

**Fact Patterns**  
**Port Administration and Legal Issues Seminar**  
April 15-17, 2009, Baltimore, MD

**Wednesday, April 15 -- 11:00 a.m.–Noon**

**Plenary Session: Torts, Property Damage and Bodily Injury**

*What steps should a port take to ensure that claims are preserved? A general discussion of tort and property damage issues will be followed the analysis of a hypothetical involving a collision of two vessels, injuring a port employee, an ILA worker and causing damage to a dock and blocking a channel.*

**Facts:**

Two vessels were involved in a collision in our harbor. The collision occurred when one vessel which was departing the port and another vessel entering the port apparently became confused about their arrangement for passing. Additionally, after the collision it was determined that a channel buoy in the vicinity of the collision maintained by the port authority was off station.

As a result of the collision, one vessel THE ALPHA allided into one of the port authority's docks, causing an indeterminate amount of physical damage to the pier and cranes. The other vessel, THE OMEGA, grounded just outside the channel, but blocking access to the terminal.

Two individuals, one a port employee and the other an ILA worker, were injured.

THE ALPHA is owned by the largest shipping line based out of the city republic of Songapire. THE OMEGA is a tramp liner with Panamanian registration and hazy ownership.

**Questions:**

1. What steps should I take to ensure the port authority's claims and defenses are preserved?
2. What approaches should the port take with respect to each vessel?
3. How do I handle the bodily injury claims under workers compensation and the U.S. Longshore and Harbor Workers Act?
4. How can I prepare for the likely lawsuits?

**Wednesday, April 15 -- 1:30–3:00 p.m.**

**Concurrent Session: The Shipping Act and FMC Regulation**

*The panelists will discuss how ports must approach issues like negotiations with competing tenants, tug franchises, and truck restrictions/licensing under the Shipping Act.*

**A. Competing Tenants**

**Facts:** The Port leases and operates container and breakbulk facilities. A large stevedoring company with operations in every region of the country recently approached the Port's Property Department and expressed an interest in leasing one of the facilities.

At the same time, the Marketing Director just returned from an overseas trip and reports that a small shipping line is interested in leasing space at the Port. Although it's unstated, the Port has a preference to lease to a shipping line because there's a certainty of cargo volume, while the stevedore can't assure it will bring any cargo.

Questions:

1. Can the Port choose to bargain with just the shipping line and exclude bargaining with the stevedore?
2. Does the Port have to institute a competitive process for leasing the facility? If not, how can it avoid liability under the Shipping Act?
3. What if the Port is able to offer one of the potential tenants another facility that isn't quite as desirable?
4. Does the Port need to take account of the terms of leases at other terminals?
5. Can the Port just use its business judgment and make its best deal for the Port and city/state?

**B. Tug Franchises**

Facts: The Port just recently obtained legal authority to award franchises for tugs operating in its harbor. There are currently three tug companies offering service. A new tug company wants to begin operation. Port customers say they are getting by fine with the three existing tug companies. The Operations staff is worried about ruinous competition if there are four tug companies competing for existing business.

Questions:

1. Can the Port refuse to grant a franchise to the new tug company?
2. Does the Port need to promulgate "regulations" on how to award tug franchises?
3. Does the FMC have jurisdiction to consider a complaint from the new tug company, or vessel operators that use tug services, if the new operator is denied a franchise?

**C. Truck restrictions**

Facts: The city where my port operates has put its foot down on the traffic jams that trucks are causing on city streets when they queue up to enter our terminals. The city is going to start fining the port and the terminal operator a significant amount of money each day that we don't achieve certain benchmarks indicating a reduction in truck congestion.

Questions:

1. Can the port go so far as to impose restrictions on when trucks can enter the terminals?
2. Can the port begin a program of truck licenses as a prerequisite to calling on a port terminal?

**Wednesday, April 15 – 3:15-4:00 p.m.**

**Plenary Session: Labor Law Issues**

*As the economy falters, strikes and other labor law issues will be a rising concern for ports.*

Facts: The longshore union has decided that a non-union terminal is cutting into union work. The union has put up picket lines at various entrances to the port, and has convinced shippers to use alternative ports (boycott the port) until either the port gets rid of the non-union terminal operator or the terminal operator signs a union contract. As a result of this, cargo volumes overall at the port are down 30%.

