

**SECURITY OF TRANSPORTATION TERMINALS:  
EMERGING ISSUES**

**Carlos Rincon**

**Delgado, Acosta, Braden & Jones, P.C.  
221 N. Kansas, Suite 2000  
El Paso, Texas 79901**

*Presented at: Federation of Defense and Corporate Counsel Transportation Section  
Mid-Winter Meeting, Big Island, Hawaii, March 11, 2004*

*The author would like to acknowledge John P. Rodriguez, CPP, CFE of Rodriguez, Zagal & Co. for his assistance in providing research materials. The author would also like to acknowledge Bobbie M. Guerra-Cavazos, an associate with the firm of Delgado, Acosta, Braden & Jones, P.C. for her editorial assistance.*

## **I. Overview**

Statistics bear out that the risk of cargo theft increases when that cargo is stopped or unloaded while in transit. *See Cargo Crime in the United States* (Meeting for the National Cargo Security Council) (June 10, 2003). Consequently, security associated with the facilities that operate to provide necessary rest/fuel to drivers or host interchange/unloading facilities is a facet of security in the trucking industry that warrants careful scrutiny. The most logical theft risk comes from an unauthorized person gaining access onto the terminal premises to damage or steal cargo. Economic concerns aside, the emerging concern is where the cargo is hazardous or toxic, it may become the target of theft for purposes of use in a violent or terroristic act. In this regard, and most attributable to recent events, transportation terminals have required a re-assessment of their security protocol. Additionally, in view of the fact that multi-modal systems pass cargo through differing modes of transportation, attention must be given to the security measures recommended for and instituted for other chains of the multi-modal system. Whether cargo theft is economically or politically motivated, transportation terminals and the trucking industry must employ increased security measures that have been both recommended by governmental agencies or initiated by members of the private sector to better manage legal risk.

The purpose of this paper is to provide general background on the legal principles that govern civil liability damages for criminal acts of third parties, which would be the basis of liability against a transportation terminal proprietor in the event of stolen cargo, whether for economic gain or for use in a terroristic act. Also included, is a survey of the government and industry response to heightened concerns over the prospect of stolen hazardous cargo being used for terroristic motives. The paper concludes with a case study that involves an actually litigated

case in El Paso County, Texas that involved civil liability for criminal acts of third parties arising from the theft of cash. While that case study does not involve a trucking or transportation terminal operation, the points made are illustrative of the types of tort liability fact issues that may arise in cases of cargo theft.

## **II. Introduction**

Civil liability for the criminal acts of third parties is a risk component that has necessitated an increased response from all sectors of industry in the United States. Historically, the most common scenarios from which this issue arises has been in the context of the ownership or occupation of a premises. In this regard, the criminal perpetrator's conduct often falls into one of two categories. In the first scenario, the perpetrator's intent is to commit a crime against an establishment. The perpetrator's acts invariably result in collateral risk of injury or death to the establishment's customers, employees, guests or others having a legitimate reason for being on the premises. In the second scenario, the crime motive is directed at a victim and the nature of the premises lends itself to being conducive to the commission of a crime (i.e., assault of an apartment complex resident in a poorly lit parking lot).

In either above scenarios, when injury or death arises as a result of the commission of crimes in the premises context, litigation ensues with the cornerstone issue being foreseeability of the occurrence. Victims and/or their representatives will point to the conduciveness that a premises presents for the commission of a crime such as demographics, historical patterns or other characteristics of the premises. The bases of such argument being that the commission of the crime, as it occurred, was foreseeable to the owner/occupier of the premises, and, thus, created a duty to warn or to protect the victim against the occurrence. The counter argument will

typically assert that the criminal acts of the third party were unforeseeable and constitute an intervening or superseding cause to any failure on the part of the owner/occupier of the premises to exercise reasonable care.

The issues involving third party criminal acts have not been limited to the realm of premises liability. Rather, they have extended to circumstances wherein third party criminal acts occur outside a private premises and involve the use of an instrument of commerce. As the tragic events of 9/11 and the anthrax scare have demonstrated, the criminal mindset has necessitated that risk prevention contemplate circumstances wherein the perpetrator uses an instrument of commerce to inflict injury and/or death. No doubt these more recent events document how industry must be battle ready to protect, warn of, and deter crimes motivated by political or religious conviction, as opposed to only those crimes motivated by monetary gain or violence. By using instruments of commerce, the perpetrator not only victimizes the innocent persons directly associated with the crime, but also impacts a wide web of other persons and institutions, who though not directly involved, must immediately modify their behavior and operations to address the heightened perception of risk

Against this backdrop, the Trucking Industry in the United States has been forced to re-evaluate how it is responding to the increased recognition that the criminal mindset may consider a tractor/trailer and its cargo as the next choice to deliver a devastating blow to our economy or way of life. As members of the Trucking Industry and as the lawyers who represent them, when debating how these circumstances have heightened the score card on how we will be judged in hindsight to have responded to such an occurrence and what proactive measures should be contemplated and implemented, the logical starting point for discussion would be to address the

prevailing legal standards that have given rise to liability for the criminal acts of third parties. Also essential to this discussion is a review of the Trucking Industry's response to the heightened sense of concern over recent events that have made what was in the past unforeseeable, foreseeable. This paper attempts to discuss these issues and attempts to provide a real life case study involving the liability for third party criminal acts.

