

## **BAILEE VS. WAREHOUSE LIABILITY**

Do not confuse these terms! A bailee is charged with different responsibilities for property it holds than a warehouseman. Separate and distinct insurance coverage is needed for each.

A bailee is one to whom another entrusts property for a purpose. Customarily the purpose will encompass; storage, consolidation and deconsolidation, packing and processing. Typical examples of bailees are; common carriers (truckers, airlines, vessel lines, rail lines), warehouse operators, professional packers, garage keepers and dry cleaners.

A bailee is to maintain the property entrusted to them, while in their care, custody and control in a "safe condition". Courts use the basis of "ordinary care" and "negligence exhibiting that care" to establish the level of whether the property was maintained in a safe condition. This is defined as the amount of care a "prudent" person will use for his own property. Despite this definition, different levels of care are applicable to different properties. The amount of care and safeguarding a bailee applies to jewelry is to be much greater than that for bundled rags.

Usually a bailee is in possession of the property entrusted to them or at least represents to the owner their property is in the bailee's custody. Because of this and since the bailee is in the business of caring for property, the courts generally hold the bailee to be "absolutely liable" for the property. They are held to a "high degree" of care. In most cases, if the property is returned damaged or not returned at all the bailee is liable.

Bailees are generally permitted to limit scope and monetary amount of their liability. Interstate Commerce Commission and Public Utilities Commission regulate truckers; Warsaw Convention regulates most international airlines; Carriage of Goods by Sea Act regulate most vessel line and the Uniform commercial Code determines the limitation of liability for warehouse operators. The regulations allow the limitation of absolute liability and deviation from appropriate care because of the premise that a common carrier can not always be privy to the contents and value of enclosed (packaged) property and therefore can not be expected apply the proper level of care required.

There are essentially three types of warehouse operators. A public warehouse is one that will accept property for storage from anyone. A private warehouse is used by one entity for storage of its own property. A bonded warehouse is controlled by the warehouse operator and Customs and is available to shippers necessitating temporary storage of cargoes and proportional payment of duties.

For reasons mentioned, a warehouse operator usually will take advantage of the regulations to limit their liability. In order to do so the limitation must be expressed to the property owner. This may be done in writing or orally. We strongly suggest this be done in writing. A warehouse receipt is the customary written form. The receipt, governed by the Uniform Commercial Code, will state the warehouse operator is liable for their negligence and specify certain exclusions. Customary exclusions are acts of God, war, strikes, civil commotion, extreme changes in

temperature, deterioration, vermin and wear and tear. The customary monetary limitation is fifty cents per pound and or fifty dollars per warehouse receipt. For an additional storage rate the warehouse operator will waive their limitations.

"Acts of God" are often listed as an absolute exclusion. The reason being, a warehouse operator or other bailee can not control such forces of nature (earthquake, hurricane, windstorm, etc.). However, there are circumstances where liability may be imposed. If a warehouse operator had warning of an impending loss and could have taken reasonable steps to avoid it they may be found liable. An example to illustrate this is; a situation where a warehouse is located along a river in an area prone to flooding from hurricanes and the ground floor had been flooded previously causing damage to cargo stored there. The warehouse operator would be negligent not to move the cargo to a higher floor or alternative location when warned of an approaching hurricane.

Disclaimers are sometimes used by bailees to state they are not liable for any loss or damage to property in their care, custody and control. A common example is receipts issued by parking garages. A bailee can not disclaim their liability. The disclaimers have been found by the courts not to be valid and binding.

Defense costs are often a substantial expense incurred by the bailee when presented with a claim for loss or damage. They can easily exceed the monetary amount of damages. Not all insurance policies include the defense costs as part of the coverage purchased by the bailee. At times the coverage is included but limited to a low percentage of the policy insurance limit.

Debris removal is another cost sometimes incurred by the bailee. They represent the cost to have damaged property contained, removed from the storage premise and properly disposed. Currently, debris removal costs are further impacted by environmental regulations.

Helpful suggestions:

You should assess the nature of your operations and corresponding documentation with an independent party or parties. We recommend contacting your insurance broker and possibly an attorney. As insurance brokers specializing in the Forwarder/Broker industry, Roanoke Brokerage Services utilizes the services of independent cargo and property surveyors and our "in house" legal counsel to support out risk management analysis.

If you are holding cargoes in your warehouse for short periods of time ("just overnight") and not issuing a proper warehouse receipt nor insuring the cargo for the shipper, then purchase a bailees's policy (or endorsement to your cargo policy).

If you are issuing warehouse receipts, have your insurance broker and or attorney ensure it suits your operation and is in accordance with the Uniform Commercial Code. Purchase warehouse legal liability insurance

Consider offering the cargo owner "shipper's interest" insurance and provide "all-risks" coverage.

As applicable to the insurance coverage you purchase, ensure it contains adequate limits and provides defense costs and debris removal extensions.

If your insurance broker is not proficient to your satisfaction with this important subject, consider an alternative.