Questions:

1. What remedies does the port have to stop the picketing and requests for customer boycott?
2. What can the port claim against its business interruption insurance carrier?

**Wednesday, April 15 – 4:00-4:45 p.m.**

**Plenary Session: Minimizing/Avoiding Liability in Port Construction Projects**

*Panelists will discuss the pros and cons of various types of construction contracts, alternative dispute resolution/arbitration/litigation, and how to minimize the likelihood of bid protests.*

**A. Problem with Bid**

Facts: The port published a bid invitation for the development of a large warehouse. Our bid packet says we will reject any bid that fails to sign all documents as required. The apparent low bidder failed to sign an affidavit to pay prevailing wages, even though prevailing wage compliance by the successful contractor is explicitly required. In addition, the same company included conditions in its proposal that varied from the invitation to bid. The effect of accepting the variation would be to reduce the cost of performing the contract. The bidding documents include a provision that asserts that we have the ability to waive all minor irregularities and “technicalities.” The difference between the bid of the apparent low bidder and the second low is substantial. The local construction climate is really tight, so we have a lot of contractors bidding on this job and they’re watching every move we make.

Questions:

1. Can we go back to the bidder and ask them to “clarify,” amend or supplement the proposal and sign the prevailing wage affidavit?
2. Can we waive the failure to sign the prevailing wage affidavit as a minor irregularity, even though we say in our documents that the bidder is required to sign the document?
3. What can be done about the attempt to condition the bid?
4. What could have been done to avoid these problems in the first place?
5. If a protest is threatened, what should the port do to prevent the filing of the protest or, if that is unsuccessful, defend against the protest?

**B. Allocation of Risk**

Facts: On the same warehouse project, and after an award of the contract and the commencement of construction, the contractor advises the port that he is encountering

subsurface conditions that will make the construction of proper foundations as designed much more expensive. The port's engineer has characterized the subsurface as "unclassified," although this terminology does not appear in the bidding documents. The engineer had geotechnical testing performed and a geotechnical report prepared but did not provide the report with the project manual, saying that he has never included such a report as part of the contract. The contract documents make the contractor responsible for all subsurface conditions, whether disclosed or not. The operative subsurface conditions clause was prepared after one of the port's advisors attended a national construction conference and was told that this was how to reduce the port's potential liability. No claim has yet been filed.

Questions:

1. What should the port do in connection with the potential claim?
2. What should the engineer do in connection with the cost of implementing the design?
3. What could have been done to avoid this problem in the first place?
4. What should the port do if a claim is filed?

**Thursday, April 16 – 8:30-10:30 a.m.**

**Plenary Session: Environmental Issues Facing Ports**

*This session will address environmental liability and insurance coverage. A fact pattern involving historical pipeline discharges, with resulting property and natural resource damages, will be used to illustrate how ports should respond to environmental liabilities and how insurance coverage may/may not apply.*

Facts: During construction of a new bulkhead, Port notices a huge oil slick emanating from the banks of the construction site into Pristine Bay, along with hundreds of dead fish. Port quickly realizes that the oily substances are coming from the underground pipeline corridor that runs to its docks. The underground pipeline corridor is there subject to easement agreements with the Port's three largest tenants: Big Oil Company, Giant Benzene Corporation, and Colossal Diesel, Inc. There does not appear to be a rupture of any of the pipelines; instead it is determined that none of the pipelines were properly maintained, that the gasoline, benzene and diesel lines have been slowly leaking since World War II, and that the removal of the existing bulkhead allowed the accumulated materials to escape into the bay.

Questions:

1. Can the Port be held liable for the costs of the cleanup of the released petroleum and chemical products?
2. Does it matter that the gasoline, benzene and diesel were leaking from the other parties' pipelines since WWII? Is the Port responsible for the acts of the bulkhead contractor and its subcontractors?
3. Can the Port recover some or all of its costs from Big Oil Company, Giant Benzene Corporation, and Colossal Diesel, Inc.? Anyone else?
4. If the Port's real-property and business is damaged due to the releases or a shut-down of the terminal during cleanup, can the Port recover those damages?
5. Can the Port be held responsible for the fish kill or other damages to the natural resources? Can anyone else?