### **III. Legal Standards**

#### **A. Duty**

As a general rule, and in the absence of a statute, a special relationship or other circumstances that create a duty, an individual is under no duty to protect another from a criminal assault or the willful act of violence of a third person. *See Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477, 481 (D.C. Cir. 1970); *see also* 57A AM. JUR. 2D *Negligence* 104 (2003). A person, however, may be charged with a duty to take precautions to protect others from intentional criminal acts of third persons when an unreasonable risk of harm is foreseeable. *See Lillie v. Thompson*, 332 U.S. 459, 92 L. Ed. 73, 68 S.Ct. 140 (1947); *see also* 57A AM. JUR. 2D *Negligence* 108 (2003). The Restatement of Torts more fully describes the duties and liabilities of a premises owner and/or occupier. Section 344 of the Restatement opines as follows:

Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is

such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

RESTATEMENT (SECOND) OF TORTS § 344, cmt. at f (1965).

Thus, in accordance with the above standards, the corporate defendant's risk of exposure lies with its reasonableness in anticipating the conduct, warning others of the conduct and protecting against it.

**B. Foreseeability - Superseding/ Intervening Cause**

The standard defense to an assertion that a duty of care is imposed on an owner or occupier of land is a defense that the criminal conduct of a third party was an unforeseen intervening and/or superseding cause of any alleged injuries. The Restatement of Torts defines a superseding cause as “an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.” RESTATEMENT (SECOND) OF TORTS § 440 (1965); *see also* Prosser and Keaton, HANDBOOK OF THE LAW OF TORTS § 53, at 325 (4<sup>th</sup> ed. 1971). Further, intervening cause is defined as “one which actively operates in producing harm to another after the actor's negligent act or omission has been committed.” RESTATEMENT (SECOND) OF TORTS § 441 (1965).

However, while the criminal conduct of a third party may serve as a superseding cause relieving the potentially negligent entity from liability, tort liability will not be excused where the criminal conduct is a foreseeable result of such negligence. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546 (Tex. 1985); 57A AM. JUR. 2D *Negligence* §621 (2003).

Consequently, where certain types of criminal conduct are reasonably foreseeable, avoidance of liability will require executing a reasonable security response commensurate with the level of risk. As noted below, what would be required to adequately discharge one's duty will differ from fact pattern to fact pattern.

For example, in *Lopez v. McDonald's Corporation*, action was brought against *McDonald's* by the survivors and surviving family members of the victims of a massacre that took place in a restaurant. *Lopez v. McDonald's Corp.*, 238 Cal. Rptr. 436 (1987). In this case, a lone gunman entered one of *McDonald's* restaurants and began shooting patrons and employees. *See id.* at 438. The gunman made no demand for money. *See id.* He killed 21 people and injured 11 others. *See id.* Suit was brought seeking damages on grounds of negligence and premises liability. Plaintiffs alleged that *McDonald's* knew the restaurant was located in a high-crime area and failed to provide safety devices or security personnel. *See id.* Summary judgment in favor of *McDonald's* was upheld on the ground that the boundaries of the duty to take reasonable precautions to protect patrons from reasonably anticipated criminal conduct of unknown third parties did not encompass the burden to protect against once in a lifetime massacres. *See id.* The likelihood of the unprecedented murderous assault was so remote and unexpected that, as a matter of law, the general character of the restaurant's nonfeasance in not providing security was held not to facilitate its happening. *See id.* at 450.

Additionally, even in the presence of a special relationship, civil liability for acts of third persons is not automatic. For example, while an employer-employee relationship may be deemed "special" for purposes of imposing a duty of care on the employer to guard against and protect the employee against the criminal acts of others, the possibility of some criminal act,

though not necessarily the precise act, must be reasonably foreseeable before the failure of the employer to take reasonable precautions to protect the employee against harm may be said to be negligent. *Ozment v. Lance*, 437 N.E.2d 930, 934 (Ill. 1982); see RESTATEMENT (SECOND) *Torts* § 302B cmt. f (1965).

