



Enviroterrorism: Long-Term Legal Challenges

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There is no better time than the present to prepare for enviroterrorism.

Even now, many months after the events of September 11, 2001, boards of directors remain aware of the need to anticipate possible catastrophic events caused by terrorism. Environmental protection and regulation are at the front line of the world's ongoing war on terrorism. Terrorism through release of biological, chemical, and radiological agents is predicated on use of the environment as a medium or weapon of mass harm and destruction. As a group, such acts can be referred to as "enviroterrorism." (This term should be distinguished from "ecoterrorism," which has frequently been used to describe crimes committed allegedly to protect the environment.) Measures and technology aimed at preventing or mitigating domestic and international enviroterrorism could eventually become a standard part of our nation's strategy.

Anticipating Legal Challenges

It is much too early to assess the full dimensions of the coming long-term legal challenges posed by enviroterrorism, but it seems prudent to try to anticipate them and to be positioned to confront them efficiently and effectively.

The following list is an effort to anticipate potential areas of long-term legal change in the fields of environmental protection and regulation, and, in some cases, to suggest strategies that may prove helpful in preparing for it. It also is a modest prototype for the kind of global checklist that corporate boards will want to develop in planning how they will prepare and respond to the new realities.

Such a checklist can be particularly valuable for directors charged with oversight of legal compliance and/or risk management.

Common Law Duty of Care

Common law negligence claims typically turn on whether or not a defendant exercised due care in connection with acts or omissions that have resulted in injury or damage to a plaintiff.

Now that the average person is on full notice about the possibility of terrorism, is it reasonable to expect that companies will evaluate their activities and operations in light of reasonably foreseeable terrorism-related dangers to their employees, customers, vendors, and the public?

Will common law standards of care one day encompass a duty to minimize harm to people and property after a terrorist act the same way standards evolved decades ago in connection with the "crashworthiness" of automobiles?

In response to such questions, it seems prudent to consider reasonable precautions necessary to avoid or minimize such dangers. It seems possible that anti-terrorism audits might one day become a significant liability prevention tool just as environmental audits are now used in certain industries.

Federal Regulatory Standards

Federal regulations regarding environmental quality standards and employee safety and health may evolve to include antiterrorism provisions.

Worker and Public Safety and Health

The *indoor* environment area is one of the most obvious places in need of evaluation in light of reasonably foreseeable risks posed by terrorism (*e.g.*, mail room anthrax risks). The *general duty* clause in Section 5 (a)(1) of the federal Occupational Safety and Health Act (OSH Act) could, at least in theory, expose employers to liability for failure to protect workers from foreseeable acts of terrorism even in the absence of specific regulations. That section generally requires employers to furnish a workplace that is free from recognized hazards that are likely to cause death or serious physical harm to employees. For this reason, as well as others, anti-terrorist evaluations or audits may make increasing sense in the area of worker safety and health protection. Proactive companies also may want to participate in industry consensus groups, if any, that seek to develop anti-terrorism practices in the workplace.

New Environmental Permits/ Performance Standards

To protect both worker and public health, companies would be wise to design programs that can prevent or minimize human and environmental impacts caused by the uncontrolled release of, and exposure to, toxic or hazardous substances. Air quality, water quality, and

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SUMMARY

The risk of future terrorist acts has legal implications for boards of directors under the duty of care as well as federal statutes. Here is a guide to these potential sources of liability. ▸

waste management permits and programs often require prudent management practices or contingency/emergency plans in the operation of permitted facilities. Future permit writers or agency enforcement officers could possibly require permittees or other regulated entities to evaluate potential risks to workers and the public posed by potential terrorist activities. Areas that might be covered include:

- ▶ catastrophic chemical releases
- ▶ contamination or interruption of water supplies, and
- ▶ pollution control equipment outages.

It is also not unimaginable that anti-terrorist measures could be incorporated into technology-based pollution control standards under the Clean Air Act and Clean Water Act. The trend toward tighter regulatory oversight related to the new threats already is well underway in the nuclear power industry, and the logic of augmented regulatory controls will easily expand beyond that industry. Among other industries, pesticide/fertilizer production and application operations and pharmaceutical research may also come under special regulatory scrutiny from the perspective of potential environmental risks.

CERCLA/Clean Water Act Liability

Could facility owners or operators become liable for cleanup of hazardous substance releases under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the federal "Superfund" environmental cleanup law, even if the release was caused solely by the acts of a third party with whom the owner or operator does not have a contractual relationship (*i.e.*, a terrorist)?

The question is not absurd. A close reading of Section 107 (b)3 of CERCLA suggests such liability if, among other things, the owner or operator cannot establish by a preponderance of the evidence that it "took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions."

The owner or operator, however, also may possibly escape cleanup liability to the extent that it can establish that the release and the resulting damages were caused solely by an "act of war" under Section 107 (b)(2). Section 311 of the federal Clean Water Act presents similar liability and defense issues in connection with releases of oil or hazardous substances into waters of the United States.

Chemical and Product Storage and Transportation

A number of industries exempted under chemical risk/process safety management programs mandated by the Environmental Protection Agency and the Occupational Safety and Health Administration may nevertheless elect to use those programs as guidebooks for their operations. Companies will need to re-evaluate their chemical and product storage and transportation practices to determine if refinements are feasible and desirable to minimize safety risks.

Other steps may include, among other things, improvements in inventory control, packaging, and changes in proximity to potentially exposed off-site populations (*e.g.*, schools and hospitals) and/or on-site facilities.

Corporate managers may also want to scrutinize transportation companies with whom they do business to determine what precautions such transporters are taking—including insurance coverage, security measures, and employee oversight. Contractual allocation of liability for terrorist-related transportation accidents may need to be re-examined. Import/export agreements and relationships may need review from the same perspective.

