

# Sitting duck?

*Liability and insurance cover after a 'dirty bomb' attack: two lawyers' views.*

BY ROBERT MOTTLEY



**T**he formerly unthinkable has become plausible: could your company continue to do business if your vessel or cargo happened to be the means used for a terrorist attack involving a weapon of mass destruction?

A short answer is that even the most famous and well-heeled corporate brand names in transportation and logistics would not survive for long in the worst-case legal aftermath of such an event, being undone by exposure to liability and public opprobrium.

Legal consequences would depend on the nature and extent of damage.

A "dirty bomb" would spread radiation or disease over the affected vessel and the immediate area around it. Based on data released by the Federal Emergency Management Agency (FEMA) and the Department of Homeland Security, in the port of New York-New Jersey, if the incident occurred in Port Newark, N.J., immediate damage would likely be confined to container terminals in Port Newark, Port Elizabeth, and shipping channels leading to the port area.

In the adjacent ports of Los Angeles and Long Beach, such an incident in either port would affect newly built terminals, a considerable part of the infrastructure of both ports including three bridges, nearby refineries and residential neighborhoods.



While FEMA and DHS offer scenarios for more devastating categories of weapons of mass destruction in major U.S. ports, for this article, two admiralty attorneys on the East and West coasts: Dennis L. Bryant, of Holland & Knight in Washington, D.C., and Albert E. Peacock III, of Keesal, Young & Logan in Long Beach, Calif., discussed likely legal consequences relating to liability and insurance following a terrorist attack, in which the weapon of mass destruction would be a “radiological dispersal device” or “dirty bomb.”

**Preceding Events.** In a hypothetical scenario analyzed by Bryant and Peacock, here’s what occurred before such a device detonated in a U.S. port:

A major U.S. apparel importer, which

happened to be approved by U.S. Customs and Border Protection for its Customs-Trade Partnership Against Terrorism (C-TPAT) program, filled a 20-foot container with men’s and women’s jeans at a sourcing plant in China’s Pearl River Delta. The container was then sealed at the plant.

The originating apparel shipper used a well-known freight forwarder to arrange for shipping the container of jeans to the United States.

That trip had three segments: by truck from the manufacturer’s plant to Shanghai, by feeder vessel from Shanghai to Hong Kong, and by a larger containership from Hong Kong to the United States.

The originating importer’s freight forwarder asked a non-vessel-operating common carrier to hire Carrier A to ship the container from Shanghai to Hong Kong on the first part of its journey. The NVO subsequently arranged for a Chinese trucking company to pick up the container at the manufacturer’s plant and deliver it to Carrier A in Shanghai.

While the container was en route to Shanghai, terrorists halted the truck, prized the hinges from both of the container’s rear doors, and removed the doors without breaking the shipper’s seal. Then, the terrorists braced their dirty bomb between pallets of jeans bound up in shrink wrap, and put the doors back on the container. The truck continued to Shanghai.

Suspecting nothing amiss, Carrier A shipped the container on a feeder vessel from Shanghai to Hong Kong.

At that point, Carrier B, also contracted by the NVO, transported the container on a 5,000-TEU vessel to a U.S. port.

Dockside, a stevedoring company was using a port-owned crane to remove the container from Carrier B’s vessel. Just as the crane’s lifting bars touched the container, the bomb inside exploded, spreading lethal radiation over an area equivalent to 40 city blocks.

## Liability exposure

The major players in this sequence of events are the originating importer, the importer’s freight forwarder, the NVO used by the freight forwarder, and carriers A and B.

Lesser players include the stevedoring company, the port that owned the crane and the dock beside the vessel, and the crane manufacturer.

All of them face liability, in varying degrees, for the explosion and its aftermath.

A torrent of lawsuits can be expected from victims and shippers of other cargo lost or ruined in the incident.

“You’ve got adjacent ships, the port facilities where they are berthed, land-based property, and potentially numerous civilian casualties,” Bryant said. “Let’s assume the people who have incurred losses are unable to sue the terrorists. They are going to look for the deepest pockets among the major players.”

There is already case law to suggest what might happen. “What did people who suffered losses on 9/11 do afterwards? Most of them accepted the government’s buyout,” he said.

The U.S. government established an arbitrator to determine what compensation should be. “The catch was that, if you took the government’s money, you couldn’t sue anybody else — except the terrorists,” Bryant explained.

“Most people took the buyout route. Some families received over \$1 million. But about 100 families or so decided to sue the airlines; the airports; the aviation security companies in charge of running security checks at airports; Boeing, the manufacturer of the jets that were hijacked; and the Port Authority of New York and New Jersey,” he said.

**Duty Owed.** The plaintiffs filed their suit [*In re September 11 Litigation No. 21 MC 97 (AKH)*] in the U.S. District Court for the Southern District of New York.

Banding together, “the defendants filed a motion for summary judgment, saying ‘there’s no way we can be held liable because it wasn’t our fault — the terrorists did it, not us,’” Bryant said.

The defendants also argued, in Bryant’s words, “there’s no way we could have known what the terrorists would do. No one had ever hijacked passenger jets and turned them into flying bombs before 9/11.”

The district court, “in a very detailed, well-reasoned decision,” Bryant said, denied the defendants’ motion for summary judgment on Sept. 9, 2003. A trial will shortly be held in the same venue.

First, the court asked if the airlines and Boeing had owed a duty to people on the ground.