In *Ozment v. Lance*, the minor male plaintiff, a hotel employee, was sexually assaulted by two male hotel guests. *Ozment*, 437 N.E.2d at 932-33. The assault occurred when plaintiff was directed to deliver alcoholic beverages to the guests' room. *See id.* Upon entering the room, the inebriated men assaulted the plaintiff. *See id.* Plaintiff sued the employer alleging it was negligent in failing to provide a safe work place. *See id.* 932. The court in *Ozment* held that the incident was unforeseeable as the conduct was bizarre and not of the type to be reasonably anticipated. *See id.* at 935.

### **C. Preemptive Measures - Discharging the Duty**

If it is determined that a criminal event is foreseeable, the analysis then shifts to evaluate whether the corporate defendant has undertaken those measures that a reasonable and prudent entity facing the same or similar risk of third party criminal acts, would have initiated. For example, following 9/11, the perception is that terroristic assaults on high rise/high profile apartment/condominium complexes in major U.S. cities are foreseeable. *See* Thomas C. Hornburger and Timothy Grant, *A Real Estate Focus: A Changing World: A Commercial Landlord's Duty to Prevent Terrorist Attacks in Post-September 11<sup>th</sup> America*, 36 J. MARSHALL L. REV. 669. In this context, it has been opined that the traditional analysis of basing foreseeability on whether prior similar crimes have occurred on the same premises will not serve to limit liability for terroristic acts. *See generally In Re September 11 Litigation*, 2003 U.S. Dist.

LEXIS 15522 (S.D. NY 2003). The argument is based on the events of 9/11 which have made threats of terroristic acts targeting buildings such as Chicago's IBM Plaza and The John Hancock Center foreseeable. See Thomas C. Hornburger and Timothy Grant, *A Real Estate Focus: A Changing World: A Commercial Landlord's Duty to Prevent Terrorist Attacks in Post-September 11<sup>th</sup> America*, 36 J. MARSHALL L. REV. 669. As a note, proprietors of these types of premises have been pro-active in implementing additional security measures to include increased security staff, checkpoints to review visitor's photo identification badges and bags, restricting access to parking garages, and random searches of trunks. These proprietors are also in the process of installing x-ray machines as well as security mail and ventilation systems to prevent bio-terrorist attacks. See Thomas C. Hornburger and Timothy Grant, *A Real Estate Focus: A Changing World: A Commercial Landlord's Duty to Prevent Terrorist Attacks in Post-September 11<sup>th</sup> America*, 36 J. MARSHALL L. REV. 669.

#### **D. Assumption of a Duty**

Finally, liability may ensue in a situation where in the absence of a special relationship or special circumstances, a duty to protect against the criminal acts of third parties is assumed. See generally Linda A Sharp, *Employer's Liability to Employee or Agent for Injury or Death Resulting from Assault or Criminal Attack by Third Person*, 40 A.L.R. 5<sup>th</sup> 1, ¶ 6a (2000). As embodied in the *Mendoza v. Contico* case study commented in this paper, this theory of liability presents a viable approach for claimants to pursue actions when they otherwise would have no recourse to pursue legal remedies. The overriding point to be made when discussing the response to this liability approach, is that all remedial measures should be initiated and executed

with the same vigor whether the duty is one that is inherent or assumed, as the law appears silent on imposing a lesser duty to the alleged tortfeasor who assumes a duty he otherwise did not have.

#### **IV. Industry Initiatives and Response to Elevated Perception of Risk and Governmental Regulations Enacted to Counter Balance the Risk**

Perhaps the single most significant development in the transportation industry that would impact terminal operations is ever increasing presence of multi-modal transportation networks. Cargo taken into a terminal facility has changed hands on numerous occasions and a breach of security at one of those other levels can be felt at the terminal. *See* Dr. Saul B. Wilen, *Countering Terrorism Threats: Trucking Industry and Multi-Modal Distribution Network Vulnerabilities* (February 10, 2003). In this regard, vertical looking industry all inclusive security programs, such as the Customs Trade Partnership Against Terrorism (C-TPAT) sponsored and initiated by the United States Customs Service have been initiated. *See* U.S. Customs & Border Protection, Customs CTPAT, available at [http://www.customs.ustreas.gov/xp/cgov/import/commercial\\_enforcement/ctpat/](http://www.customs.ustreas.gov/xp/cgov/import/commercial_enforcement/ctpat/). Under this program, all participants in the transportation network may be considered for C-TPAT certification. *See id.* From importers to air consolidators, licensed brokers, warehouseman and over the road truck carriers, a joint recognition between government and business has been implemented to enhance supply chain and border security. *See id.* Businesses apply for C-TPAT certification by submitting the following: an agreement that the applicant is committed to the C-TPAT security guidelines; and a supply chain security profile questionnaire. *See* U.S. Customs & Border Protection, *C-TPAT Validation Process Guidelines*, available at [http://www.customs.ustreas.gov/xp/cgov/import/commercial\\_enforcement/ctpat/](http://www.customs.ustreas.gov/xp/cgov/import/commercial_enforcement/ctpat/). Thereafter, the validation process begins wherein the security profiles of C-TPAT participants is reviewed and

validated. In sum, the C-TPAT certification serves as a security seal of approval which is issued only after fairly exhaustive due diligence to assure that the applicant's security profile is compliant with mandated security requirements.