Food and Drug Safety

Although not really a "pollution control" field, the area of food and drug safety presents similar concerns, and is worth mentioning in this context. Many will remember the over-the-counter drug tampering cases some years ago. These incidents triggered improvements in product packaging safeguards. A number of consumer products appear to remain vulnerable to this type of tampering, and recent terrorist activity further heightens concerns about such tampering. Food, agricultural product, and

pharmaceutical packaging may need further evaluation and improvement, along with corresponding changes to consumer safety warnings and labeling under the Consumer Product Safety Act. In addition, retail and wholesale businesses may need to take steps to further safeguard such products being held for sale to the public.

Other Statutory Duties

Similar to Section 5 (a)(1) of the OSH Act, Section 112 (r)(1) of the federal Clean Air Act imposes a "general duty" on regulated owners and operators to identify and prevent potential "accidental" (*i.e.*, "unanticipated") releases of designated hazardous substances, design and maintain a "safe" facility, and minimize the consequences of releases that do occur.

Moreover, Section 113 (c)(4) of the federal Clean Air Act imposes, under certain circumstances, criminal liability for negligent releases of designated hazardous air pollutants or extremely hazardous substances.

Could industrial facility operators become civilly or criminally liable for catastrophic releases of hazardous substances caused by terrorist actions that are reasonably foreseeable and might have been prevented, or at least minimized, through exercise of due care?

Ordinarily, such liability would not be expected, especially in view of the uniquely extenuating circumstances and available legal defenses in the context of criminal statutes.

Civil liability for regulatory violations caused by terrorist actions also should be remote. (See, for example, 30 Texas Administrative Code Section 70.7, entitled "Force Majeure." That provision explicitly excuses regulatory violations caused solely by, among other things, "acts of war.") But might there be a set of facts where normal expectations or defenses would not be justified or controlling? For example, what about a case where mass injuries were caused by a terrorist action that could have easily been anticipated and prevented? There may never be a finding of liability, but no company wants to be the test case. Consequently, companies and their boards will want to conduct due diligence in this area.

Building/Facility Security, Maintenance, and Design

Clearly, the new realities prompt the need for companies to re-examine their building/facility security measures, particularly in industries with high-risk processes (e.g., certain types of chemical production) and those handling especially hazardous materials (e.g., munitions and explosives).

For example, at high-risk facilities, armed guards and augmented electronic surveillance may be appropriate. Maintenance programs also will need to adapt and incorporate measures to prevent or foil terrorist acts, including inspection and alteration of ventilation systems and monitoring of indoor air quality. Closer landlord scrutiny of tenant activities may also become appropriate.

Furthermore, building design, construction code, and fire code conventions may need to change to incorporate safety features such as:

- ▶ detecting intruders
- ▶ preventing tampering with, or misuse of, utilities, equipment, or telecommunications and ventilation systems, and
- ▶ facilitating speedy evacuation.

Risk Allocation in Insurance and Other Contracts

Insurance historically has been a basic risk management tool, although it is too early to fully assess how the insurance markets will adapt to future business risks posed by terrorism. It seems prudent, however, for company management to contact existing insurance brokers or carriers and discuss the scope of protection afforded by existing policies and what improved coverage might be obtained through new or different products.

Allocating the risk of loss caused by acts of terrorism may become a more active area of negotiation in commercial transactions, product specifications (including "crashworthiness"), and real estate and equipment leases. Accordingly, commercial contract provisions and indemnities may need to be examined and negotiated in light of reasonably

foreseeable liabilities arising out of terrorist acts. These same concerns will need to be considered in leasing and other types of agreements relative to commercial and industrial property.

Regulatory Reporting

Federal and State Agencies

Regulated businesses typically provide both routine and episodic reports to state and federal agencies regarding environmental releases and chemical management. More thought will have to be given by both government and the regulated community about what portions of these reports should be submitted and maintained subject to confidentiality claims based on public safety concerns rather than trade secret/confidential business information or national security grounds.

Currently, most environmental reporting programs do not (or do not adequately) provide for confidentiality claims by regulated entities based on public safety concerns. The federal Freedom of Information Act does exempt documents in government files from mandatory public disclosure on public safety grounds, but only in connection with documents related to "law enforcement." Further refinements to state and federal "freedom of information" laws may be deemed necessary to address the need to exempt certain information from public disclosure on public safety grounds. The private sector may need to prompt reforms in these areas if governmental action is not forthcoming.

SEC

Public companies in certain industries or locations may need to consider disclosing business risks associated with potential terrorist activity—both domestically and overseas—in their filings with the Securities and Exchange Commission (SEC). This will necessitate a careful balance between adequate disclosure, on the one hand, and avoiding the creation of a "roadmap" to terrorists, on the other. Moreover, in some cases, the costs associated with addressing such risks might be material enough to merit disclosure in SEC filings.

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Conclusion

As stated at the outset, the preceding discussion is an exceedingly modest beginning to an appreciation of all the post-September 11th legal challenges that the nation will confront in the areas of environmental protection and environmental regulation. A great deal more legal analysis and creative thinking will certainly be necessary to both understand and respond to these challenges. In the meantime, an effective response, among other things, will entail the following elements:

- ▶ a detailed understanding of the "real world" risks presented by a given business activity
- ▶ a systematic evaluation of the possible damage and potential legal liabilities that could result when a risk becomes a reality
- ▶ the development of practical and legal safeguards calculated to prevent harm to human health and the environment under the identified risk scenarios, and
- ▶ the identification of practical and legal steps that can serve to mitigate adverse consequences when they occur. ▶

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