6. Can the Port recover from insurance for the costs or damages it suffered? What is the status of policies issued between WWII to 1986?
7. Was the Port an additional insured under the policies of Big Oil Company, Giant Benzene Corporation, or Colossal Diesel, Inc.?
8. What did the easements require? Are their contractual indemnities? What can the Port require of its tenants to protect the Port from such liabilities?
9. What actions should the Port take to preserve its claims against third parties and insurance carriers?

**Thursday, April 16 – 10:45 a.m.-Noon**

**Plenary Session: Human Resources/Employment**

*A discussion of employment challenges, including lay-off procedures, workplace challenges (such as employee possession of handguns), and insurance coverage for employment practices liability.*

**A. Lay offs**

Facts: During senior team meeting last month, we determined that we needed to lay off seven (7) employees because the economic downturn has hit our bottom line hard. Using objective criteria, we selected four (4) employees in our accounting division and three (3) in our real estate division for layoff. One of the affected employees recently returned to work following the birth of her child then suffered post-partum depression and is now back out on leave. Her healthcare provider estimates she will not be able to return to work for another six (6) months. Other employees have told us that this employee does not plan to return to work at all and would prefer to stay home with her new baby or perhaps work for us part-time.

Questions:

1. What action would you take and what factors would you use to justify that action?
2. What Federal laws does the employer need to be mindful of?
3. What are some examples of State laws that may come into play?
4. Once the employee is released to return to work, what right does she have to reinstatement in her former position?
5. What recourse might the employee have?

**B. Handguns in the workplace**

Facts: We have a situation in which two employees have reportedly brought handguns to their workplace. Neither has mentioned or displayed them and they are otherwise model employees. They may or may not have concealed weapons permits. Also, one is a union member and the other isn't. All this is based on second-hand information.

Questions:

1. What can or should the port do?
2. What do we need to look at in the collective bargaining agreement with the represented employee?

**Thursday, April 16 – 1:30-2:45 p.m.**

**Concurrent Session: Planning for Financial Downturns and Bankruptcy**

*Using a simple hypothetical, this session will address how a port can protect its interests, through lease provisions and other means, when one of its tenants faces financial hardships, including possible bankruptcy.*

Facts: The port has a lease with ABC corp. ABC is actually a subsidiary of XYZ holding company. The port has 3 months of lease security under a letter of credit issue by Washington Mutual. There are rumors that XYZ is getting ready to file for Chapter 11 bankruptcy.

Questions:

1. What should the port do?
2. Is our lease security safe? How can we improve our situation in the future? What should we provide in our other leases?

**Friday, April 17 – 8:30-9:45 a.m.**

**Plenary Session: Security Issues**

*Two security incidents will serve as the basis for discussion.*

**A. The First Transportation Security Incident (TSI) (CrabPort):**

On July 4, 2009, at the Port of Crabcake Bay (a/k/a CrabPort) located in a state of the U.S. on the East Coast, a fire truck arrived at the Port's main gate in response to a fire set in a warehouse located on the waterfront. The Port's security guards, trained by their company and the Port's Security Department in matters concerning the Transportation Workers Identification Credential (TWIC), let the fire truck and its occupants proceed into the Port's secured and restricted areas and proceed to the scene of the fire at the waterfront warehouse. No one on the fire truck had a TWIC and the CrabPort security guards did not ask if they did.

Upon arrival at the warehouse, the occupants of the fire truck quickly and easily extinguished the fire, but also, unseen by any others, loaded some cargo stored in a corner of the warehouse into a bay of the fire truck. Since the cargo was not stored in a container, the fire truck was able to bypass the Port's Radiation Portal Monitors (RPMs), operated by US Customs & Border Patrol (CBP), and exit from the Port without detection.

Approximately two hours later, the City of CrabPort's downtown was devastated by a "dirty" radioactive bomb. Thousands of people were killed and severely injured by the blast which continued to pollute the air in a deadly manner throughout the downtown and inner city. Panic ensued as people attempted to evacuate. One school attempted to "shelter in place," but the technology which was supposed to seal the building off from outside radioactivity was faulty, even though it had been U.S. SAFETY Act certified.