Additionally, regulatory bodies such as the United States Department of Transportation and the Transportation Security Administration ("TSA"), an agency of the Department of Homeland Security, have promulgated new security requirements for offerors and transporters of hazardous materials. *See generally The Role of Hazardous Material Placards In Transportation Safety and Security* (U.S. DOT, et al.) (June 15, 2003). Several of the regulations embodied in 49 C.F.R. §§ 171 *et. seq.* were a result of the work of The Research and Special Programs Administration to establish new requirements to enhance the security of hazardous materials transported in commerce. *See generally The Role of Hazardous Material Placards In Transportation Safety and Security* (U.S. DOT, et al.) (June 15, 2003) (note that a few revised sections will be effective October 1, 2004). Given the potential for implication in catastrophic or criminal events, shippers and carriers of certain highly hazardous materials will now be required to develop and implement security plans in conformity with 49 C.F.R. §§ 171 *et. seq.* *See* 49 C.F.R. § 171.802. Further, specific guidelines for determining who is eligible for applying for and obtaining hazardous materials endorsements for a commercial drivers license have also been enacted. *See* 49 C.F.R. §§ 172.701 *et seq.* The following excerpts are two of the specific provisions that relate to the mandate for security plans:

- (2). Unauthorized access: Measures to address the assessed risk that unauthorized persons may gain access to the hazardous materials covered by the security plan or transport conveyances being prepared for transport of the hazardous materials covered by the security plan.

- (3). En route security: Measures to address the assessed security risks of shipments of hazardous materials covered by the security plan en route from origin to destination, including shipments stored incidental to movement.

49 C.F.R. § 172.802(a)(2) & (3).

Additional provisions relevant to driver background and driver qualification security and the authority to transport hazardous materials include:

- (a) TSA checks the following databases and conducts a security threat analysis before determining that an individual does not pose a security threat warranting denial of an authorization under this part:
  - (1) Interpol and other International databases;
  - (2) TSA watch lists; and
  - (3) Any other databases relevant to determining whether an individual poses a security threat or that confirm an individual's identity.
- (b) An individual poses a security threat under this section when the TSA determines or suspects him - or her of being a threat -
  - (1) To national security;
  - (2) To transportation security; or
  - (3) Of terrorism.

49 C.F.R. § 1572.107.

As specifically applied to facility security, the Federal Motor Carrier Safety Administration has published guidelines that are to be initiated in the event of a Code Orange National Threat Level designation. See FMCSA, available at [http://www.fmcsa.dot.gov/Home\\_files/hmcatt.htm](http://www.fmcsa.dot.gov/Home_files/hmcatt.htm) (last modified Oct. 23, 2003). Those actions are:

- Cooperate with federal or local law enforcement officials concerning security checks or safety checks.
- Restrict the availability of information related to your facility and employees, and the materials you handle.

- Restrict access to a single entity or gate. Control who enters and leaves your facility, if possible. Require visitors to show photo identification and have someone accompany visitors at all times.
- Add security guards and increase off-hour patrols by security or law enforcement officials.
- Reduce your internal tolerance for “security anomalies”, such as overdue or missing vehicles, perimeter of physical plant intrusions, unverified visitors, evidence of tampering and the like.
- Install additional security systems on areas containing hazardous materials, if needed.
- Do not preload hazardous materials shipments.
- Require employees to display identification cards or badges while at the facility.
- Conduct spot checks of personnel and vehicles.
- Test your emergency response communications systems.
- Upgrade security procedures for pick-ups and deliveries. Verify all paperwork and require pick-up and delivery appointments from known vendors. Require pick-up drivers to provide driver’s name and vehicle number-confirm with vendor. Accept deliveries in designated areas only.
- Confirm legitimacy of new vendors through listings in phone book or industry publications, websites or references.
- Secure hazardous materials in locked buildings or fenced areas. Have a sign-out system for keys.
- Secure valves, manways, and other fixtures on transportation equipment when not in use. Secure all rail, truck and barge containers when stored at your location.
- Use tamper-resistant or tamper-evident seals and locks on cargo compartment openings.
- Maintain current inventories of on-site hazardous materials and check account for shortages or discrepancies.

See FMCSA, available at [http://www.fmcsa.dot.gov/Home\\_files/hmcatt.htm](http://www.fmcsa.dot.gov/Home_files/hmcatt.htm) (last modified Oct. 23, 2003) (facility security).

