SECURITY AND THE LAW IN THE WAKE OF SEPTEMBER 11, 2001

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ABSTRACT: *Everything has changed since the terrorist attacks against the United States on September 11, 2001. With more than 360 ports and 3,700 terminals handling passengers and cargo, the U.S. government quickly realized that the maritime industry was vulnerable and that the apparent gaping hole in our national security must be fixed. Numerous initiatives, including legislative, regulatory, and ad hoc actions, are being implemented to ensure the maritime industry is ready in case it is the "next target." Concomitant with these efforts, come changes in existing standards and liabilities, including reduced rights and enhanced enforcement. This paper discusses the maritime-related implications of the emerging security regime in the United States post-September 11 including: (1) new and proposed legislation affecting vessel and facility owners and operators, (2) how increased security inspections may be used to enhance enforcement efforts, and (3) how the terrorist attacks have "raised the bar" with regard to owner and operator liability. Pollution preparedness and liability implications are also explored, including changes in liability and response actions resulting from a terrorist attack. Lastly, recommendations on appropriate preventive measures are provided.*

Background

It has been said many times, but it still rings loud and clear, that the world will never be the same after September 11, 2001. Immediately following the terrorist attacks, the Congress, United States Coast Guard, United States Customs Service, Federal Bureau of Investigation (FBI), and other federal agencies quickly realized that vessels and maritime-related facilities were vulnerable to terrorism because of the wide variety of trade and commerce carried out at U.S. ports and by the very open and exposed nature of port operations. U.S. ports were potentially gaping holes in the United States' international boundary, with little security infrastructure or federal funding for security. As a result, federal personnel and equipment resources were immediately diverted to security-related patrols, boardings, and other measures intended to reduce the threat of terrorism to U.S. ports, and vessels operating in U.S. waters, on an *ad hoc* basis until vulnerabilities were identified and formal measures could be put in place.

Congress passed the USA Patriot Act (discussed below) just a few months after the terrorist acts and is in the process of finalizing comprehensive port and maritime security legislation that includes many mandates directly affecting vessel movements and port activities. In addition, the Coast Guard is moving forward on its own initiative under existing statutory authority to assess and develop an expanded port security regime related to physical security, operational measures, and access control.

Legislative/regulatory implications

There is currently no comprehensive U.S. national port security policy. One of the first major new anti-terrorism laws, enacted on October 26, 2001, is known as the USA Patriot Act, Pub.L.No. 107-56 (the Patriot Act). This Act gives government agents new resources and methods to combat terrorist organizations, but at the same time reduces rights that companies previously enjoyed. Among other things, the Patriot Act allows, under certain circumstances, execution of a federal search warrant without notice to the owner of the premises being searched. This expanded power is not limited to terrorist-related investigations. Secret court orders may now be obtained for the production of business records related to a terrorist investigation. Applicants for a state license to operate a motor vehicle transporting hazardous substances must now go through a federal certification process to determine that the individual does not pose a security risk warranting denial of a license. In addition, this Act requires that the Department of the Treasury adopt regulations to enhance its ability to detect money laundering. This provision applies to "financial institutions," which are broadly defined to include banks, travel agencies, real estate companies, auto, aircraft, and boat dealers, and other businesses designated as one "whose cash transactions have a high degree of usefulness in criminal, tax or regulatory matters."

Security legislation more specific to the maritime sector, the Port and Maritime Security Act of 2001 (S. 1214), was passed by the Senate on December 20, 2001. This proposed legislation would, among other things, require U.S. and foreign-flag carriers, vessel/marine terminal owners and operators, and port authorities to: (1) provide cargo/passenger manifest pre-arrival information by electronic transmission in advance of entry and prohibit export of cargo unless properly documented; (2) provide enhanced levels of security on vessels, including armed security; (3) prepare and submit vessel/facility security plans to the U.S. Coast Guard for approval and comply with other programs for vessels and facilities; (4) provide travel advisories to passengers and require enhanced forms of identification to crewmembers; and (5) participate in port security field exercises, conduct physical searches and background checks, and pay related fees. In addition, the proposed legislation provides the Secretary of Transportation (Secretary) with enhanced vessel enforcement

authority to ban or restrict entry of U.S.-flag or foreign-flag vessels to U.S. ports if it is determined that a foreign port visited by a vessel has inadequate security measures. It also requires the Secretary to establish local port security committees involving the private sector and port authorities.