The event, referred to as a Transportation Security Incident (TSI) in federal security regulations, was a total catastrophe. Lawsuits were quickly filed alleging multiple

theories of recovery. Among the many defendants were CrabPort, the security guard company, the CBP, and the respective manufacturers/developers of the hand-held nuclear detector and the Port's Master Security Plan & Emergency Response Program – MSP&ERP (each of which was purchased with a grant from the federal Port Security Grant Program, although since the Program did not include Operation and Maintenance Expenses, the Port, under severe pressure because of the current economic crisis, had neglected upkeep of the detector and proper training under the MSP&ERP). Among their defenses, they each pleaded immunity under the federal SAFETY Act. They also attempted to prevent discovery of evidence, alleging that it constituted “Sensitive Security Information” under 49 CFR 1520 and the federal statutes under which this regulation was promulgated.

In response to discovery requests concerning insurance, the Port acknowledged that it carried a policy of terrorism insurance. CrabPort's Risk Manager and General Counsel met to analyze the amount, coverage, and collectability of this insurance in the face of the TSI.

The Plaintiffs, not content to use solely the court rules for discovery, made numerous requests under the federal Freedom of Information Act (FOIA) as well as its state version.

Public demand ensued to stay the litigation, and legislation was introduced to enjoin all litigation concerning the TSI.

## **B. The Second TSI (Crawport):**

**1. The Truck.** On September 11, 2009, at the Port of Crawfish Bayou (a/k/a CrawPort), located in a state of the United States on its Gulf Coast, in an area with a heavy concentration of chemical and petrochemical refineries, a truck driver arrived in a truck bearing foreign plates. He presented a TWIC to Crawport's security guards. Unknown to the security guards, the driver was a convicted felon, having been tried and found guilty on separate occasions of arson, possession of explosive devices, improper transportation of a hazardous material, and sales of illegal drugs. Along with the driver, there was also a passenger in the truck who did not possess a TWIC.

The security guards, trained in TWIC procedures by the CrawPort FSO, did a “flash pass” check of the driver's TWIC and the passenger's driver's license and let them onto CrawPort Road which led into CrawPort's restricted area where chemical tank farms and a maze of chemical pipelines were located next to CrawPort Road and the United Specific Rail Road (USRR) tracks.

**2. CrawPort's Escort Monitoring and Responsive Software Systems.** The truck driver and occupant in his vehicle were monitored by sophisticated security cameras linked to CrawPort's Emergency Operations Center computers which possessed “Intelligent Video” software as well as chemical release tracking software (“ChemRelease”).

ChemRelease was designed, in the event of a chemical release into the atmosphere, to identify chemical types, dangers, wind speed and direction in order to trace the path of toxic airborne chemicals, residential areas that would be affected, projected times and routes for evacuation and locations of buildings with sheltering-in-place systems, and the contact information for personnel with emergency response capabilities for the released chemical. Both of these systems, Intelligent Video and ChemRelease, were SAFETY Act certified.

**3. The Train.** As the truck driver made his way into the restricted area, a USRR train arrived at CrawPort. At the rail gates, the security guard checked the conductor's TWIC up at the front of the train (but not the non-TWIC holding rail worker at the back of the train) and let the train proceed into CrawPort where it was scheduled to off-load chlorine, ammonia and certain other explosive chemicals classified by federal regulations as hazardous materials.

**4. The Mariner Bus.** Also at this time, some thirty (30) mariners, none of whom were U.S. citizens, and none of whom possessed TWICs, debarked from a vessel working at CrawPort's docks and got into a bus (the "Mariner Bus") driven by a TWIC holder. The Mariner Bus headed towards CrawPort's Main Gate.

**5. The Construction Worker Bus.** At the same time, 25 persons, none of whom possessed a TWIC but identifying themselves as construction workers on a project in CrawPort's restricted area, arrived at CrawPort's Main Gate in another bus (the "Construction Worker Bus") driven by a non-TWIC holder and, with the consent of the security guards, they were escorted by the Mariner Bus into CrawPort's restricted area. The two buses drove towards the chemical tank farms.

**6. The Cyber Attack.** At the same time as the truck drive and USRR train arrived at CrawPort, CrawPort's computer system was hit by a Cyber attack that effectively knocked out its security cameras and Intelligent Video system. Thus, the truck, train and buses all proceeded freely into CrawPort's restricted areas without further monitoring or detection.

