be liable; provided, however, that such liability may on written request of the bailor at the time of signing such storage agreement or within a reasonable time after receipt of the warehouse receipt be increased on part or all of the goods thereunder, in which event increased rates may be charged based on such increased valuation, but that no such increase

be liable for loss or damage to the goods. This section, in effect, follows the pre-code rule that a warehouse is not an insurer of the goods.⁶

Section 7-204(2) permits the warehouse to limit its liability, except for conversion of the goods to its own use. This subsection makes the bailor either a self insurer or places the economic burden upon him to secure an "all risks" insurance policy or some kind of extended coverage under an existing insurance policy.⁷ If the bailor requests that the coverage liability be increased, then the warehouseman will most likely demand increased storage charges in order to cover this additional liability. The bailor, in either event, pays the costs of insurance whether he is self-insured, pays for his own insurance or declares a higher value and pays increased storage costs.

At first glance, it may appear unfair for the bailor to pay for insurance against the warehouse's negligence, but virtually every transaction which has an "end user" results in the end user paying for the costs of insurance. For example, part of a patient's fee is allocated towards his doctor's malpractice policy. Similarly, a portion of the consumer's purchase price of a product is allocated for products liability insurance.

If the bailor already has adequate insurance coverage, he would naturally feel reluctant to declare the full value of the bailed goods and pay a higher charge because he would, in effect, be paying for double coverage. It has been suggested, however, that the insured bailor's failure to declare the true value of the goods may preclude his insurer's right to full subrogation recovery against the

shall be permitted contrary to a lawful limitation of liability contained in the warehouseman's tariff, if any. No such limitation is effective with respect to the warehouseman's liability for conversion to his own use.

(3) Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the bailment may be included in the warehouse receipt or tariff.

(4) This section does not impair or repeal . . . [.]

The Uniform Warehouse Receipts Act did not expressly authorize the use of valuation or limitation of liability clauses, and the courts were split as to the validity of these clauses under general contract principles. See *George v. Bekins Van & Storage Co.*, 33 Cal. 2d 834, 205 P.2d 1037 (Cal. 1949).

6. U.C.C. §§ 7-204, 7-403 (1978).

7. See the general discussion by Professor Honnold relating to the fact that most insurance policies insure the goods in the owner's possession without covering goods located in the possession of others. J. HONNOLD, *THE LAW OF SALES AND SALES FINANCING*, 167-70 (4th ed. 1976) [hereinafter cited as HONNOLD].

warehouse.⁸ Further, the bailor's insurer could argue that the bailor's failure to declare the full value of the goods and the consequent impingement of its insurer's subrogation rights is a defense to the policy. On the other hand, if the law compels the bailor to declare the true value and pay a higher rate for insurance coverage, then there may well be a subrogation windfall for the insurer at the bailor's expense.

Professor Honnold has raised the question, "Would the failure of a warehouseman to carry insurance protecting both himself and the owner constitute a default in the 'reasonable care' standard? If so, should the net result be simplified by change in the language of the Code?"⁹ Although there is an ambiguity in the question, it appears that Professor Honnold meant that the warehouse could be liable for inadequate insurance coverage only in cases where it was at fault and only up to the declared value of the goods. If the question means that the insurance is to protect the owner for the actual value, then it seems to contradict the liability limitation of section 7-204. Assuming that the former interpretation is correct, how does one enforce this duty unless the bailor has possession of an insurance certificate which names the bailor as the insured? If the warehouseman breaches his duty and does not have adequate insurance coverage in the event of a major loss, the warehouseman's duty will be ineffective when that loss results in its bankruptcy.

Section 7-204(1), which defines the warehouseman's duties as to "loss or injury to the goods," was not meant to encompass a case of misdelivery of the goods. Section 7-403(1)¹⁰ requires the bailee

8. *Fireman's Fund American Insurance Co. v. Boston Harbor Marina, Inc.*, 406 F.2d 917, 921, n.5, 6 U.C.C. Rep. Serv. 186, 189, n.5 (1st Cir. 1969).

9. HONNOLD, *supra* note 7, at page 417.

10. U.C.C. § 7-403 (1978). Obligation of Warehouseman or Carrier to Deliver; Excuse.

(1) The bailee must deliver the goods to a person entitled under the document who complies with subsections (2) and (3), unless and to the extent that the bailee establishes any of the following:

(a) delivery of the goods to a person whose receipt was rightful as against the claimant;

(b) damage to or delay, loss or destruction of the goods for which the bailee is not liable, [but the burden of establishing negligence in such cases is on the person entitled under the document];

Note: The brackets in (1)(b) indicate that State enactments may differ on this point without serious damage to the principle of uniformity.

(c) previous sale or other disposition of the goods in lawful enforcement of a lien or on warehouseman's lawful termination of storage;

(d) the exercise by a seller of his right to stop delivery pursuant to the provisions of the Article on Sales (Section 2-705);

to "deliver the goods to a person entitled under the document," and subsection (4) states that the person entitled under the document means the "holder of a negotiable document, or the person to whom delivery is to be made by the terms of or pursuant to written instructions under a non-negotiable document." Section 7-403, therefore, governs a misdelivery case, and the warehouseman's care or lack of care is irrelevant. The warehouse is, in effect, absolutely liable for misdelivery.¹¹ This U.C.C. misdelivery rule is merely a codification of the common law rule that a misdelivery, even though innocently made, was a conversion of the bailor's goods.¹²

Section 7-204 makes no attempt to articulate who has the burden of proving the exercise or non-exercise of reasonable care by the warehouse; this problem is dealt with in section 7-403(1). If the volume of cases is any indication, the burden of proof aspect has presented the more difficult problem. The case law under section 7-204 has been rather routine. This article, therefore, will first discuss the burden of proof problems arising under section 7-403(1) and then deal with the relatively few cases arising under section 7-204.

II. BURDEN OF PROOF

Section 7-403(1)(b) provides:

The bailee must deliver the goods to a person entitled

(e) a diversion, reconsignment or other disposition pursuant to the provisions of this Article (Section 7-303) or tariff regulating such right;

(f) release, satisfaction or any other fact affording a personal defense against the claimant;

(g) any other lawful excuse.

(2) A person claiming goods covered by a document of title must satisfy the bailee's lien where the bailee so requests or where the bailee is prohibited by law from delivering the goods until the charges are paid.

(3) Unless the person claiming is one against whom the document confers no right under Sec. 7-503(1), he must surrender for cancellation or notation of partial deliveries any outstanding negotiable document covering the goods, and the bailee must cancel the document or conspicuously note the partial delivery thereon or be liable to any person to whom the document is duly negotiated.

(4) "Person entitled under the document" means holder in the case of a negotiable document, or the person to whom delivery is to be made by the terms of or pursuant to written instructions under a non-negotiable document.

11. *Turner v. Scobey Moving & Storage Co.*, 515 S.W.2d 253, 15 U.C.C. Rep. Serv. 1122 (Tex. 1974).

12. R.A. BROWN, *PERSONAL PROPERTY* § 86 (1936); R.A. BROWN, *PERSONAL PROPERTY* § 11.7 (3d ed. 1975).

under the document . . . unless and to the extent that the bailee establishes any of the following:

(a) . . . ;

(b) damage to or delay, loss or destruction of the goods for which the bailee is not liable [but the burden of establishing negligence in such cases is on the person entitled under the document].

The phrase "burden of establishing" means "the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence."¹³

The bracketed language in section 7-403 is optional language, and at the time of the writing of this article, 16 states had adopted it, or a variation thereof.¹⁴ California and Texas have limited the burden of persuasion language to cases involving fire damage or destruction.¹⁵ Indiana has also limited the optional clause to cases involving fire, but only in those instances where the claimed loss exceeds \$10,000.00,¹⁶ while Idaho has followed this fire damage approach, but has limited it to warehouses which are not statutorily licensed.¹⁷

Initially, one might wonder why the burden of establishing negligence should rest upon bailors in the case of fire loss or damage but not in the case of theft, flood, windstorm, et cetera? Is the bailor, in a fire circumstance, in a better position to prove negligence than in any other case of loss? Surely the warehouse is in a better position than the bailor to account for its own behavior or misbehavior regardless of the nature of the loss. On the other hand, the police will usually investigate any fire damage to warehouses if there is any thought of arson; insurance investigators will also be involved in all alleged arson cases. Consequently, a bailor may have evidence which he would not have in other casualty losses.

Florida has adopted the optional section without restricting it to fire losses, but has confined it to instances where the loss exceeds \$10,000.00.¹⁸ The Florida provision was promptly attacked

13. U.C.C. § 1-201(8) (1978).

14. U.C.C. § 7-403, 2A U.L.A. 433-34 (1978); *see id.*, at 155 (Supp. 1984).

15. CAL. COM. CODE § 7-403(1)(b) (West 1984); TEX. BUS. & COM. CODE ANN. § 7.403(a)(2) (Vernon 1984).

16. IND. CODE ANN. § 26-1-7-403(1)(b) (Burns 1984).

17. IDAHO CODE § 28-7-403(1)(b)(1984).

18. FLA. STAT. ANN. § 677.403(1)(b)(West 1984).

on equal protection grounds. It was upheld on the basis that in "mom and pop" bailments of under \$10,000.00 the burden of proof ought to be on the warehouse because of the costs of discovery, while in bailments over this amount the bailor can afford the discovery costs.¹⁹ The court, in essence, made a rational classification between bailors.