For en route security, the following have been adopted during a Code Orange Threat Level:

- Verify identity of carrier or driver prior to hazardous materials loading. Ask driver for photo identification and compare with information provided by carrier.
- Ask the driver to tell you the name of the consignee and the destination for the material and confirm with your records before releasing shipments.
- Identify preferred and alternated routing, including acceptable deviations. Make sure routing complies with local routing restrictions.
- If possible, alternate routes to frequent destinations.
- Minimize exposure in downtown or heavily populated areas and expedite the shipment to the final destination.
- Minimize stops en route; if you must stop, select locations with adequate lighting on well-traveled roads and avoid high-crime or dangerous areas.
- If materials are stored during transportation, make sure storage facilities are secure.
- Train drivers how to avoid hijackings or theft of property- keep vehicles locked when parked and avoid conversation on open channels or with strangers about route, cargo and destinations.
- Consider an escort or guard for high-hazard shipments (e.g. explosives, radioactive materials or inhalation of hazardous toxics).
- Consider using advanced technology to track or protect your cargo en route to their destination (i.e., satellite tracking systems, anti-theft systems for trailers and tractors and surveillance systems). GPS tracking systems should relay updates more frequently.
- Install tamper-proof seals on all valves and package or container openings.
- Implement a system for a customer to alert the shipper if a hazardous materials shipment is not received when expected.
- When products are delivered, check the carrier's identity with shipping documents provided by the shipper.

- Get to know your customers and their hazardous materials programs. If you suspect you shipped or delivered a hazardous material to someone who may intend to use it for a criminal activity, notify your local FBI or local law enforcement officials.

See FMCSA, available at [http://www.fmcsa.dot.gov/Home\\_files/hmcatt.htm](http://www.fmcsa.dot.gov/Home_files/hmcatt.htm) (last modified Oct. 23, 2003) (en route security).

This recently announced security protocol by the U.S. Government has for some time been standard operating procedure for many of the leaders in the private trucking sector. Additionally, organizations such as the American Trucking Association (“ATA”) and the National Cargo Security Council (“NCSC”), as well as many other trucking industry organizations, are working with their membership to ensure that the private sector response meets and exceeds all of the recent government promulgations. From a liability standpoint, a claim or suit flowing from a security breach will no doubt rely upon existing government regulations and guidelines to establish a minimum standard of care. Consequently, trucking entities and operators of transportation terminal facilities must be prepared to demonstrate that their own internal operating guidelines adhere to what the governmental bodies dedicated to fighting crime/terrorism in these sectors say are reasonable approaches to deterring and preventing this type of activity.

In addition to adhering to and implementing government security driven guidelines, many trucking industry members are being extremely pro-active in their approach to security by creating partnerships with government agencies to address security threats. For example, “hot spots” for cargo theft have been identified and have led to increased vigilance and prevention measures in those regions. Specifically, anti-cargo theft units have been created in Los Angeles, Memphis, Miami, Georgia and New Jersey to deal with some of the most prolific problems with

cargo theft in the nation. These law enforcement units work closely with all members of the transportation industry, including the trucking industry and their insurers to develop security measures and quick response to reported losses. *See* John J. Tomoney and Jim McKay, *Cargo Security - An Overview* (Meeting for the National Cargo Security Council) (June 10, 2003). Consequently, for transportation terminals that operate in these regions, they are “on notice” that the likelihood for criminal activity is higher than in other parts of the nation.

While hijackings, for example, only make up approximately 5% of all cargo theft loss in the United States, the U.S. DOT has issued recommendations that suggest use of escorts for particular types of loads irrespective of where the load is being shipped. *See The Role of Hazardous Material Placards In Transportation Safety and Security* (U.S. DOT, et al.) ( June 15, 2003); *Cargo Crime in the United States* (Meeting for the National Cargo Security Council) (June 10, 2003). Thus, it is clear that the minimum baseline for the types of criminal events that are foreseeable and the corresponding acceptable response to a risk, is increasing. This development impacts the standard of care that will be pled and opined about in civil actions for money damages by litigants and ultimately enforced by the courts. As such, sound security practice dictates that at minimum, additional information be disseminated to augment awareness to the drivers and transportation terminal operators having to operate in these regions.