The House passed its version of maritime security legislation, the Maritime Transportation Antiterrorism Act of 2002 (H.R. 3983), on June 4, 2002. The House bill takes a slightly different approach than the Senate's and only focuses on jurisdictional areas covered by the Department of Transportation. The bill is modeled on planning requirements contained in the Oil Pollution Act of OPA 90 (OPA 90) and is less detailed than the Senate version. A conference committee was formed in June 2002 to resolve the differences between the two bills with the goal of enacting comprehensive vessel and port security legislation.

Meanwhile, the Coast Guard, immediately following the terrorist attacks, had established various port security zones and took security-related actions (some without rulemaking), such as restricting the movement of vessels. In addition to the Coast Guard's nationwide measures and risk assessments, each Marine Safety Office has employed security measures it deems necessary to ensure the safety and security of its port. These offices have also taken on the responsibility of issuing security planning directives to certain vessel operators. The Coast Guard has broad existing authority under the Magnuson Act (50 U.S.C. §§ 191 *et seq.*) and the Ports and Waterways Safety Act (33 U.S.C. §§ 1221 *et seq.*), as amended by the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 (46 U.S.C. §§ 1801 *et seq.*), to implement and enforce various security measures. This is being done with great diligence.

In January 2002, the Coast Guard held a workshop to receive input on port security issues in its first major step to develop formal port security policy and regulations that may encompass: (1) vulnerability assessments; (2) security plans, security committees, and sharing of information; (3) access control for personnel, passengers, and cargo (*e.g.*, criteria for background checks, personnel credentials, check points for screening); and (4) physical security standards (*e.g.*, alarms, lighting, guards, and personnel on watch). The Coast Guard has indicated that it intends to promulgate Navigation and Vessel Inspection Circulars followed by regulations to implement its new security regime in the near future.

With regard to vulnerability assessments, Congress appropriated money to the Transportation Security Administration (TSA) for grants to conduct port security assessments and improvements. A selection board consisting of the Under Secretary of the TSA, Maritime Administrator, and Commandant of the Coast Guard awarded grants in the amount of $92.3 million in June 2002 to 51 ports located throughout the nation. Some vessel operators were also awarded grant money. A total of $78 million was awarded to enhance facility and operational security, $5 million to evaluate the vulnerability and identify mitigation strategies for certain facilities, and $9.3 million to fund new technology security projects. In addition, the Coast Guard is conducting more in-depth port vulnerability assessments for the nation's most critical commercial and military seaports.

Enhanced enforcement

As noted above, under the broader current definition of "national security" stemming from the September 11 terrorist attacks, federal agencies have quickly shifted personnel and equipment resources to security-related patrols, investigations, boardings, and other measures intended to reduce the threat of terrorism. This has resulted in increased scrutiny of maritime-related activities and has expanded opportunities to take enforcement action by the mere fact that government inspectors/investigators have a much greater presence on vessels and at facilities.

Moreover, the Department of Justice (DOJ) and other federal agencies have aggressively pursued enforcement actions related to environmental crimes in the last few years and the increased security initiatives provide additional opportunities to discover other violations. At the end of fiscal year 2001, the Environmental Protection Agency (EPA) reported that it had recovered a total of $95 million in criminal fines and restitution. In addition, individual defendants were sentenced to a combined total of 256 years in prison, which represents an increase of more than 100 years from fiscal year 2000.

The general view of the federal government is that these enhanced security inspections may be used as "targets of opportunity" to look for an array of other regulatory violations, even though looking for such violations is not the objective. Accordingly, it is likely that the number of civil and criminal investigations and enforcement actions will increase due to these enhanced security measures and close coordination among federal agencies.

Of note, the following five factors have been cited by DOJ as often determative of whether to pursue a criminal action: (1) failure of a vessel owner or operator to address known deficiencies affecting the safety of the vessel; (2) failure to report spill incidents or hazardous conditions aboard the vessel; (3) false statements made to federal agents; (4) falsification of required vessel logs; and (5) obstruction of justice (*e.g.*, instructing crew members not to talk to federal agents, hiding/destroying documents, or otherwise impeding an investigation).