One court has judicially noted²⁰ that, since federal law has usually placed the burden of persuasion upon the warehouse, the optional language in section 7-403(1)(b) ("but the burden of establishing negligence in such cases is on the person entitled under the document") seems to be at odds with the official comment²¹ which states that the "optional language in subsection (1)(b) states the rule laid down for interstate carriers in many federal cases. State decisions are in conflict as to both carriers and warehousemen. Particular states may prefer to adopt the federal rule." This authority suggests that the draftsman may have intended to place the burden of persuasion upon the warehouse, rather than upon the person entitled under the document.

Moreover, the two clauses seem internally contradictory: if the warehouseman "establishes" (proves) that fire caused the loss and that he was not negligent, he is not liable for any amount - if the burden is on the holder of the warehouse receipt to "establish" that the warehouse was negligent, then you have a contradiction in terms. Both bailor and bailee cannot "prove" their respective cases. The bailee was or was not negligent, freedom from negligence and negligence cannot be proved at the same time.

I.C.C. Metals, Inc. v. Municipal Warehouse Co., Inc., attempts to reconcile the apparently conflicting provisions of section 7-403 (1)(b) with the optional clause:

Where the warehouse simply refuses to return bailed property upon a legitimate demand and does not advance any explanation for that refusal, the plaintiff will be entitled to recover without more. Similarly, where the warehouse does suggest an explanation for the loss but is unable to proffer sufficient evidentiary support for that explanation to create a question of fact, as in this case, the plaintiff will be entitled to recover with-

19. *Reserve Insurance Co. v. Gulf Florida Terminal Co.*, 386 So. 2d 550, 551 (Fla. 1980); see also *E.S. Meats, Inc. v. Gulf Florida Terminal Co.*, 639 F.2d 1348 (5th Cir. 1981).

20. *United States v. Cloverleaf Cold Storage*, 286 F. Supp. 680, 5 U.C.C. Rep. Serv. 881 (N.D. Iowa 1968).

21. Comment 3 to U.C.C. § 7-403 (1978).

out more. Where, however, the warehouse proffers sufficient evidence supporting its explanation to create a question of fact, the jury must be instructed that if it believes that explanation, the plaintiff must be denied any recovery unless he has proven that the warehouse was at fault (Uniform Commercial Code § 7-403 subd. [1], par. [b]). In other words, if the jury is persuaded that the goods were accidentally mislaid or destroyed in a fire or accident or stolen by a third party, the plaintiff cannot recover unless he has proven that the loss or the fire or the accident or the theft were the proximate result of either a purposive act or a negligent commission or omission by the warehouse.²²

In short, the court is stating that the burden of establishing the *nature* of the loss is on the warehouse, but that the burden of establishing the warehouse's negligence is on the bailor. This approach is more of a re-writing of the statute than an interpretation of it.

The burden of proof problem becomes acute when the goods mysteriously disappear, thus neither the warehouse nor the bailor has any explanation for the loss except conjecture that the goods may have been stolen by employees, or by third persons, or were misdelivered altogether. At least three main views have developed in response to this problem.

The first view, which is fairly represented in an intermediate appellate decision from Florida, states that when bailed goods disappear from the warehouse and the warehouseman is unable to offer any explanation for the loss, then this "evidence only permits the finding of negligence on the part of Atlantic [the warehouseman], not a conversion."²³ Because of this finding of negligence, rather than conversion, the warehouseman could plead that he was liable for only fifty cents per pound for frozen shrimp (totaling \$1,250 for 2,500 pounds of shrimp) rather than \$8,000, the market value of the shrimp.

The warehouseman admitted negligence in this case, which is not surprising in light of the limitation clause. The court made no mention of section 7-403(1)(b) but instead confined its discussion to section 7-204. The court committed egregious error when it stated that "in order for Sanfisket [the bailor] to prove a conver-

22. 431 N.Y.S.2d 372, 378, 409 N.E.2d 849, 854, 29 U.C.C. Rep. Serv. 217, 224 (N.Y. 1980).

23. *Sanfisket, Inc. v. Atlantic Cold Storage Corp.*, 347 So. 2d 647, 649, 21 U.C.C. Rep. Serv. 1155, 1157 (Fla. 3d DCA 1977).

sion upon Atlantic's [the warehouseman] failure to deliver the shrimp upon demand, Sanfisket must show that Atlantic had the shrimp at the time of the demand and was able to comply therewith."²⁴ This statement completely overlooks the fact that a prior misdelivery by the warehouseman would also constitute a conversion.²⁵ If one follows the view that there is no legal defense of "negligent misdelivery," then the only possible explanation of the loss of 2,500 pounds of frozen shrimp is that warehouse employees stole it or that the warehouse converted it. What the court is really saying in the case of the disappearance of a large, bulky, and heavy object is that it will give the warehouseman the benefit of the doubt. If the benefit of the doubt test is to be used, it ought to be confined to small, easily transported and hidden objects, not to over a ton of frozen shrimp.

A lower federal court has opined that:

[W]here the record is silent as to the actual disposition of the bailed goods, and that silence includes not even an attempt by the bailee to offer an explanation, the permissible inference is one of negligence but not one of conversion, with the result that the stipulated-for limitation of liability will be held by the Pennsylvania courts to be effective.²⁶

Similarly, a Kentucky appellate court has held that when over 900 cases of pickles were missing from a warehouse and there was no explanation as to the cause of the disappearance, the bailor ought to be granted a judgment based upon negligence as a matter of law. The court never intimated that the warehouse ought to have been treated as a convertor.²⁷

The second view regarding mysteriously disappearing bailed goods originated, perhaps accidentally, in *Proctor & Gamble Distributing Co. v. Lawrence American Field Warehousing Corp.*²⁸ In that case approximately 151 tank car loads of soy bean oil disappeared after allegedly being deposited in warehouse storage tanks. The bailor sued in conversion and won. The New York Court of Appeals affirmed and stated:

24. *Id.* at 648, 21 U.C.C. Rep. Serv. at 1156.

25. J.J. WHITE & R.S. SUMMERS, *UNIFORM COMMERCIAL CODE*, 795 (2d ed. 1980).

26. *Adams v. Ryan & Christie Storage, Inc.*, 563 F. Supp. 409, 414, 36 U.C.C. Rep. Serv. 930, 937 (E.D. Pa. 1983).

27. *D.H. Overmyer Co., Inc. v. Hirsch Bros. & Co., Inc.*, 459 S.W.2d 598, 8 U.C.C. Rep. Serv. 894 (Ky. 1970).

28. 16 N.Y.2d 344, 213 N.E.2d 873, 3 U.C.C. Rep. Serv. 157 (N.Y. 1965).

The Appellate Division well said that it is self-contradictory for a warehouseman simultaneously to assert due care and total lack of knowledge of what happened, and that it would establish an unwise rule to place a bailee in a better position to be excused if he knew less about the disappearance of the goods than if he knew more.²⁹

While there is a certain appeal to the quoted language, the court overlooked the fact that a "total lack of knowledge" could exemplify negligence rather than a conversion. It could show that the warehouseman's employees cooperated with third parties to steal the oil. Furthermore, the court's cited authority was not really supportive of the conversion notion; in every cited case there was a known theft or fire damage to the goods. Moreover, a reading of the intermediate decision in this case would show that the warehouse had not taken reasonable measures to guard the oil. Additionally, the discussion was more oriented towards the negligence aspect, rather than conversion.³⁰ Finally, neither decision discussed any limitation of liability clauses in the warehouse receipts, so that the recovery in conversion or for negligent loss could, perhaps, have been the same. The court did not need to stretch presumptions in order to find for the bailor.

Subsequent to *Lawrence*, a New York court treated it as if it were a negligence case, rather than a conversion case. In *Karmely v. Alitalia-Linee Aeree S.P.A.*, an airline, acting as bailee, maintained custody of twenty-two rubies pending customs clearance. The rubies disappeared, and the carrier-warehouse claimed that they were stolen; it did not offer "one single word of explanation for the disappearance of plaintiff's rubies beyond a categorical statement that they were stolen."³¹ The court stated that in cases where the defense to the disappearance of bailed goods was theft "the bailee is required, in order to evade liability, to show that the loss was caused by occurrences beyond his control, giving proof of the circumstances of loss and at least prima facie evidence of due care on his part."³² Naturally, this burden would not be satisfied when the bailee was unable to show that (1) the key to a storeroom

29. 16 N.Y.2d 344, 360, 213 N.E.2d 873, 881, 3 U.C.C. Rep. Serv. 157, 167 (N.Y. 1965).

30. Proctor & Gamble Dist. Co. v. Lawrence American Field Warehousing Corp., 22 A.D.2d 420, 255 N.Y.S.2d 788, 2 U.C.C. Rep. Serv. 464 (N.Y. App.Div. 1965).

31. *Karmely v. Alitalia-Linee Aeree, S.P.A.*, 174 N.Y.L.J., Nov. 10, 1975, at 8, col. 4, 18 U.C.C. Rep. Serv. 479, 481 (N.Y. Sup.Ct. 1975).

32. 18 U.C.C. Rep. Serv. at 481.

had not been duplicated, (2) it kept no logs on the inventory in the storeroom, (3) the records showing the deposit of valuable goods were in full view of the warehouse's employees, and (4) there were no signs of any kind of burglary.

Comparing the two cases, it might appear that employee theft would be a clear inference in the disappearance of twenty-two rubies while that inference may be less clear in the disappearance of tons of soy bean oil in *Lawrence*. One employee could easily steal and fence twenty-two rubies, but how would one or a few employees steal tons of oil, transport it, store it, and then sell it? One can conclude that as the goods increase in size and weight, it takes more than employees' theft and employer negligence - it takes employer action to accomplish it.