Additionally, according to statistics published at the June 2003 meeting of the NCSC, approximately 88% of all cargo thefts take place when the container or trailer hauling the cargo is parked in the road or in some other type of facility, such as a truck stop or truck terminal. *See Cargo Crime in the United States* (Meeting for the National Cargo Security Council) (June 10, 2003). Consequently, any member of the transportation chain that has to manage stopped cargo

must at the minimum employ security measures that can be construed as meeting the state of the art in security to avoid theft or pilfering of cargo. The ATA for example published “Security Tips for Terminals” which embody the spirit of many of the terminal security guidelines issued by the U.S. Government in response to a heightened national level of security. The ATA security tips include the following:

- 24-hour security;
- Fencing and maintaining well-lit facilities;
- Utilization of close circuit cameras and recording devices at all entrances and exits;
- Requiring that all bags and packages coming into the terminals be searched;
- Locking and sealing all equipment parked in terminal facilities;
- Providing a secure employee parking lot, away from the terminal facility;
- Making mandatory employee identification badges for all employees;
- Making mandatory visitor identification badges;
- Minimizing access to computers;
- Utilizing security patrols with varied patterns;
- Ensuring that security is especially present for weekends, evenings and holidays; and
- Diligence in hiring practice. Verify information.

ATA, *Security Tips for Terminals to ATA Member Motor Carriers*, available at

[http://truckline.com/insideata/truckon/021002\\_terminal\\_security\\_tips.html](http://truckline.com/insideata/truckon/021002_terminal_security_tips.html) (last updated on February 10, 2002).

In the past, prudent trucking business practice and terminal security management dictated that careful thought be invested in evaluating each of these security issues. Fundamental security protocol including restricted access to terminals, securing cargo and conducting background checks on drivers has always been an integral, and, in certain facets, a required part of doing business as a trucking carrier in this country. These new available certifications and regulations are making it so that not only will heightened security detail be encouraged but in many

instances will be a pre-requisite to either maintaining a competitiveness in the market place and potentially being able to conduct business at all.

The case study detailed below attempts to illustrate the previous discussions and provide examples of the necessity for heightened security measures due to third party criminal acts.

## **V. Case Study**

### **A. Background**

As stated, assessment of security based allegations of negligence and gross negligence, both with respect to terminal operations and cargo transport, is aided by considering the factual circumstances and ensuing theories of liability in the case styled *Mendoza v. Contico*, Cause No. 92-8751, County Court at Law #3, El Paso County, Texas. *Mendoza* involved the violent death of two employees of the Mexican corporation Continental Sprayers, a wholly owned subsidiary of U.S. Parent Contico Manufacturing (“Contico”). The two individuals, Alfonso Jurado, an unarmed security guard, and Lorena Mendoza, a 27 year old accounting clerk, were murdered while transporting cash payroll from the hub Mexican operation in Cd. Juarez (border city to El Paso, Texas) to a satellite facility in Palomas, a Mexican city along the Rio Grande.

Continental Sprayers, a Mexican legal entity, had a substantial manufacturing facility in Cd. Juarez, Mexico; said facility employing approximately 750 employees. Continental Sprayers was set up as a manufacturing arm by Contico (at that time a global leader in the manufacture of containers) due to favorable labor costs. The same individual who ran the El Paso management facilities, oversaw the Mexican operations on a day to day basis and was both a high ranking employee of Contico and an officer of Continental Sprayers. The individual who served in the capacity as general manager (hereafter “GM”) was a Mexican national and served as virtually an

autonomous decision maker with extensive authority and discretion with respect to operations on both sides of the border.

At some point in time, Contico determined that it would increase manufacturing capacity in its Cd. Juarez facility. Due to a labor shortage in Cd. Juarez, the GM undertook a comprehensive search for a satellite manufacturing facility. Certain key considerations were driving the site selection. Those considerations included: an available and suitable workforce; proximity to the Cd. Juarez facility and to El Paso, Texas; acceptable infrastructure in terms of egress/ingress; and availability of an existing physical site that could house a manufacturing facility that would serve to employ approximately 100 employees and the physical wares to accommodate that type of operation. After considering approximately 6 other locations, a decision was made to go with establishing a facility in Palomas.

Once it was decided that the Palomas facility would be selected, a campaign was initiated to recruit a local employment force from the community. Public announcements in the form of flyers and posting of announcements were distributed in mass to draw applications. Given the manner that new employee recruitment took place, it was not surprising when it was learned that background checks on new employees were never completed, nor prior employment references validated. Additionally, no consideration was given to conducting an assessment of the crime history of Palomas at large, the area immediately encompassing the new facility or the highway that would have to be traveled by the Continental Sprayers employees who would be transporting the payroll on a weekly basis. [Because of the absence of federal or state databases such as those which exist in the U.S., efforts to perform this type of due diligence would most likely had been futile, especially for a remote region such as Palomas. *Mendoza* family representatives argued,

however, that this limitation should have served as notice to Contico officials that no operation in Palomas could have been commenced without significant risk that persons of questionable pasts would be hired].