“The answer was ‘yes, they did.’ There is plenty of case law where people injured or killed on the ground can sue airlines and airplane manufacturers for plane crashes,” Bryant said.

The court also said the airline had an

obligation to lock cockpit doors, and that merely complying with federal regulations wasn't necessarily good enough.

The court's rationale went like this, in Bryant's words: "We know terrorists have hijacked airplanes. We know they've also undertaken suicide missions. It's not that much of a leap to have anticipated a suicide hijacking."

In the case of Pan American Flight 103, which a bomb destroyed over Lockerbie, Scotland, in December 1988, killing 259 passengers and crew on the plane and 11 persons on the ground, the victims' families subsequently sued Pan Am.

"Pan Am said in court that it thought in good faith that it was going a good job," Bryant noted. "The courts replied, 'no, you didn't have a robust enough security system. You let the bag with the bomb get on Flight 103. Failing to comply with federal regulations constitutes gross negligence, so you can't limit your liability.' The result was that Pan Am was sued out of existence."

**Reality Is Not Legality.** The Pan Am and 9/11 cases are portents of how courts are likely to rule after an incident involving a weapon of mass destruction.

Basically, "if you don't comply with federal regulations for maritime security, you won't be able to limit your liability," Peacock said.

"Assume the dirty bomb was on a foreign-flag vessel. The first thing that a shipowner will do after an incident — and in our hypothetical case, that means Carrier B — is to file in federal court for a limitation of liability," Bryant said.

"The judge will first ask, 'did you comply with international and U.S. Coast Guard requirements?' he explained. "Carrier B will say 'yes. The Coast Guard said if I did what the international requirements said, then I'm good with the Coast Guard.'

"The judge will then ask, 'did you comply with all applicable federal laws?'" Bryant noted. "Here's where it gets dicey. Carrier B may have to answer, 'no Your Honor, I didn't, because the Coast Guard said I didn't have to comply.'

"The Coast Guard has said, in its administrative enforcement of the will of Congress, that a foreign-flag vessel which meets internationally approved security requirements of its home nation or flag register is deemed to be in compliance with U.S. security statutes," Bryant said.

"Congress has said very specifically to the Coast Guard, 'hold it — you don't have the authority to say that. We don't agree with your interpretation of our statute.'

"The Coast Guard has replied, 'we're doing what we have to do as a practical matter



***"If a ship vaporizes or is rendered irrevocably radioactive, there's no general average because there is no venture left to save."***

**Albert E. Peacock III**  
attorney,  
Keesal, Young & Logan

and in a reasonable way to enforce the law,'" Bryant told *American Shipper*.

However, that accommodation with reality doesn't satisfy legality.

In the hypothetical case at hand, "the judge will say to the beseeching shipowner, 'the federal statute says that every ship that operates in U.S. waters will submit a security plan to the U.S. Coast Guard for review. You didn't, so you can't limit your liability.'

"Only a handful of foreign-flag carriers have been smart enough to file security plans with the Coast Guard anyway, even though the Coast Guard apparently hasn't reviewed them," Bryant said. "I urge all shipowners to file vessel security plans with the Coast Guard, and keep the proof of having done so."

If Carrier B can show the judge that its vessel involved in a terrorist incident did file such a plan before the event, then carrier B may be allowed to limit its liability.

"You have to understand that after an incident, judges are going to be looking for ways not to limit liability. Why? Because courts look with disfavor on such limits. They set a very high standard for qualify-

ing for a limit. Carrier B will have had to comply with all requirements, to the letter — or else," Bryant said.

**Vessel's Value.** Admiralty law relating to maritime disasters gives shipowners a way of reducing liability that other parties to an incident involving a weapon of mass destruction wouldn't have.

When the *Titanic* sank in 1912, several lifeboats were saved after the liner *Carpentaria* reached New York with survivors.

"The White Star Line hauled a lifeboat into court and said, 'that's all the *Titanic* is worth now: the value of one lifeboat,' and the court agreed," Bryant noted.

If a vessel with a weapon of mass destruction on board was irrevocably ruined by radiation or vaporized, then the value of the ship is zero, and so is the shipowner's liability.

"In our hypothetical case, even if Carrier B is found to be liable, Carrier B only has to pay what the value of the vessel is reckoned to be after an incident," Peacock said.

"Everyone else, including any cargo interests involved, has to face the standard legal regime, which theoretically is unlimited liability," Bryant said.

**No Cover From C-TPAT.** The originating shipper, in particular, should not expect any leniency by a court for having been part of the C-TPAT program.

"If the weapon that detonated was in a container that had passed speedily into the U.S. because the shipper was part of the C-TPAT program, that status won't bring any limit of liability for a shipper," Bryant said. "It could make the situation worse, because the originating shipper had an obligation, as a C-TPAT member, to enforce augmented security, of which there had so obviously been a breach.

"It's very well known that Customs and Border Protection doesn't really audit anyone who signs up for C-TPAT, or verify afterwards that they have indeed spruced up their security," Bryant said.

**Carrier A.** Matters could also go badly for Carrier A, which shipped the container with the dirty bomb from Shanghai to Hong Kong.

"Suppose that when the container was presented to Carrier A in Shanghai, the paperwork wasn't all in order. Things were fishy, but Carrier A accepted the container anyway," Bryant said.

After the detonation in a U.S. port, "let's say that Carrier B was able to limit its liability to the now non-existent value of its ship. Where does that leave Carrier A?

"As the originating party, Carrier A is