**7. The Storm.** The only thing more ominous at CrawPort than the suspicious characters and activities that day was the threatening sky. Shortly after the arrival of the truck, the train and the two buses, CrawPort was suddenly hit by a fierce tropical storm that had unexpectedly picked up hurricane-force winds in the bath-like late-summer Gulf. The storm took an unanticipated trajectory directly through CrawPort. The senior weather analyst at the National Weather Service, being down to the "L's" in the alphabet for naming storms, named it "Like Ike." Like Ike had very strong surge-producing winds and a relentless rain, which quickly flooded the low-lying CrawPort and prevented those arriving on the truck, train and vessel from carrying out any activities.

Like Ike's ferocity quickly uprooted trees, made flying projectiles from ripped warehouse roofs and snapped light poles, tossed the truck on its side, de-tracked the train, chased the



buses out of the port, and put an immediate stop to the plans and schemes of all their occupants. In short, Like Ike was the hero of the day.

**8. CrawPort's Storm Response Using its Security Infrastructure.** CrawPort utilized its back-up (redundant) systems to overcome the Cyber attack. With its video data sharing arrangements with the U.S. Coast Guard and the State Highway Transportation Department, it was able to assist in tracking of the storm path and facilitate evacuation of the populace in an orderly fashion.

Meanwhile, the security guards, noticing the truck lurking in the restricted area of the truck farm, stopped, detained and arrested the truck driver when he could not produce his TWIC.

On a larger scale, CrawPort executed successfully its Emergency Operations and Continuity of Operations (COOP) plan (which was part of its USCG-approved Facility Security Plan or FSP), using, among other things, its sonar arrays to test the depth of its ship channel for proper depth since Like Ike's storm surge could have adversely affected the depth required for vessels. CrawPort was re-opened in a matter of several days and the port business for the CrawPort region was saved along with countless jobs in the community.

Meanwhile, Like Ike had long gone north and was busy ravaging the docks and vessels at WindPort and CarPort in the Great Lakes region of the United States.

**9. Recovery Alternatives.** CrawPort's General Counsel and Risk Manager then met to review CrawPort's insurance policies and to prepare for months of meetings with FEMA in which CrawPort's storm damage claims were asserted. An issue arose as to whether the best recovery for damages was through (1) FEMA's storm disaster recovery program, (2) FEMA's Port Security Grant Program, or (3) the Administration's new Stimulus package for ports.

**Friday, April 17 – 10:00-11:15 a.m.**

**Concurrent Session: Real Estate**

*This session will examine liability issues in the context of property ownership, lease and/ or intermittent use.*

Facts: A man drowned after the truck he was driving collided with a steel crane base which caused the truck to careen off the dock and plunge into the water. The man, working for SeaFish Products, had just finished transferring fish from a vessel onto his truck and struck the crane base as he drove away from the dockside. The Port-owned property where the accident occurred was vacant and not under lease to a tenant, nor was it easily accessible from the main road due to fencing around the perimeter of the property.

SeaFish had been using the wharf area for a few years on an intermittent basis by obtaining access through Port property leased to MegaTerminals, Inc. Although not in its permitted area, MegaTerminals occasionally used the property for excess storage of containers and allowed SeaFish to drive through its property to reach the wharf. After the accident, inquiries within the port indicated that the crane base was part of a crane installed by a former port tenant, Marine Fisheries, a company no longer in business. Marine Fisheries removed all but the crane base when its lease with the port expired.

Questions:

1. Who is responsible for the crane base remaining on the terminal after Marine Fisheries' lease expired?
2. To what extent is MegaTerminals liable for the accident?
3. What obligations and liabilities are present for the port if it knew about the occasional use of the wharf by the fishing companies? What if the port did not know about the use?
4. Do the answers to the above questions change if MegaTerminals were operating under a tariff versus a lease?

Facts: Ace Hotel Developers ("AHD") executes an agreement with the Port of Apple Valley to build a 400 room hotel on Port property. AHD and the Port agree on the price and terms of a development agreement and future lease terms.

The site that AHD will develop was once used as a shipyard operation by former Port tenant Moon Shipyard. As a result of the uses, the site is contaminated with PCBs, metals and copper. The property is contaminated on the land side and the contamination extends to the adjacent waters and sediments. The extent of the contamination is unknown to the Port. There was no environmental conditions or indemnity language in the Moon Shipyard's lease.