Important to note is that Mexican labor law requires that employees be paid in cash, each Friday and at the place of employment. Consequently, consideration would have to be given to how to get cash payroll from the Cd. Juarez facility to the tiny community of Palomas (population 12,000). Interestingly, absent in Palomas was the existence of a banking facility that could provide a local solution to the Mexican legal requirement of on site payment of employees. Because the weekly payroll obligation was approximately \$4,000 U.S. dollars per week, the GM believed that these funds could be transported by highway from Cd. Juarez to Palomas each payday. The GM had researched the prospect of having an armored car service deliver the cash payroll, but concluded that this was not an available option. Additionally, the GM had inquired about entrusting a Mexican bank with this cash payroll requirement, but was unable to find a workable solution. When a decision was made to go with Palomas for the expansion facility, the GM had concluded that the cash payroll would be delivered each Friday by some combination of Continental Sprayers employees.

The system that had been devised by the GM to deliver the payroll was to have an unarmed security guard and an accounting clerk travel in a company car each Friday morning. They would depart at the start of the business day and would arrive in Palomas approximately 2 hours later whereupon dispensing with the payroll, would immediately return to Cd. Juarez. The only navigable road between Cd. Juarez and Palomas is a two lane highway with no shoulder.

This payroll system was implemented and followed through as planned for 70 consecutive weeks. However, early on a Friday morning in August of 1990, Continental Sprayers employees, Jurado and Mendoza, left the Cd. Juarez facility towards Palomas and did not arrive in Palomas. At approximately noon, the Cd. Juarez facility was notified that Jurado and Mendoza had not arrived. What commenced after receipt of this call was an exhaustive and non-stop effort on the part of Contico and Continental Sprayers' management and employees alike to find their brethren. Their efforts marshaled all available law enforcement and teams of volunteers to comb the roadway between Cd. Juarez and Palomas. The search included use of aircraft in attempts to find the company vehicle the Continental Sprayers employees had been driving.

After no word had been received from the two Continental Sprayers employees by day's end on Friday, fears had escalated and tragically were confirmed on the following Sunday afternoon. At that time, an elderly man rummaging through a make shift dumping area in the outskirts of Palomas came across a burned out vehicle. Sensing something odd, he immediately contacted local Palomas law enforcement who then proceeded to the site where the vehicle was located. Upon opening the trunk of the car, the charred remains of Jurado and Mendoza were discovered. While it appeared that some of the cash payroll had actually been consumed in the flames, the investigation concluded that the money was taken as part of a robbery.

Several weeks after this occurrence, a ranch located in the U.S., but in very close proximity to the border region close to Palomas, was the subject of an armed assault by a gang of several Mexican nationals. U.S. Border Patrol officers intervened and a gun battle ensued. None of the Mexican perpetrators were captured in the U.S. However, upon re-entering Mexico, this

gang was met up by a strong force of Mexican law enforcement who were able to apprehend one of the suspects. Upon intense interrogation, the suspect revealed that he was a member of a gang that had carried out the assault of the Continental Sprayers employees. In this confession, the gang member revealed that the gang was led by several convicted felons and veterans of the Mexican correctional system, all of whom had horrid histories for commission of violent crimes. He stated that in preparation for the Continental Sprayers' assault, one of their gang members had obtained employment in the Palomas facility to learn as much as he could about the cash management and payroll systems. Once the perpetrators reached their desired comfort level, they planned an armed robbery using a makeshift roadblock to stop the two Continental Sprayers employees. The confession went on to describe how both employees were tortured, assaulted and shot, eventually being tied up and placed in the trunk of their vehicle. The confession was subsequently recanted by the declarant.

A wrongful death and survivorship action was eventually filed in Texas on behalf of both of the estates of the Continental Sprayer employees and their family members. The causes of action were negligence and gross negligence. The theory of recovery was that the U.S. parent Contico assumed the duty to provide a safe workplace to the employees of its Mexican subsidiary, based on the fact that high ranking officers of Contico were involved in the day to day management of Continental Sprayers, including making all material decisions relating to security. Because the crime had never been solved, the plaintiffs were given alternatives on trial strategy. First, if this tragedy had in fact come at the hands of an organized conspiracy that had infiltrated the company consistent with the confession, the focus was on the absence of background checks that would have potentially detected the questionable background of the

infiltrator and the lax security that allowed the cash management/payroll process to become so easily understood by a criminal mind set.

Alternatively, had this crime been attributable to a roaming band of bandits that simply came upon the Continental Sprayers' vehicle, the plaintiffs contended that such events were readily foreseeable, primarily because on this desolate highway a roadblock of the type that was used could very well have been foreseeable.