Increased liability

The bar has clearly been raised with regard to owner and operator liability resulting directly or indirectly from terrorist incidents. In other words, what was prudent for an owner/operator to do in terms of security before 9/11 is no longer adequate. Everyone is now on notice and must take appropriate preventive measures.

Under principles of general maritime law, a negligence action may be brought by virtually anyone who suffers a loss or injury in an admiralty setting. The elements of maritime negligence are: (1) the existence of a duty which obliges a person to conform to a certain standard of conduct in order to protect others from unreasonable risks; (2) a breach of that duty; (3) a causal connection between the offending conduct and resulting injury (proximate cause); and (4) actual loss, injury or damage suffered by the plaintiff. Before September 11, an owner or operator had a much lower standard of care related to prevention of a terrorist attack because such an attack was arguably unforeseeable. Accordingly, assuming that a terrorist attack is found to be the proximate cause of actual injuries or damages suffered by a plaintiff, an owner or operator faces a heavy burden to demonstrate that adequate precautions were implemented to protect persons and property, taking into account the magnitude and gravity of possible injuries, deaths, and damages that could result from a terrorist attack.

Furthermore, the maritime industry may be subject to additional significant liabilities should a terrorist incident result in

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a pollution event. OPA 90 makes the responsible party of a vessel or facility strictly liable for damages and removal costs resulting from an oil spill up to its limits of liability. 33 U.S.C. § 2702. A responsible party is not liable for removal costs and damages if the responsible party can prove, *by a preponderance of the evidence*, that the oil discharge was caused *solely* by (1) an act of war or (2) an act or omission of a third party where the responsible party exercised *due care* with respect to the oil concerned and *took precautions against foreseeable acts or omissions* by any such third party. *Id.* § 2703. However, a responsible party may face an insurmountable challenge to demonstrate that this standard has been met in a case involving an oil spill incident resulting from a terrorist attack. As a general rule, courts narrowly construe defenses under a strict liability statute.

The courts have not yet examined the "act of war" defense under OPA 90, however, the term has recently been analyzed under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a strict liability statute that provides the same defenses as OPA 90. In *United States v. Shell Oil*, No. 00-55027, 2002 U.S. App. LEXIS 12845 (9th Cir. 2002), certain oil companies attempted to invoke CERCLA's act of war defense related to the cleanup of a Superfund site contaminated with hazardous waste resulting from the production of aviation fuel during World War II on the basis that there was no alternative means of disposing of the waste. Although the court noted the absence of judicial precedent and legislative history explaining the term "act of war," it dismissed the defense after citing CERCLA's sweeping liability provisions and narrowly drawn defenses.

The use of the "act of war" defense in the context of a terrorist attack after September 11 may be possible, though will be difficult because the defense presumes governmental sponsorship and the formalization of hostilities – the actions of one state against another as opposed to independent organizations or individuals. Therefore, it would likely prove difficult to prevail on this argument unless it can be demonstrated that a "War on Terrorism" involving armed conflict with the military forces of these terrorist groups is equivalent to a formalized war against a recognized international state.

In order to prevail under the "act of a third party" defense, the burden would be on the responsible party to show that (1) the incident was cause "solely" by terrorists; (2) "due care" was exercised; and (3) adequate "precautions" were taken against foreseeable acts and consequences.

In light of September 11, the courts will probably regard any subsequent attack as "foreseeable." If those attacks are regarded as such, the next question would be what precautions responsible parties took to avoid liability. Proper precautions may now include vulnerability assessments, implementation of adequate security measures, and the inspection of cargo and persons. Finally, perhaps a novel defense can be crafted under an OPA 90 provision that allows the responsible party to fashion a defense using a combination of the "act of war" and "act of a third party" defenses. 33 U.S.C. § 2703(a)(4).

Even if a responsible party raises a third party defense, the responsible party would still be responsible for the payment of removal and cleanup costs to any claimant under OPA 90. However, the responsible party would be entitled by subrogation to all rights of the United States Government and any claimants to recover those expenses from the third party or the Oil Spill Liability Trust Fund. *Id.* § 2702(d)(1).

In summary, it will be most difficult indeed, for a responsible party to prove that a terrorist act was unforeseeable and that adequate precautions were taken. Regardless of security requirements that may come into effect to implement new federal policy or legislation, it is clear that the physical security and safety of a vessel or facility will remain the primary responsibility of the owner or operator, and not the government.