AHD expresses concern over the condition of the site and insists that the Port indemnify the developer as to the environmental condition of the site. Since there was no indemnity in with Moon Shipyard, the Port agreed to voluntarily remediate or clean up the development site.

AHD also has plans to assign its interest to a large unidentified hotel chain as development plans proceed. AHD believes that the assignment should ultimately increase its profit, and lessen lease and rental costs despite the terms of the development agreement establishing fixed rent and various lease terms for fifty years. AHD believes that it will receive a rent reduction once the hotel is built regardless of the appraised value of the developed site.

Questions:

1. What issues are presented by the scenario?
2. What type of analysis should occur to resolve the issues?

**Friday, April 17 – 11:15 a.m.-Noon**

**Concurrent Session: Legal Ethics**

*This session will examine the difficult role a lawyer has between competing leadership factions within a port, ultimately asking the question of who is the client. A hypothetical posing this situation will be analyzed using the rules of professional conduct as a guide. The hypothetical will also raise the issue of waiver of attorney-client privilege.*

Facts: The Port of Bedlam is governed by a group of 7 commissioners, five of whom county voters elect and two of whom the governor of the state appoints. All seven vote for a president from among their group. Structurally, the Commission hires an Executive Director who is the only staff member who reports directly to the Commission. The ED is responsible for hiring the rest of the staff at the Port and all lines of authority below the ED run through to the ED.

The Port's Executive Director, Kristine Diehlhammer, is a well-respected veteran of the port industry and was hired with the unanimous support of the Commissioners. Unfortunately for Kristine, she has had a spate of bad luck as some minor scandals rocked her mid-level staff. The largest newspaper in the state, the Bedlam Citizen Ledger (commonly referred to in the community as the BCL, and which Port staff claim stands for "Bird Cage Liner"), publicized these missteps to such a degree that they became a campaign issue at both the state and local level. In the last campaign, a new governor won, having campaigned on cleaning things up at the Port and vowed to appoint 2 new commissioners, which he promptly did. At the same time, one of the Commissioners who voted to hire Kristine 4 years ago lost his reelection bid largely as a result of the unfortunate controversies described in detail on the pages of the BCL.

The atmosphere on the Commission has become tense, as the new Commissioners clash frequently with the incumbent members. Kristine has her hands full trying to get the Commissioners to work together, and failing at that, to cobble together a coalition to advance the business initiatives she believes are important to the Port. Kristine herself is frequently becoming the target of attacks by some of the new Commissioners, some of whom have been quoted in the BCL as calling for her firing.

The Commission recently had to face an issue involving the awarding of a lease to a controversial tenant. The three new commissioners wanted to block the lease because the prospective tenant was a nonunion employer. There are rumors of a possible lawsuit, based on a highly strained reading of a recent federal case on the other side of the country. Kristine directs the Port's general counsel, Hugh Morrison, to write a legal memorandum explaining the legal risks in rejecting the new tenant solely on the basis that it was a nonunion employer. Hugh prepared the memo and discussed its contents in an executive session with the Commission. He did not distribute the memo.

Faced with an unambiguous legal opinion that prevented them from voting the way they wanted to, the 3 dissident commissioners voted to approve the lease. However, they sent an email to Hugh and directed him to release the legal memo to the BCL so their campaign supporters would understand why they voted the way they did. Hugh shows the email to Kristine who instructs Hugh not to release the memo to the newspaper.

Hugh advises the three Commissioners that he has been instructed not to release the memo. They remind him that they are the leaders of the Port and that he is violating his obligation as the attorney for the Port to follow the orders of his client.

Questions:

1. Who is Hugh's client? The Commission or the Executive Director (Kristine)?
2. Should Hugh release the memo?
3. What if 5 Commissioners are selected by the Governor and 2 are elected?
4. What if the Commission memo was about the risks of selecting a foreign owned terminal operator and the failure to follow the appropriate CFIUS rules passed in the wake of the Dubai Ports World episode?
5. What if Kristine was the one who wants Hugh to release the memo because she felt it was necessary to explain to the thwarted lessee the reasons for the Port's decision? Assume that release of the memo could put the Port in a vulnerable legal position. Would your answer change if the memo related to the selection of a foreign owned terminal operator (as indicated in question 4)? What if Kristine's motives are not business oriented but are tied to saving her job at the Port?