



Insurance and the Warehouse Industry

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INSURANCE AS IT PERTAINS TO THE WAREHOUSE INDUSTRY is often subject to misunderstanding by the depositor, the warehouse and even the insurance provider. As such, it is important to understand the following regarding insurance and the warehouse industry:

- (1) Although the warehouse has entered into a bailee/bailor relationship with the depositor, the depositor often assumes (inappropriately) that it is outsourcing all risk associated with its goods;
- (2) The Uniform Commercial Code identifies the duty of care imposed upon the warehouseman. As such, the warehouse cannot reduce its duty of care beyond that specified under the Code. Conversely, a warehouse that increases its liability beyond that specified under the Code will jeopardize its warehouse legal liability insurance ; and
- (3) Several diverse and distinct types of insurance can impact the warehouse operation.

The Warehouse as the Bailee

Public warehousing as it exists today can be documented through Common Law records to Sir William Blackstone who, in his *Commentaries on The Law*, said “if he undertakes specially to keep the goods safely he is bound to take care of them, as a prudent man would take care of his own.” Thus, Blackstone articulated the “Reasonable and Prudent Man Doctrine”, the heart of the law of bailment which governs a warehouseman’s liability for product placed in his care.

The term *bailment* is derived from the French term “*bailler*” which means “to place in the hands of.” It refers to the situation where temporary possession — as distinguished from title — of personal property is transferred from one person (bailor) to another (bailee) for a specific purpose. The characteristics of bailment are:

- (a) Transfer of possession is without intent to transfer title to the bailee.
- (b) Possession is to be for some temporary purpose.
- (c) Possession is to revert to the bailor (or his designated representative) either upon the fulfillment of the purpose of the bailment, at the expiration of a designated period of time, upon the happening of a specific event, or at the demand of the bailor unless otherwise agreed to.

The bailee (warehouseman) has care, custody and control of the product while the bailor (the depositor) retains title to the product.

Since the title to the bailed property resides with the bailor, he retains the risk of loss or damage. The bailee is only responsible to the bailor for such loss or damage to the bailed property as results from his negligence. In other words, the warehouseman's liability is limited to loss or damage to the depositor's goods attributable to the warehouseman's negligence.

Uniform Commercial Code/Duty of Care Imposed upon the Warehouseman

The Uniform Commercial Code specifies the duty of care imposed upon the warehouseman. Section 7-204(1) of the Code states:

(1) A warehouseman is liable for damages for loss of or injury to the goods caused by its 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.

The Code states that the warehouseman cannot reduce this duty of care. In other words, the warehouseman cannot state that it will be liable only for "willful negligence". Although the warehouseman cannot reduce the standard of care, he is allowed to limit the damages for which he will be liable. Section 7-204(2) of the Uniform Commercial Code states:

(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 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.

Conversely, a warehouse may be asked to increase his liability beyond the negligence standard; however, the consequence may be a loss of warehouse legal liability protection. Thus, it is advisable to exercise extreme caution when committing to a contract provision that might be construed as elevating the warehouse's duty of care, i.e., "guaranteeing the safety of the goods in storage". Many warehouse legal liability policies will not respond if the warehouse has increased his duty of care.

Section 11 of the Standard Contract Terms and Conditions for Merchandise Warehousemen specifically addresses the issue of liability as between the warehouse and the depositor:

Liability and Limitation of Damages – Sec. 11

(a) The Warehouseman shall not be liable for any loss or injury to goods stored however caused unless such loss or injury resulted from the failure by the warehouseman to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances and warehouseman is not liable for damages which could not have been avoided by the exercise of such care.

(b) Goods are not insured by the warehouseman against loss or injury however caused.

(c) The Depositor declares that damages are limited to _____, provided, however, that such liability may at the time of acceptance of this contract as provided in Section 1 be increased upon Depositor's written request on part or all of the goods hereunder in which event an additional monthly charge will be made based upon such increased valuation.

(d) Where loss or injury occurs to stored goods, for which the warehouseman is not liable, the Depositor shall be responsible for the cost of removing and disposing of such goods and the cost of any environmental clean up and site remediation resulting from the loss or injury to the goods.

Limitation of Liability

In accordance with Section 7-204(2) of the Uniform Commercial Code, the limitation of damages must be by "a specific liability per article or item, or value per unit of weight." Examples of this are \$100 per drum or \$10.00 per pound.

Another common basis for the limitation of damages is by a multiple of the base storage rate. Many warehousemen use such a multiple and most courts have accepted it as consistent with the UCC provision that allows the warehouseman to limit his liability for loss or damage to the goods "... by setting forth a specific liability per article or item, or value per unit of weight, beyond which the warehouseman shall not be liable." Where the storage rate is \$5.00 per case or \$5.00 per hundred pounds then the calculation is 250 x \$5.00 to determine a limitation that is on a per article or per pound basis and thus consistent with the statute. However, if the storage rate is \$5.00 per square foot the resulting calculation is not a limitation "per article or unit of weight". Consequently it is not consistent with the statute and will not be enforced by the court. Recently, a federal district court in Kansas held that limiting damages by a multiple of the base storage rate was not an acceptable limitation method as it did not conform with the Uniform Commercial Code's specifications.

In determining the appropriate level of warehouse legal liability insurance coverage, it is important to determine the value of the goods in storage. Although this figure may vary depending upon current market price, percentage of occupancy, turnover, etc., an estimate of value should be constructed. With that information as the maximum exposure the warehouseman can price warehouse legal liability insurance coverages. It can determine what amount of warehouse legal liability insurance it can afford to carry. Then, it can select the limits of liability which will be consistent with such coverage. The limitation should correspond to the warehouseman's individual circumstances. The limitation should fit its need rather than some mythical industry standard.

Some customer contracts require that valuation at the time of loss be based on the selling price of the goods. However, warehouse legal liability policies will not respond in this situation as the warehouse can only be held liable for the manufactured landed costs of the goods. All warehouse legal liability policies exclude additional assumed liability on the part of the warehouse.

Additional Insurance

Contracts often contain insurance clauses that require the warehouse to maintain Comprehensive General Liability, Workers Compensation and Warehouse Legal Liability insurance policies. Frequently, the Depositor may request to be identified as an additional insured on the various insurance policies. It is important for the warehouse to discuss this issue with its insurance carrier before committing to adding the depositor as an additional insured on the various types of policies. Although there may not be a problem with adding the customer as an additional insured on the general liability policy, to do so on the warehouse legal liability policy may have detrimental consequences. Warehouse legal liability is a third party liability policy; it will pay for loss or damage to property of others while in the warehouse's care, custody, and control and attributable to warehouse negligence. Adding the customer to the warehouse legal liability policy would negate coverage since the Depositor cannot be liable to itself.

It is crucial that the depositor understands that it cannot outsource all risk and liability associated with its product simply by outsourcing its logistics needs. The International Warehouse Logistics Association's non-negotiable warehouse receipt specifically states, "the property covered by this receipt has not been insured by this Company for the benefit of the depositor against fire or any other casualty." As such, it is important that the depositor obtain adequate insurance for its product while it is in the possession of the warehouse.