Pollution response implications

The pollution planning and response regime of OPA 90 requires a responsible party to prepare a vessel/facility response plan and respond to a spill incident in accordance with its response plan; an applicable area contingency plan; and a national contingency plan. In addition, although the Federal On Scene Coordinator (FOSC) is ultimately responsible for ensuring that a response is carried out expeditiously to minimize harm to the environment, OPA 90 envisions that the responsible party will take the lead to clean up the spill with commercial resources. After September 11, a responsible party needs to think through the issues related to responding to a spill incident resulting from a terrorist incident and evaluate priorities to ensure that personnel and property are adequately protected from an ongoing attack, while ensuring that its limits of liability are protected. The limits of liability may be broken if reasonable cooperation and assistance is not provided in connection with removal activities. 33 U.S.C. § 2704(c)(2)(B).

Although there is little guidance in this area, the Coast Guard promulgated an Incident Management Handbook (IMH), Commandant Publication P3120.17, in April 2001 that contemplates a response to a terrorist incident resulting in a hazardous materials discharge. Although the IMH is designed to provide guidance to Coast Guard personnel on the use of the National Interagency Incident Management System and Incident Command System (ICS) during response operations, it also provides useful information to commercial marine industry personnel responding to such an incident. The IMH replaces the oil-specific Field Operations Guide and has been expanded to apply the ICS concept to all types of incidents, including terrorism.

It is noteworthy that this guidance recognizes that many terrorist incidents may be hazardous materials incidents and should be responded to under the National Response System. Due to the unique nature of such a spill, the Unified Command may find themselves working for the FBI or the Federal Emergency Management Agency (FEMA). The FBI is the lead agency responsible for "Crisis Management" (*i.e.*, the law enforcement response to a terrorist incident) and FEMA is the lead agency responsible for "Consequence Management" (*i.e.*, measures to mitigate the effects of a terrorist incident). Some Coast Guard personnel now have access to "First Responder Training" for these such incidents. This training will help them to "back off" if it is determined that a terrorist incident is ongoing or to respond if the terrorist threat has abated. Thus, it is important to note that the appropriate immediate response by private responders to a pollution incident resulting from a terrorist activity may be to remain clear of the area until it is determined that it is safe to respond. Close coordination with the FOSC should be maintained during such events to properly assess how to respond.

Conclusions and recommendations

There is clearly no room for a "business as usual" approach after the terrorist attacks on the World Trade Center and the

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Pentagon. New policies and legislative mandates have been put in place, with others imminent. As a result, we are seeing reduced rights, enhanced enforcement, and increased liability. Ultimately, a comprehensive maritime security regime will become a reality through new legislation and regulatory initiatives. In the interim, various policies and interim governmental security measures are being applied on a regional or local basis.

The stakes are too high, however, for the maritime industry to wait until the government formalizes its security regime. The maritime industry is now on notice that terrorist attacks can happen again and that the standard of care is greater. In short, the bar has been raised in terms of what an owner or operator must do to be considered a prudent operator. So what should be done?

- Assess vulnerabilities now and take appropriate measures to address any vulnerabilities identified. Do not wait for Congress, the Coast Guard or other federal agencies to dictate what should be done.
- Put a crisis plan in place. Consider: (1) designating a security officer; (2) developing a written plan to address threats, preventive measures, and emergency actions; (3) coordinating actions with law enforcement personnel; (4) restricting access to operating areas; (5) instituting procedures for reporting suspicious activity; (6) modifying training and employee information procedures to include security; and (7) conducting sweeps for suspicious activity.
- Review pollution response procedures and ensure that they take into consideration a pollution event that was caused by a terrorist attack. Response plans should be revised accordingly.
- Understand legal rights, train employees to understand their rights and what to do if law enforcement authorities want to question them or conduct searches.

In summary, taking these actions makes good business sense and will greatly assist in preparing for, and responding to, a terrorist incident and enforcement actions, as well as minimizing your liability exposure.

Biography

Jon Waldron, a partner in the firm of Blank Rome LLP (formerly Dyer Ellis & Joseph), specializes in maritime, international and environmental law. His expertise includes marine transportation regulatory and environmental compliance matters. He received his undergraduate degree from the United States Coast Guard Academy and a J.D. with honors from the University of Miami, Florida.

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