Regardless of the inconsistency between the two cases, the New York Court of Appeals, in *I.C.C. Metals, Inc. v. Municipal Warehouse Co., Inc.*, followed the reasoning in *Lawrence*³³ and imposed conversion liability upon a warehouse which could not offer any facts supporting a plea of theft. In *I.C.C. Metals, Inc.*, a bailor deposited three lots of indium (an industrial metal) in a warehouse; the indium weighed 845 pounds and was worth \$100,000, but the bailor signed a warehouse receipt which acknowledged that the metal was worth only \$50.00. The bailor made demand upon the warehouse, which acknowledged that it was unable to find the metal. The bailor sued, and the warehouse answered that the metal had been stolen through no fault of its own. The lower courts held that the warehouse was liable for the metal's full value on the basis that when the warehouse was unable to allege and provide satisfactory evidence of the cause of the loss, a prima facie presumption arose that the warehouse had converted the metal to its own use. As a result, the warehouse could not plead the limitation of remedy clause in the warehouse receipt in accordance with section 7-204(2). The New York Court of Appeals affirmed on the basis that public policy required that the warehouseman account for his custody of the goods, and that if he were not legally obligated to do

33. 431 N.Y.S. 2d 372, 409 N.E.2d 849, 29 U.C.C. Rep. Serv. 217 (N.Y. 1980). Whatever one may think about the holding in *I.C.C. Metals*, the Court of Appeals for the Second Circuit has adopted its holding in an admiralty case to cover a stevedore (which the court treated as a bailee) in whose possession metal bars were lost. *Phillip Brothers Metal Corp. v. S.S. "Rio Iguazu,"* 658 F.2d 30 (2d Cir. 1981). *Phillip Brothers* was decided on August 7, 1981. But see *Clariol, Inc. v. Moore-McCormack Lines, Inc.*, 79 A.D.2d 297, 436 N.Y.S.2d 279, (N.Y. App. Div. 1981), which stated that the Second Circuit had not yet adopted *I.C.C. Metals*; *Clariol*, however, was decided on February 26, 1981.

so, this would encourage conversion as well as negligent custody of the goods. The court further concluded that the warehouseman is in a much better position than the bailor to show what happened to the goods. In addition, there was a strong dissent which argued that the warehouse's failure to explain what happened to the goods might well support a *prima facie* case of negligence, but not a conversion which requires the warehouseman to commit a deliberate act of wrongdoing. The majority decision, in a footnote, stated that "[w]e find no merit to defendant's suggestion that the term, 'conversion to his own use' as used in section 7-204(2) means something more than a simple conversion (see *Lipman v. Peterson*, 223 Kan. 483, 525 P.2d 19)."³⁴

In *Lipman v. Peterson*, the court held "that 'conversion' and conversion to his own use' are synonymous terms and, accordingly, the limitation clause is inapplicable."³⁵ The court, however, noted that the warehouseman's misdelivery did not result in any profit to him. It would appear that the misdelivery grew out of a confused setting resulting from a fire which partially damaged the goods; in fact, the warehouse manager had authorized the delivery from his hospital bed. It is submitted that *Lipman* was wrongly decided because (1) no authority on point was cited, (2) the court failed to recognize that the draftsmen must have had some purpose in mind in adding the words "to his own use" (if the two expressions are "synonymous" then the draftsmen were guilty of redundancy) and (3) from a moral, as well as a legal standpoint, a "conversion to his own use" is greatly different from a "conversion caused by confusion." The law should be much more inclined to punish a willful wrongdoer than one who makes a human error.

Another case has held that when the bailee admits that the goods may well have been misdelivered, it cannot plead any limitation of its liability because misdelivery constitutes a conversion. It seems, however, that the court paid no attention to the total phrase "conversion to his own use" as used in section 7-204(2).³⁶ On the other hand, a court, in another case involving the unexplained loss of a large quantity of metal, refused to sustain a conversion action. It did so because of prior Indiana case law which, as

34. *I.C.C. Metals, Inc. v. Municipal Warehouse Co., Inc.*, 431 N.Y.S. 2d at 376, 409 N.E.2d at 853, 29 U.C.C. Rep. Serv. at 221.

35. 575 P.2d 19, 21, 23 U.C.C. Rep. Serv. 997, 1001 (Kan. 1978).

36. *Joseph H. Reinfeld, Inc. v. Griswold & Bateman Warehouse Co.*, 189 N.J. Super. 141, 458 A.2d 1341, 36 U.C.C. Rep. Serv. 262 (N.J. Super. Ct. Law Div. 1983).

a matter of law, exonerated the warehouse from liability for conversion when there was no explanation as to what happened to the goods, and because the court believed that the phrase "conversion to his own use" continued the thrust of the former case law. In order to support a conversion theory there would have to be proof that the warehouse perpetrated some positive wrongdoing. Once the bailor proved the bailment and the failure to return, the burden of showing freedom from negligence was on the warehouse. Because the warehouse failed to show any explanation for the loss, summary judgment was granted on the basis of negligence.³⁷

The pre-code rule in Arkansas was that once the bailor proved the bailment, the request for return of the goods and the bailee's refusal or inability to do so, then the conversion had been proved unless the warehouse showed that, without its negligence, the goods were either destroyed by fire or were lost or stolen.³⁸ Inasmuch as Arkansas did not adopt the optional clause in Section 7-403(1)(b), the pre-code view may well continue.

In another recent "mysterious disappearance" case, 486 cases of bottle carrier cartons containing 85,000 carrier cartons disappeared. The bailor sued for breach of contract and the court held that under the case law once the bailor alleged that the warehouse breached its contract by failure to return, the burden of proof shifted to the warehouse to prove a legal excuse for its failure to return. The court noted, almost as an afterthought, that the warehouseman was "free to show that his non-delivery was due to the destruction, loss, etc. of the goods from a cause for which he is not liable. See § 400, 7-403(1)(b). Respondent made no such showing."³⁹ The opinion seemed to indicate, from prior case authority, that if the bailor had sued in negligence, the burden of proof could be on the bailor. Section 7-403 (1)(b), nonetheless, should have the effect of doing away with any necessity for the remedy to dictate the burden of proof.

Fire is one of the major causes of loss or damage to bailed goods, and, unlike "mysterious disappearance" cases, the nature of the loss is easily established and the burden of proof issue can be more easily resolved. The same should hold true in water damage

37. *Inland Metals Refinery Co. v. Ceres Marine Terminals, Inc.*, 557 F. Supp. at 344, 36 U.C.C. Rep. Serv. at 266.

38. *American Express Field Warehousing Corp. v. First National Bank*, 346 S.W.2d 518 (Ark. 1961).

39. *Church v. Richfer Corp.*, 618 S.W.2d 29, 31, 33 U.C.C. Rep. Serv. 664 (Mo. 1981).

cases.

In Connecticut the bailee has to show not only that a fire or theft occurred, but also the circumstances of the fire or theft, including what precautions were taken to avoid the loss. The warehouseman, in essence, must show the origins of the fire and what steps were taken to prevent it. If the warehouseman sustains this burden, then the bailor must prove negligence.⁴⁰

A similar view is in effect in New York. The bailor must show delivery of goods to the bailee and a failure of the bailee to return them on demand; this is sufficient to make a *prima facie* case of negligence. The ultimate burden of persuasion does not shift from the bailee to the bailor under this rule; rather the bailee can rebut the *prima facie* case by showing that the loss was not caused by its negligence or that proper care of the goods had been taken and that the loss could not have occurred as a result of its negligence. Therefore, a plaintiff's showing that the warehouse's sprinkler system was inoperative, that the fire alarm was manually activated rather than automatic in the event of fire, that there was no night watchman, that the fire department would have arrived sooner if there had been an automatic fire alarm, could all have been sufficient, if presented to the jury, to prove negligence.⁴¹

In North Dakota there is a presumption of negligence against a warehouseman when it is shown that the goods were bailed in good order and were either not re-delivered or were re-delivered in a damaged condition, except in the case of perishable goods which deteriorated "in the course of time from inherent or natural conditions."⁴² In this latter case, the bailor must show that the negligent acts or omissions of the warehouse and not the inherent or natural condition of the goods caused the damage to the perishable goods.

Under Tennessee law, the bailor has the burden of proving that he deposited goods in satisfactory order, that the goods were or were not returned in damaged condition, and that some defect in the goods did not cause the loss. The bailee then has the burden of proving that he did not cause the loss.⁴³ Note that this Tennes-

40. *Griffin v. Nationwide Moving & Storage Co., Inc.*, 187 Conn. 405, 446 A.2d 799, 34 U.C.C. Rep. Serv. 970 (Conn. 1982).

41. *Singer Co. v. Stott & Davis Motor Express, Inc.*, 79 A.D.2d 277, 436 N.Y.S.2d 508, 31 U.C.C. Rep. Serv. 658 (N.Y. App. Div. 1981); *accord J. Aron and Co., Inc. v. Service Transportation Co.*, 486 F. Supp. 1070, 28 U.C.C. Rep. Serv. 165 (D. Md. 1980).

42. *F.M. Potatoes, Inc. v. Suda*, 259 N.W.2d 487, 491 (N.D. 1977).

43. *Irving Pulp & Paper, Ltd. v. Dunbar Transfer & Storage Co., Inc.*, 732 F.2d 55, 38

see view is predicated upon another statute⁴⁴ and not upon section 7-403(1)(b) (without the optional clause), which Tennessee has also adopted.

In Colorado, when bailed goods are re-delivered in a water-damaged condition a "presumption of negligence on the part of the warehouseman arises, and the burden of going forward with the evidence to rebut the presumption [of negligence] rests on the warehouseman. There is, however, no shift in the burden of proof, which still remains with the plaintiff."⁴⁵ This result seems inconsistent with the "establishing" rule of section 7-403(1)(b).

Prior to the adoption of the U.C.C., the rule in a number of states was that if the bailor sued in tort for loss or damage to warehoused goods, he would have the duty to allege and prove the warehouseman's negligence. If, however, the bailor sued for breach of contract, then it would be incumbent upon the warehouseman to prove proper diligence in the custody of the goods.⁴⁶ At least one court has held that the adoption of the U.C.C. did not change this rule;⁴⁷ however, a number of courts have held that section 7-403 (1) (b) now controls and the form of action (tort or contract) should not affect the burden of proof aspect.⁴⁸

A. *Proper Phrasing and Placement of the Limitation Clause*

Section 7-204(2) states that the limitation may be stated by "setting forth a specific liability per article or item, or value per unit of weight. . . ." One court has held that the quoted words were complied with when the receipt stated that the limitation was ".60 per pound, per article."⁴⁹ The bailor contended that this clause

U.C.C. Rep. Serv. 312 (6th Cir. 1984).

44. TENN. CODE ANN. § 24-5-111 (1984).

45. Keefe v. Bekins Van & Storage, Co., 540 P.2d 1132, 1133, 17 U.C.C. Rep. Serv. 1286, 1287 (Colo. App. 1975).

46. See generally, R.A. BROWN, PERSONAL PROPERTY § 87 (1955).

47. A.A.A. Parking, Inc. v. Bigger, 113 Ga. App. 578, 149 S.E.2d 255, 3 U.C.C. Rep. Serv. 618 (Ga. Ct. App. 1966).

48. Otto Gerdau Co. v. Lambert's Point Docks, Inc., 733 F.2d 343, 38 U.C.C. Rep. Serv. 565 (4th Cir. 1984), and *infra* notes 68-69.

49. Dunfee v. Blue Rock Van & Storage, Inc., 266 A.2d 187, 188, 7 U.C.C. Rep. Serv. 1344, 1346 (Del. Super. Ct. 1970). A liability provision in a warehouse receipt which limited liability to "100 times the base/monthly storage rate" sufficiently complied with the wording of Section 7-204 that the receipt must recite "a specific liability per article on the item, or a value per unit of weight" because the storage charges were based on each item at separate

limited her rights "by weight *and* by article, rather than by weight *or* article."⁵⁰ The court stated that it could not "read the statute to intend that a monetary limitation must be based upon either item or weight, without any possibility of using both, even though circumstances might so require."⁵¹ The court found that the limitation was clearly stated, and that the bailor understood its meaning. The bailor's arranging for outside insurance coverage indicated that she knew the meaning of the limitation clause.

This view should be contrasted with the decision in *Modelia, Inc. v. Rose Warehouse, Inc.*⁵² where the bailor made three separate deposits: the first for 69 cartons, the second for 180 cartons, and the third for 2 cartons. The warehouse gave back warehouse receipts which were identical as to terms and conditions: "each warehouse receipt provided in part that the liability of the warehouse should be limited to the sum of \$50 for all property designated in each receipt"⁵³ The court held that this limitation clause was invalid because it did not follow the language of section 7-204 which states that the warehouse receipt must set "forth a specific liability per article or item, or value per unit of weight"⁵⁴ It is surprising that the warehouseman, or at least the lawyer who drafted the form, did not perceive the patent invalidity of paying damages of \$50.00 for 2 cartons and paying the same sum for 180 cartons.

Section 7-204(2) of the U.C.C. requires that the agreement limiting the warehouse liability appear on "the warehouse receipt or storage agreement" A limitation of liability statement on an insurance certificate will not satisfy this requirement.⁵⁵

rates of storage. *Sun Valley, Inc. v. Southland Bonded Warehouse, Inc.*, 171 Ga. App. 233, 319 S.E.2d 91, 39 U.C.C. Rep. Serv. 984, 985 (1984).

50. *Id.* at 189, 7 U.C.C. Rep. Serv. at 1347.

51. *Id.*

52. 160 N.Y.L.J., Oct. 29, 1968, p.2, col. 3M, 5 U.C.C. Rep. Serv. 1004 (N.Y. Sup. Ct. 1968).

53. *Id.*

54. *Id.*

55. *Levy v. Narrod Moving Services, Inc.*, 120 Ill. App.3d 528, 458 N.E.2d 189, 38 U.C.C. Rep. Serv. 307 (Ill. App. Ct. 1983). This same court (different judges) without citing section 7-204 (2) of the U.C.C., has held that when a warehouse receipt recited the value of a mink coat to be \$300 and the liability of the warehouse was limited to \$100 (even though the warehouse allegedly appraised the coat as being worth \$4,296.00), then the limit of liability was \$300 which would be binding upon the bailor and her subrogating insurance company. *Blume v. Evans Fur Co.*, 126 Ill. App. 3d 52, 39 U.C.C. Rep. Serv. 987 (2d Dist. 1984).

The current but limited case law is in accord; the limitation of liability clause need not be printed in conspicuous type, nor must it be printed on the face of the warehouse receipt or storage document.⁵⁶ Wisconsin, however, adopted a contrary legislative view inserting the word "conspicuous" before the word "term" in section 7-204 (2) with the result that the limitation clause must be in conspicuous terms.⁵⁷

B. Must the Limitation Clause be Bargained For?

Section 7-204(2) requires the limitation clause to be stated on the warehouse receipt or storage agreement; there is no express requirement that the limitation clause be bargained for or even drawn to the bailor's attention. Consequently, one court has held that under section 7-204 the warehouseman is not bound by any duty to inform the bailor that he can pay an increased storage charge for his goods and thereby secure greater protection for them; rather the bailor has to make a written request for such coverage.⁵⁸

Additionally, some courts hold that there is no duty for the warehouseman to call the bailor's attention to the limitation of liability language in the warehouse receipt.⁵⁹ Conversely, professional warehousemen in Connecticut, when dealing with a layman, have "the burden of proving actual knowledge on the part of the plaintiff (bailor) or a justifiable belief on his part that she had such knowledge in order to be exculpated under the limitation of liability clauses in the documents involved in this case."⁶⁰

56. *Strom International, Ltd. v. Spar Warehouse & Distributors, Inc.*, 69 Ill. App. 3d 696, 388 N.E.2d 108, 27 U.C.C. Rep. Serv. 233 (Ill. App. Ct. 1979); *Sanfisket, Inc. v. Atlantic Cold Storage Corp.*, 347 So. 2d 647, 21 U.C.C. Rep. Serv. 1155 (Fla. 3d DCA 1977).

57. *Wis. STAT. ANN.* § 407.204 (West 1984).

58. *Hartford Fire Insurance Co. v. Zackinizing Corp.*, 162 N.Y.L.J., Oct. 10, 1969, at 2, col. 4T, 6 U.C.C. Rep. Serv. 1086 (N.Y. App. Term 1969).

59. *Keefe v. Bekins Van & Storage Co.*, 36 Colo. App. 382, 540 P.2d 1132, 17 U.C.C. Rep. Serv. 1286 (Colo. App. 1975); *Dunfee v. Blue Rock Van & Storage, Inc.*, 266 A.2d 187, 7 U.C.C. Rep. Serv. 1344 (Del. Super. Ct. 1970); *World Products, Inc. v. Central Freight Service, Inc.*, 222 F. Supp. 849, 2 U.C.C. Rep. Serv. 675 (D.N.J. 1963), *aff'd*, 342 F.2d 290, 2 U.C.C. Rep. Serv. 716 (3d Cir. 1965).

60. *Griffin v. Nationwide Moving & Storage Co., Inc.*, 187 Conn. 405, 446 A.2d 799, 34 U.C.C. Rep. Serv. 970, (Conn. 1982). *Accord* *Carter v. Reichlin Furriers*, 34 Conn. Supp. 661, 386 A.2d 647, 22 U.C.C. Rep. Serv. 133 (Conn. Super. Ct. 1977).

C. *Time Limitations for Complaints and Suit*

Section 7-204(3) permits the parties to agree on "[r]easonable provisions as to the time and manner of presenting claims and instituting actions based on the bailment" As a consequence, it is relatively common for warehouse receipts to require the bailor to make written claims as well as to bring suit within a short period after loss or damage. It has been held in New York that in the event that the warehouse is unable to prove the cause of the disappearance of bailed goods and merely advances the speculation that the warehouse employees stole them, conversion by the bailee is then presumed and it cannot use the time limitation as a defense.⁶¹ Section 7-204(2) provides that liability limitation clauses will be ineffective when the warehouseman converts the goods to his own use; nothing in this section compels the holding that a time limitation clause is equally ineffective. Implicit in this holding is the notion that in cases of conversion or presumed conversion there has been a fundamental breach of contract which sets the contract aside as any kind of protection for the warehouse.

D. *Exculpatory Clauses*

Although section 7-204 authorizes limitation of liability clauses, clauses which totally exculpate the warehouse from liability are invalid.⁶² Similarly, if a warehouseman gives a rate schedule agreement to a bailor which provides that the warehouseman shall not be liable for any loss of goods which the bailor has insured under an extended coverage all risk insurance policy, this provision is void as an attempt to exculpate the warehouseman from his duty of care under section 7-202(3).⁶³ This warehouseman or more properly his lawyer, in essence, was trying to use the old "benefit of insurance" trick under which maritime bills of lading would provide that the ship would have the benefit of any insurance carried by the shipper of the goods. The benefit of insurance clause would then deprive the shipper's insurance company of any subrogation

61. *Continental Metals Corp. v. Municipal Warehouse Co., Inc.*, 112 Misc.2d 923, 447 N.Y.S.2d 849, 33 U.C.C. Rep. Serv. 660 (N.Y. Sup. Ct. 1982), *aff'd*, 459 N.Y.S.2d 406, 35 U.C.C. Rep. Serv. 1608 (N.Y. App. Div. 1983).

62. *Hayat v. MZ Enterprises*, 26 U.C.C. Rep. Serv. 172 (D.N.J. 1979); *Fireman's Fund American Insurance Co. v. Capt. Fowler's Marina, Inc.*, 343 F. Supp. 347, 11 U.C.C. Rep. Serv. 180 (D. Mass 1971).

63. *Kimberly-Clark Corp., v. Lake Erie Warehouse*, 49 A.D.2d 492, 375 N.Y.S.2d 918, 18 U.C.C. Rep. Serv. 476 (N.Y. App. Div. 1975).

rights against the maritime carrier.⁶⁴ The Carriage of Goods by Sea Act has expressly invalidated these clauses in foreign maritime cargo transportation.⁶⁵ Unless there is some statutory authority which directly or indirectly invalidates these benefit of insurance clauses, it would appear that they are valid.⁶⁶ These clauses can be circumvented, nonetheless, by use of the "loan receipt" approach.⁶⁷

E. *Extending Section 7-403 (1) (b) to Other Bailees*

Nebraska has not only adopted the optional section, but has judicially extended its coverage to include other bailees for hire such as a car dealer to whom the owner had entrusted his car for warranty repair work. The court noted that the burden upon the bailee to prove by a preponderance of evidence that he exercised due care to prevent the loss (by theft) applies whether the suit be brought in contract or in tort.⁶⁸ Likewise, Massachusetts has extended section 7-403 to an upholsterer with whom the bailor had entrusted his furniture. The court, in addition to its use of section 7-403, conducted an extensive analysis of its prior case law and concluded that:

[O]nce the bailor proves delivery of the property to the bailee in good condition and the failure to redeliver upon timely demand, the burden of proof is irrevocably fixed upon the bailee to prove by a fair preponderance of the evidence that he has exercised due care to prevent the property's loss or destruction. Our holding extends to all bailment for hire cases, whether brought in tort or contract, in which the bailee has exclusive control over the property at the time it was destroyed or damaged.⁶⁹

One court in Idaho has also used section 7-403 to hold that an automobile repair garage had the burden of proving freedom from negligence when a transmission was stolen from a car that was being repaired. The court noted that when Idaho adopted section 7-403 it did not adopt the optional language, and that this was a clear indication that, as a matter of policy, "the burden of estab-

64. G. GILMORE & C.L. BLACK, JR., *THE LAW OF ADMIRALTY*, 189-91 (Foundation Press 2d ed. 1975).

65. 49 STAT. 1207, 46 U.S.C. § 1303(8) (1984).

66. 16 G.J. COUCH, *COUCH ON INSURANCE* §§ 61:175-61:183 (2d ed. 1983).

67. *Id.* at § 61:182.

68. *Knight v. H.H. Chevrolet*, 215 Neb. 166, 337 N.W.2d 742, 36 U.C.C. Rep. Serv. 1315 (Neb. 1983).

69. *Knowles v. Gilchrist Co.*, 362 Mass. 642, 289 N.E.2d 879 (Mass. 1972).

lishing negligence should not be placed on the bailor."⁷⁰

F. *Findings and Non-Findings of Negligence*

Negligence of the warehouseman can be found from only a few facts. For example, in a boat marina case (which the court treated as a warehouse) the court found negligence from the fact that the marina did not employ a night watchman, and that it did not have a source of water for the firefighters to use. The lack of water caused a thirty second delay because the firemen had to dig a fire hydrant out from under the snow and lay 500 feet of hose. The bailor proved that the delay caused the damage to its yacht from a fire which had originated on an adjoining yacht.⁷¹

Although a hurricane is an act of God, a warehouse may be liable for flood damage caused by the combination of moon tide and storm surge when the facts show that the warehouse was negligent for failing to take sufficient precautions in light of all of the circumstances. Such precautions could include removing the goods from the warehouse altogether or putting them on the second floor rather than on the first.⁷²

In a most unusual warehouse case, a warehouseman who approved the actions of an architect in redesigning a roof construction plan was held entitled to rely upon the skill of the architect, and was not liable for damage to bailed goods caused by the collapse of the roof. In the absence of any proof that the warehouseman knew of the defects in the changed plans, or should have known of the defects, there would not even be a jury question as to negligence.⁷³

In *Citizens Bank of Trust Co. v. SLT Warehouse Co.*,⁷⁴ the court was confronted with the question of reasonable care when a bank, which had lent upon the security of non-negotiable ware-

70. *Low v. Park Price Co.*, 95 Idaho 91, 503 P.2d 291 (Idaho 1972).

71. *Fireman's Fund American Insurance Co. v. Capt. Fowler's Marina, Inc.*, 343 F. Supp. at 347, 11 U.C.C. Rep. Serv. at 180 (D. Mass. 1971), *cf.* *Fireman's Fund American Insurance Co. v. Boston Harbor Marina, Inc.*, 406 F.2d 917, 6 U.C.C. Rep. Serv. 186 (1st Cir. 1969) (determination of whether the U.C.C. or marine law governs covered storage of a yacht).

72. *World Products, Inc. v. Central Freight Service, Inc.*, 222 F. Supp. 849, 2 U.C.C. Rep. Serv. 675 (D.N.J. 1963), *aff'd*, 342 F.2d 290, 2 U.C.C. Rep. Serv. 716 (3d Cir. 1965).

73. *S.S. Kresge v. Port of Longview*, 18 Wash. App. 805, 573 P.2d 1336, 23 U.C.C. Rep. Serv. 431 (Wash. Ct. App. 1977).

74. 368 F. Supp. 1042, 1044, 14 U.C.C. Rep. Serv. 472, 475 (M.D. Ga. 1974).

house receipts, sued the warehouse after a bailor surreptitiously removed his own grain from the elevator. In the course of finding that the warehouse was not liable, the court, in a non-jury trial, stated:

The evidence makes it clear that the shortages in grain occurred as a result of the fact that Mathis, through a variety of means, took the grain from the warehouse controlled by SLT totally without SLT's knowledge or authority and in a way which was wrongful as to SLT. He did this by bypassing the SLT locks which had been placed on the bin doors by removing the hinges from the doors and loading grain onto trucks by means of a portable auger inserted into the bins and by bypassing the SLT lock which had been placed on the electrical switch which controlled the grain elevator by "hot-wiring" the electrical wires near the switch so that another switch which was supposed to control the operation of another piece of machinery actually controlled the operation of the elevator. These means all circumvented SLT's control and security over the grain. The court finds as a matter of fact that the shortages were not due to any negligence on the part of SLT, its representatives having taken all precautions which a reasonably prudent warehouseman would have taken in the circumstance.⁷⁵

Query if it is reasonable care to have hinges on a grain elevator which may be removed and replaced from the outside without notice to the warehousemen? The facts indicated that there had been more than one withdrawal of grain by this method. Further, is it reasonable care for the warehousemen to be unaware of the use of "portable augers?" And lastly, is it reasonable care for the warehousemen to fail to take precautions for any kind of a security service at night? The court was too kind to the warehouseman.

G. *Damages*

Although a bailee will not be liable for damage to bailed property which was caused by the negligence of a third party, the bailee may well be liable for the market value of the goods on the date of the loss if the bailee is unable or unwilling to return the damaged goods and if no one could determine the salvage value. The bailee, in effect, is punished because of its failure to return the damaged

75. *Id.* at 1044.

goods.⁷⁸

Courts are reluctant to award loss of profits as an element of damages for loss or damage to bailed goods. For profits "to be included as a loss item in a bailment contract, the bailee must have been fully appraised of the fact that the items were for resale and that the goods could not otherwise be procured in the market. Furthermore, the projected lost profits must be reasonably certain and not unduly speculative."⁷⁷

III. EUROPE

A. Italy

The Italian Civil Code, which combines both civil and commercial law,⁷⁸ articulates the general liability of warehousemen:

Warehouses are responsible for preservation of the goods deposited, unless it is proved that the loss, shrinkage or deterioration of the goods was due to an unavoidable accident, to the nature of the goods, or to defects in the nature of their packing.⁷⁹

Under article 1218 the warehousemen has the burden of proving the existence of these exonerating events.⁸⁰ The Italian warehouseman is obligated to deliver, upon request of the bailor, a warehouse receipt which states *inter alia* "whether or not they [the goods] have been insured."⁸¹

The phrasing of the code which states that the warehouseman is not liable for damage in the event that it was caused by "the nature of the goods, or to defects in the goods or their packing"

76. C.W.B. Enterprises v. K.A.T. Equipment, 449 So. 2d 354 (Fla. 3d DCA 1984).

77. Indemnity Marine Assurance Co. v. Lipin Robinson Warehouse Corp., 99 Mich. App. 6, 30 U.C.C. Rep. Serv. 658, 297 N.W. 846 (Mich. Ct. App. 1980).

78. M. CAPELLETTI, J.H. MERRYMAN & J.M. PERILLO, *THE ITALIAN LEGAL SYSTEM* 226 (1967).

79. CODICE CIVILE, art. 1787 (Italy). English, translation taken from M. BELTRAMA, G. LONGO & J. MERRYMAN, *THE ITALIAN CIVIL CODE* 445 (1969). The cited text interprets the Italian phrase "*caso fortuito*" as "fortuitous event" which is the literal translation. The author of this article has substituted the phrase "unavoidable accident" as the peculiar legal meaning of "fortuitous event."

80. *Id.*, art. 1218. Translation at 322: "1218. Liability of debtor. The debtor [in the sense of the Obligee] who does not exactly render due performance is liable for damages unless he proves that the nonperformance or delay was due to impossibility of performance for a cause not imputable to him."

81. *Id.*, art. 1790(4). Translation at 446.

does not find any parallels in either section 7-204 or section 7-309 of the U.C.C. (the latter section deals with the common carrier's duty of care in the United States). Conversely, the Uniform Bills of Lading used by rail carriers in the United States provide for the non-liability of the carrier for loss resulting from "a defect or vice in the property." In addition, the reference to "shrinkage" in the Italian Code parallels the Uniform Bills of Lading language that the carrier shall not be liable for "natural shrinkage" of the goods.⁸² Similarly, the maritime carrier under the Carriage of Good Sea Act "is not liable for wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods" or "insufficiency of packing."⁸³

The Italian concept of putting legal responsibility upon the warehouseman for loss incurred to goods in the possession of the warehouseman indicates a reflection of the Italian policy that responsibility lies with the person in possession or control. For example, parents, guardians, teachers, and masters of apprentices are liable for the unlawful acts of minors under their control unless "they prove that they were unable to prevent the act."⁸⁴ Similarly, masters and employers are liable for their servants and employees unlawful acts during the exercise of the functions to which they are assigned;⁸⁵ possessors of personal property are liable for injuries caused by items in their custody, unless the possessor "proves that the injuries were the result of an unavoidable accident,"⁸⁶ possessors of animals are similarly liable.⁸⁷ These Italian provisions imposing liability upon the person in possession of goods or property or in control of third persons are paralleled in the French Civil Code.⁸⁸

This concept of "unavoidable accident" or *caso fortuito* deserves further discussion. In the French Civil Code the words *force majeure* and *cas fortuit* appear commonly together, and, at times, they appear separately. When the terms appear together, they are

82. See sample bill of lading in J. HONNOLD, LAW OF SALES AND SALES FINANCING 193 (5th ed. 1984).

83. 49 STAT. 1207, 46 U.S.C. §§ 1300, 1304 (2)(m)(n).

84. C.c., art. 2048.

85. *Id.*, art. 2049.

86. *Id.*, art. 2051.

87. *Id.*, art. 2052.

88. CODE CIVIL, arts. 1384, 1386 (France); see J.H. CRABB, THE FRENCH CIVIL CODE, 253-54 (1977) and 2 K. ZWIEGERT & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW, 322-29 (1977).

commonly separated by the disjunctive "or" which would seem to indicate that they have different meanings. Some French writers assert that *force majeure* means basically an act of nature (storms, earthquakes, et cetera) while *cas fortuit* or "unavoidable accident" would encompass acts of humans, such as confiscation by foreign governments, civil war, acts of war and the like.⁸⁹ Still other writers assert that the case law has treated the terms as interchangeable.⁹⁰ The Italian law seems even clearer that the terms are synonymous. In fact, in the Italian Civil Code the term *forza maggiore* is not referred to at all in the law of obligations (contract), but only in the law dealing with the registration of the marriage ceremony,⁹¹ the presentment and protest of bank checks,⁹² and the presentment and protest of bills of exchange.⁹³ In the latter two articles the term *forza maggiore* is subsumed under the term *ostacolo insormontabile* or "insurmountable obstacle" in English.

It would appear that both *forza maggiore* and *caso fortuito* have been subsumed into the concept of impossibility, which is derived from a "cause not imputable to him" (*causa a lui non imputabile*).⁹⁴ For instance, an Italian text, in its index under *forza maggiore*, refers to the preceding text which does not mention *forza maggiore* but only the non-imputable clause.⁹⁵ Looking at the two sections of the Code regarding obligations, it becomes relatively clear that the term "impossibility" (which is one aspect of *forza maggiore*) has been combined with the "imputable" idea:

Liability of a debtor. The debtor who does not exactly render due performance is liable for damages unless he proves that the non-performance or delay was due to impossibility of performance for a cause not imputable to him.⁹⁶

....

Definitive impossibility and temporary impossibility. An obliga-

89. E.g. 1 C. AUBRY & C. RAU, CIVIL LAW TRANSLATIONS, DROIT CIVIL FRANCAIS 107, n. 32b (6 ed. A.N. Yiannopoulos, Trans. 1965).

90. SIR. M. AMOS & F. WALTON, INTRODUCTION TO FRENCH LAW 186 (F.H. Lawson, A.E. Anton & L.N. Brown 3d ed 1967); B. NICHOLAS, FRENCH LAW OF CONTRACT 196 (1982); 2 K. ZWIEGERT & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 171 (1977); A. VON MEHREN, THE CIVIL LAW SYSTEM 706 (1957).

91. C.C. art. 132 (Italy). Text taken from P.L. FRANCHI, V. FEROCI & S. FERRARI, CODICE CIVIL 30 (1966) [hereinafter FRANCHI].

92. *Id.*, art. 53, at 557.

93. *Id.*, art. 61, at 725.

94. *Id.*, art. 1218, at 196.

95. FRANCHI, Indice Analitico-Alfabetico 47.

96. C.C., *supra* note 79, art. 1218 at 322.

tion is extinguished when its performance becomes impossible for a cause not imputable to the debtor.

....

If the impossibility is only temporary the debtor is not liable for delay in performance as long as it continues to exist. However, the obligation is extinguished if the impossibility continues until, depending on the source of the obligation or the nature of its subject matter, the debtor can no longer be held bound to perform the obligation or the creditor is no longer interested in the performance.⁹⁷

B. *France*

The French Civil Code presents the bailee's duties in a fashion which greatly resembles the common law rules of the United States. The Code, in relevant part, provides:

The bailee must observe, in the keeping of the thing bailed, the same care that he observes in the keeping of things which belong to him.⁹⁸

....

The provision of the preceding article is to be applied with greater strictness:

1. If the bailee himself offered to receive the bailment;
2. If pay was stipulated for the keeping of the bailment;
3. If the bailment was made only in the interests of the bailee;
4. If it was agreed expressly that the bailee would answer for any kind of fault.⁹⁹

A comparison of the United States common law rules governing the duties of the gratuitous bailee, the bailment for mutual benefit and the bailment for the bailee's sole benefit with the above French rules provides a striking similarity in approaches.¹⁰⁰

The Code goes on to state:

The bailee is not responsible, in any case, for accidents from

97. *Id.*, art. 1256, at 329.

98. C. CIV., *supra* note 88, art. 1927.

99. *Id.*, art. 1928.

100. R.A. BROWN, BROWN ON PERSONAL PROPERTY §§ 80-83 (1936); R.A. BROWN, BROWN ON PERSONAL PROPERTY 252-69 (W.R. Raushenbush 3d ed. 1975).

overpowering force (*force majeure*) unless he had been put on notice [that he would be compelled] to restore the thing bailed.¹⁰¹

In the case where the bailee has lost possession of the bailed good "through an overpowering force, and who received a price or something in its place, [the bailee] must restore what he received in exchange."¹⁰² In the event that the bailee is able to return the item, he is required to do so "only in the state in which it is found at the time of restitution. Deteriorations which did not happen through his fault are charged to the bailor."¹⁰³

Although the above rules may be considered sufficient, the French government deemed it necessary to adopt the Ordinance of 6 August 1945, Relative to General Warehouses to govern commercial warehouses.¹⁰⁴ Article 5 of this Ordinance states that "[a]ny person who delivers merchandise in deposit with a general warehouse is required to declare the nature and value to the operator [of the warehouse]."

In response to this duty of the bailor, the law then provides for a reciprocal duty of the warehouseman:

The operators of general warehouses are responsible, within the limits of the value declared, for the safekeeping and the conservation of the deposits which are entrusted to them.

They are not responsible for damages and losses naturally arising from the nature and condition of the merchandise or the case of *force majeure*.¹⁰⁵

This same ordinance also provides for obligatory insurance:

Merchandise susceptible to warehouse receipts is obligatorily insured against fire by the general policy of the warehouse.

Nevertheless, for the operators of general warehouses established in the maritime ports, this obligation is suspended with regard to stored merchandise covered by maritime assurance so that this assurance guarantees these risks.

101. C. civ., *supra* note 88, art. 1929 at 351. The bracketed language has been added to the text for the sake of clarity.

102. *Id.*, art. 1934.

103. *Id.*, art. 1933.

104. DALLOZ, *CODES ET LOIS USUELS* 509-11 (36th ed. 1975) (Text translated by author).

105. ORDINANCE OF 6 AUGUST 1945, RELATIVE TO GENERAL WAREHOUSES, art. 6.

If pendent this period, a disaster occurs, the responsibility of the operator of the general warehouse shall not come bound face to face with the depositors, of the company of assurance and of the holders of the warehouse receipts. At the expiration of said period, the merchandise above mentioned to be assured under the general policies of the warehouse.¹⁰⁶

The concept of *force majeure* is sometimes translated as being the same as an act of God. This translation is incorrect, however, because *force majeure* includes acts by third parties which are beyond the control of the person (in this case, the warehouseman) who is asserting the defense as an excuse for the non-return of the bailed goods. *Force majeure*, in a sense, is a broader defense than an act of God—an unforeseeable terrorist attack on a warehouse could well be encompassed under *force majeure*, but it would not be an act of God. One authority has declared that *force majeure* exists when the "the court is satisfied that it has become impossible to perform the contract by reason of a supervening event which could not have been reasonably foreseen by the parties."¹⁰⁷

Another authority has succinctly defined the notion as possessing the following characteristics:

(1) *irresistibilite* - the event must render performance of his obligation impossible, and not merely more onerous; (2) *imprevisibilite* - the event must not be reasonably foreseeable, for he ought then to have taken steps to prevent or avoid it; (3) *exteriorite* - the event must proceed from some external cause, i.e. not from a cause within his sphere of responsibility such as vice in the goods themselves.¹⁰⁸

It has been noted that the concepts of impossibility and unforeseeability "are to be understood in a reasonable sense and in light of the circumstances. It is a question of appreciation."¹⁰⁹ A much more rigid view of *force majeure* has been expressed by another authority:

According to the doctrine of *force majeure* a contract will be rescinded in French law, and no liability will be incurred by a party to it for the nonperformance by such party of his obligations under the contract, if the courts are satisfied that it has

106. *Id.*, art. 12.

107. M. AMOS & F. WALTON, *supra* note 90, at 165.

108. BENJAMIN, BENJAMIN'S SALE OF GOODS § 662 (1974).

109. M. AMOS & F. WALTON, *supra* note 90, at 186.

become impossible to perform the contract, by reason of an event which could not have been reasonably foreseen by the parties at the time when the contract was entered into. Performance of the contract must be absolutely impossible, and must not merely be more onerous for a party in order to constitute *force majeure*.¹¹⁰

The same authority states further:

The sole fact of a war or a strike or a riot or plundering, for instance, has constantly been held not to be ipso facto a case of *force majeure*; the special circumstances of the case must always be investigated in order to determine whether such events could not have been reasonably foreseen by the parties and whether they have given rise to an absolute impossibility to perform the contract.¹¹¹

If you take the example of the warehouseman's liability for burglary, a comparison of the reasonable standard under the "ordinary care" test of the United States with the *force majeure* test of Europe should produce obvious differences. If the burglary occurs in the United States, the warehouseman will not be liable if it is shown that he used reasonable, ordinary care commensurate with the circumstances. However, this "ordinary care commensurate with the circumstances" standard may indicate that a high degree of care to prevent burglary might be required in a high crime area, and a lesser degree of care in an area relatively free of crime. Using the *force majeure* concept, burglary is always foreseeable in a real world, thus the warehouseman would have to show that he took all steps to avoid the occurrence, not just reasonable ones.

This analysis in the application of the *force majeure* concept to the warehouseman regarding the degree of care can be supported by two German professors' views of the French notion of *force majeure*:

The critical question therefore is in what cases the courts are ready to treat an obstacle to performance as "force majeure" or "cas fortuit" and so to free the debtor from his obligation to pay damages. The writers say that an obstacle to performance only serves as a defense if it is an "obstacle imprevisible et irresistible" which renders it "absolument impossible" for the debtor to

110. David, *Frustration of Contract in French Law*, 28 J. COMP. LEGIS. & INT'L L. 11 (1946).

111. *Id.* at 12.

perform (see PLANIOL/RIPERT VII no. 838). Although the courts tend to stress one of these criteria at the expense of the others, it is certain that an obstacle to performance will not serve as a defense if the debtor had even the slightest chance of avoiding it and neglected to avail himself of it. Even the very great difficulties in procuring, transporting or delivering goods which occur in wartime do not free the vendor.¹¹²

The same authors have articulated the standard of care for a person having custody of goods relative to occurrences which could be described as acts of God:

Natural events are only regarded as *force majeure* if they occur with unforeseeable suddenness and irresistible violence and the custodian in the case could not possibly or reasonably have taken the steps required to prevent the harm (see MAZEAUD/TUNC II no. 16007f., citing many decisions). In such a case the custodian is freed from liability entirely, but if some fault of the custodian concurred with the event which constitutes *force majeure*, a recent line of decisions allows the custodian to be held liable for just part harm (Com. 19 June 1951, S. 1952 1. 89).¹¹³

Professor Mazeaud and Tunc who are cited above, state:

Natural phenomenons do not present the nature of *force majeure* unless they are such, by their unexpectedness or their violence, that there is no way that you can reproach the keeper for not having taken the necessary measures to impede its harmful consequences or in the hypothesis in which the resistance of the thing reveals that it had been diminished by a hidden defect [when in fact] that the damage seems to have been caused by a natural phenomenon more than by that defect (1 *bis*). That has been judged in several cases by the wind (2) by the rain (2 *bis*) by a "false rising" of the water which is produced during tides¹¹⁴

The French authors, in support of this statement, cite an old French case which states that the "wind and tempests do not constitute *force majeure* unless they are invested with a nature of exceptional violence and if they may not be avoided."¹¹⁵ The authors

112. 2 K. ZWIGERT & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW (1977).

113. *Id.* at 327.

114. H. MAZEAUD, L. MAZEAUD & A. TUNC, TRAITE THEORIQUE ET PRATIQUE DE LA RESPONSABILITE CIVILE, § 1607 (Cinquieme ed. 1957-1960).

115. *Id.*

cite another case which held that if the tempest was the principal but not the sole cause, the court would reduce the liability of the custodian by four-fifths of the good's value.¹¹⁶ Incidentally, the court found some fault on the part of the custodian.

Under the French ordinance discussed above, a warehouseman must have fire insurance. This requirement alleviates many of the common problems which arise when bailed goods are destroyed by fire. It is surprising, however, that the ordinance does not also require insurance for other casualties such as floods, thefts and windstorms.

C. *Spain*

The Spanish law which governs general warehouses does not articulate any standard of care for the warehouseman,¹¹⁷ but rather it states that general warehousemen are governed first by the law of general warehouses and second by the Commercial Code.¹¹⁸ The Commercial Code, in its treatment of "mercantile deposits," states that the depository:

is obliged to conserve the object of the deposit according to the receipt, and to return it with its increases (*aumentos*) if it has them, when the depositor requests it.

. . . .

[I]n the conservation of the deposit the depository shall respond for the deteriorations, damages and losses which the deposited things suffer by his malice or negligence, and also for those [deteriorations, damages and losses] which arise out of the nature or vice of the things, if in these cases he did not do what was necessary to avoid or remedy it, giving notice of them moreover to the depositor, immediately when they manifest themselves.¹¹⁹

The Commercial Code further states that general warehousemen, after the General Warehouse Laws and the Commercial Code have been applied, are governed, ultimately, by the "rules of the common law, which are applicable to all deposits."¹²⁰ This "common law" is articulated in the Spanish Civil Code. Article 1.766 of

116. *Id.*

117. CODIGO DE COMERCIO, arts. 193-98 (1973) (Spain).

118. *Id.*, art. 310.

119. *Id.*, art. 306.

120. *Id.*, art. 310.

the Civil Code states that Title 1 of Book 4, which consists of articles 1.088 through 1.253, regulates the depository's conduct in the care of the deposited goods. Article 1.094 is probably the most succinct comprehensive statement of the depository's duty: "to conserve it with the proper diligence of a good father of a family."¹²¹

Article 1.183 of the Civil Code deals with the question of loss of bailed goods:

[W]hen the thing has been lost in the possession of the debtor, it shall be presumed that the loss occurred by his fault and not by unavoidable accident (*caso fortuito*) except [where there is] proof to the contrary, and without prejudice to that disposed in article 1.096.¹²²

Article 1.096 then states:

When that which must be delivered is a determined thing, the creditor, independently of the right which is declared in article 1.101, may compel the debtor to perform the delivery. If the thing was indeterminate or generic, he may request the discharge of the obligation at the debtor's expenses. If the obligee has been found in default, or if he is bound to deliver the same thing to two or more different persons, it shall be on his account unavoidable accident [in the sense of risk of loss for accidents] until the delivery is accomplished.¹²³

Article 1.101 completes the trilogy of articles:

They shall remain subject to the indemnification of the damages and injuries caused in the accomplishment of his [the obligee's] obligations incurred by fraud, negligence or delay, and those which in any manner contravene compliance with the former.¹²⁴

In sum, the warehouseman's liability in Spain requires that he exercise the highest degree of care over the goods in his possession, and there is a presumption that if those goods are lost the fault is his, unless he proves that it resulted from an unavoidable accident (*caso fortuito*). In addition, the warehouseman will be liable for damage caused by his own fraud, negligence, and delay in perform-

121. C. RODRIGUEZ, CODIGO CIVIL 282 (1982).

122. C. CIV., art. 1.183 (1982) (Spain).

123. *Id.*, art. 1.096.

124. *Id.*, art. 1.101.

ing the bailment contract.

IV. LATIN AMERICA

As might be suspected, the legislative attention devoted to the rights and duties of warehousemen varies from country to country in Latin America depending upon the degree of the development of commerce. Chile enacted The Law About the General Warehouses of Deposit in 1932, and, in spite of its relative antiquity, it presents a modern articulation of the law.¹²⁵ The warehouse receipt, under this law is required to state "[t]he special insurance which it guards against,"¹²⁶ and "[t]he marks and other necessary indications in order to determine the identity and the value of the goods deposited, or else the marks which require the regulations, in order to establish the characteristics and fix the value of these same goods"¹²⁷

In Chile, the "proprietor of the general warehouse of deposit shall respond, in every case, for the veracity of the declarations stamped on the documents which are referred to in article 4 [certificates of deposit and of pledge] and for the loss or deterioration imputable to his fault, or of his employees or clerks."¹²⁸ The warehouseman, however, "shall not respond for the losses or deterioration occasioned by *force majeure* unavoidable accident (*caso fortuito*), or inherent vice (*vicios propios*) of the goods deposited."¹²⁹

As noted above, the warehouseman is made liable "for the loss or deterioration imputable to his fault, or of his employees or clerks." (emphasis supplied). A subsequent section of the Code enlarges the respondent superior concept and states that "[t]he crimes which the employees or representatives of the general warehouses commit in the performance of obligations which grow out of its capacity as such, shall equally affect the civil responsibility of the proprietors."¹³⁰ This Chilean concept of imposing liability upon the warehouseman for loss "imputable to his fault" is reminiscent of Italian law.¹³¹

125. CODIGO DE COMERCIO (1977) (Chile).

126. *Id.*, at art. 3(6) (translation by the author).

127. *Id.*, art. 3(7).

128. *Id.*, art. 19.

129. *Id.*

130. *Id.*, art. 21.

131. See *supra* notes 94-97 and accompanying text.

Argentina, Chile's neighbor to the east, has not followed the Chilean model of providing a separate law for warehouses, but, rather it has subsumed the law under the concepts of "Deposit" and "Power of Attorney and Consignments." The "Deposit" Title is limited to the idea that the "depository from whom the thing has been snatched by force, and who has been given money or other equivalent in its place, is obliged to deliver to the depositor that which has been received in exchange."¹³² This passage is preceded by a rule which states that the law of "Deposit" is also affected by another title: "Of the Power of Attorney and of the Commissions and Consignments."¹³³

The Title for "Powers of Attorney" and of the "Commissions and Consignments" provides that the depository is responsible for the conservation of the goods "save in the case of unavoidable accident (*caso fortuito*) or of *force majeure* (*fuera mayor*) or if the deterioration results from the inherent, vice of the thing."¹³⁴ Although beyond the scope of this article, it is interesting to note that in Argentina the depository:

[I]s responsible for the loss or embezzlement of metallic funds or current money which he has in his power, . . . even when the damage or loss arises from a case of unavoidable accident or violence, unless a pact has been made expressly to the contrary, and save for the exceptions which grow out of special circumstances, whose appreciation remains free to the care and prudence of the Courts.¹³⁵

The depository also has a duty to insure the goods at the request of the bailor. The warehouseman who fails to do so will be liable provided he has received sufficient funds from the bailor to pay for the premium.¹³⁶

In 1970, Paraguay, another neighbor of Argentina, modernized its warehouse law by enacting "Law No. 215, of General Warehouses of Deposit."¹³⁷ Article 14 establishes the basic liability of the warehouseman:

General warehouses of deposit shall be responsible for the con-

132. CODIGO DE COMERCIO, art. 578 (1981) (Argentina).

133. *Id.*, art. 574.

134. *Id.*, art. 274.

135. *Id.*, art. 270.

136. *Id.*, art. 273.

137. Text translated from CODIGO DE COMERCIO Y LEYES COMPLEMENTARIOS 302-13 (annotated by O. Paciello, 2d ed. 1980).

servation, custody and restitution of merchandise stored in their warehouses, but in no case shall they be responsible for loss, shrinkage or damage which was caused by force majeure or unavoidable accident, nor for loss, damages, shrinkage or deterioration which originates from the self-same nature of the merchandise, nor will they be responsible for the loss of profit which shall occasion the loss, damage, shrinkage or damage of the merchandise, their obligation remaining limited to restore equal goods, when such case should occur [in the sense that if the warehouse should be liable for his own fault, etc.,] in equal quantity and quality of the deposited goods, or if the warehouse should prefer it, the value for said goods which have been registered in his bookkeeping.¹³⁸

The risk concept is addressed in a subsequent article:

Merchandise and products received by the general warehouses of deposit shall be insured against appropriate risks for each type of deposited merchandise under floating policies or fixed [policies] in one or various companies legally established in the country. The amount of insurance shall be the value declared by the depositor or estimated by the official of the warehouses, it ought to be equal to that [amount] represented in the Certificate of Deposit and Warehouse receipt.¹³⁹

The Paraguayan law does not contemplate that the depositor is to be the assured, on the contrary:

The merchandise must be insured in the name of the General Warehouses of Deposit, so that in case of loss, they shall receive the indemnification owed by the insurer.¹⁴⁰

Article 16 also gives the individual holder of a warehouse receipt a cause of action against the insurance company, even though the policy is in the name of the warehouse:

About the indemnification guaranteed by the Insurance Company, in case of loss, they shall exercise equal rights and privileges: The General Warehouses of Deposit, the fiscal institutions, the holders of Warehouse Receipts and Certificates of Deposit.¹⁴¹

138. CODIGO DE COMERCIO, art. 14 (Paraguay).

139. *Id.*, art. 15.

140. *Id.*, art. 16.

141. *Id.*

When the law requires insurance to cover virtually every risk of loss, the question of the warehouseman's liability then becomes moot as to the bailor, although not moot as to the subrogation rights (if any) of the insurer. Bolivian legislation handles, at least part of the problem well:

(Value of the merchandise or products). General warehouses shall issue certificates of deposit of the merchandise or products, taking as a base the value declared by the bailor (*depositante*). Only when a notorious discrepancy between said value and the standard [value] is observed, shall they proceed to demand justifiable documentation of such situation.¹⁴²

The warehouse's duty, in response to this declared value, is:

(Insurance). . . . to protect for possible losses, thefts, robberies and other similar [things], as well as against fire, explosion and other risks, to which are exposed the merchandise and products deposited, when they are not directly insured by the depositors.¹⁴³

In Honduras, however, it appears that the warehouseman's obligation to procure insurance is optional.¹⁴⁴ The optional approach seems unusual in light of the fact that the warehouseman "must take care of the thing with the most strict diligence," and because the Mercantile Deposit section of the Commercial Code does not expressly limit this duty by any notion of *force majeure*.¹⁴⁵ In neighboring El Salvador, the law requires that the certificate of deposit issued by the warehouseman state the amount of insurance and the name of the insurance company,¹⁴⁶ although either the owner or the warehouse can obtain insurance.¹⁴⁷

The Venezuelan law governing "Deposit"¹⁴⁸ incorporates the law governing "Commission Contracts" which, in turn, incorporates the law governing the transport of goods. Under the "Commission Contract" the depository "responds for the deterioration or of the loss of the thing consigned which it has in its power, which does not originate from an unavoidable accident or of its

142. C. MORALES, CODIGO DE COMERCIO, art. 1.195 pp. 1170-79 (C.M. Guillen 1981) (Translated by author).

143. *Id.*, art. 1.196.

144. CODIGO DE COMERCIO, art. 853, XI (1950) (Honduras).

145. *Id.*, art. 844.

146. CODIGO DE COMERCIO, art. 844, X (1974) (EL Salvador).

147. *Id.*, art. 857.

148. CODIGO DE COMERCIO, art. 534 (1982) (Venezuela).

own defect of the very same thing, in the terms expressed in article 173."¹⁴⁹ Article 173, which is primarily addressed to the liability of carriers, states:

The carrier is responsible for the losses and damages which the objects suffer, or delay in their transportation, unless it is proved that it has happened by an unavoidable accident or of force majeure or by vice [defects] of the objects or by their nature, or by act the shipper or of his consignee.¹⁵⁰

The same section then attempts to define *force majeure*:

Cases of force majeure are, calamitous accidents which cannot be foreseen and prevented by the prudence and the proper means of men of the respective profession. But the carrier is responsible:

1. If his act or fault has contributed to the advent of the unavoidable accident.

2. If it has not employed all of the necessary diligence and skill to stop or lessen the effects of the accident or damage.

3. If in the carriage, conveyance, or protection of the merchandise the diligence and care used by intelligent and cautious carriers has not been exercised [*no hubiere puesto*-literally means- has not been put.]¹⁵¹

It seems strange that the Venezuelan law, after stressing the liability of the warehouseman, fails to require insurance of the goods; liability without insurance coverage may often be a vain thing.

The Ecuadorian law of "Deposit" also incorporates by reference the law governing the "Commission Contract."¹⁵² The law governing "Commission Contracts" contains the same language as that found in Venezuelan law with the exception of the additional thought that "[t]he damage shall be calculated by the value of the thing in the place and in the time in which it has happened."¹⁵³ This section of the Venezuelan Code then refers the reader to article 221, which replicates the Venezuelan *force majeure* law dis-

149. *Id.*, art. 384.

150. *Id.*, art. 173.

151. *Id.*

152. CODIGO DE COMERCIO, art. 568 (1982) (Ecuador).

153. *Id.*, art. 383.

cussed above.

V. CONCLUSION

In a time in the United States when the liability of manufacturers, sellers of goods, suppliers of professional services (medical, legal, engineering, accountants), landlords, owners of real property, et cetera, is showing an almost geometric increase, it would seem that the warehouseman's capacity to limit his liability under the guise of freedom of contract is an anachronism. If the law permits this self-limitation of liability for one class of individuals, then the law ought to permit it for all classes. Of course, the present development of expanding liability will probably preclude any widespread adoption of allowing all classes to limit their liability. On the other hand, a modern trend in the law for carriers is to expand their liability to shippers and consignees of goods, particularly on the international level.¹⁵⁴ It is suggested that this trend should be extended to warehousemen, either by adopting the *force majeure* or *unavoidable accident* approach found in many of the civilian codes, or by eliminating the right of warehousemen to limit their liability by inconspicuous (and usually unbargained for) limitation of liability clauses. The developing case law in New York in mysterious disappearance cases may be a judicially inarticulate way of engrafting an American version of a *force majeure* rule upon warehousemen.

154. E.g., D.E. Murray, *The Hamburg Rules: A Comparative Analysis*, 12 LAW. AM. 59 (1980).