### **B. Lessons Applicable to the Trucking Industry**

The issues in *Mendoza*, provide a template for the types of actions and theories of recovery that could be asserted against a transportation terminal operator or a trucking company who enters a new market, opens a new terminal and begins sending drivers through new regions, with which it lacks experience. In this context and in the event of a driver highjacking or cargo highjacking that results in a catastrophic loss, some of the factors that will be pressed by plaintiffs' counsel will be:

- a. Site selection for a terminal - Extent the criminal history of the area to host the facility was evaluated.
- b. Due diligence to ensure that drivers hired did not show any propensity to engage in criminal behavior - Separate and apart from DOT mandated checks and particularly in situations where nature of cargo involves transporting hazardous materials or other cargo that would make a logical target for a criminal mindset wishing to inflict massive harm.
- c. Preserving confidentiality of security protocol - To the extent security procedures are in place, these procedures may have to be kept confidential at certain levels as a breach of confidences could result in compromise of the protocol.
- d. Reducing or eliminating the deterrent effect of security by making security measures too predictable and thus easy to circumvent - The fewer the employees that carry out a high security critical function, the fewer the souls that would have to be corrupted. The competing point is that the fewer the people involved, the tighter the control. Both considerations have merit, but certainly this issue is one that deserves careful evaluation.
- e. Training to respond to criminal act of third parties, both from a driver reaction

standpoint and management emergency response team - Whether it is a driver hauling petroleum who finds himself high jacked or the transportation terminal or trucking company who has a unit in this dire predicament, a sound response will only be helped by training and simulations and other measures that will allow all involved to making rational decisions in split seconds.

f. Security at the home base terminal - Because the crime could have its origin at the facility of the trucking operation, all facets of the security detail must be carefully evaluated.

h. Crime history analysis of routes - In instances where a trucking entity is going to begin running in unfamiliar territory or in areas that are extremely desolate and which possess a higher than normal incident rate of car jackings or similar crimes, advance planning should be implemented.

Obviously, the defense response in the *Mendoza* case was that the occurrence was a direct cause of unforeseeable criminal acts of third parties and that said conduct served to supersede any alleged act or omission of the part of Contico. Alternatively, it was argued that the security measures that plaintiffs' experts were professing demanded exercise of extreme high care, and not ordinary care. These arguments were for the most part unsuccessful with two trial judges and were going to be highly unpersuasive to the jury. (All of plaintiffs' claims were settled prior to deliberation. However, post-settlement interviews indicated that the jurors were prepared to award a sum of \$35 million U.S. dollars for compensatory damages alone and would have most certainly awarded punitive damages).

## **VI. Conclusion**

Over recent years, while the foreseeability of certain catastrophic-politically motivated terroristic criminal events may be on the rise, those events continue to remain the exception to the more common occurrence of theft for monetary gain. Consequently, transportation terminal operators continue to be much more likely to encounter tort liability flowing from the simple theft of a trailer, as opposed to an event calculated to inflict serious damage on property or

endangerment human life. It follows that legal risk analysis would point to the necessity of discharging duties to warn against or to prevent the most commonly anticipated events, with the understanding that measures be implemented to guard against the isolated catastrophic event. In this regard, many of the same security precautions that are undertaken to prevent relatively smaller crime risk, also make up part of the elevated security detail created to address heightened levels of national security risk.

On the other hand, in a changing world, and especially in the area of transport of hazardous materials, transportation terminal operators will be required to meet or exceed all facets of government and private sector security advances that are being initiated to protect against a catastrophic third party criminal/terroristic act. Compliance with this new security state of the art, while presenting new financial burdens, will aid in the deterrence of business and market disruptions that would be much more costly to the industry participant. Additionally, making progress towards implementing improved security measures can go a long way towards establishing that legally imposed duties to prevent criminal acts of third parties have been responsibly discharged. In a time when the unforeseeable is becoming increasingly more foreseeable, a proactive approach to these issues can be the best defense to any prospective tort liability in this area.

## **BIOGRAPHY**

Carlos Rincon is a senior shareholder in the firm of Delgado, Acosta, Braden & Jones, P.C. in El Paso, Texas and has been a Federation member since 2001. Mr. Rincon is board certified in personal injury trial law by the Texas Board of Legal Specialization and devotes a substantial portion of his practice to representation of national and regional trucking companies in a broad range of tort litigation. In April 2002, Mr. Rincon served as program chair for the inaugural Trucking Law Conference sponsored by the Trucking Law Committee of the Defense Research Institute (“DRI”). Mr. Rincon is also a member of the Trucking Industry Defense Association (“TIDA”) and the Transportation Lawyers Association (“TLA”). Mr. Rincon has been a speaker at numerous continuing legal education programs for the State Bar of Texas and other professional development organizations on various subjects ranging from evidence, insurance and trucking law. In 2002 and again in 2003, Mr. Rincon chaired the Mexico law forums sponsored by the Federation of Defense and Corporate Counsel and held in Mexico City. In November 2002, Mr. Rincon was named member of the month by the DRI and is currently serving as a member of the planning committee for the 2004 Annual meeting for the DRI in New Orleans.

Mr. Rincon is a graduate of the University of San Francisco School of Law and The University of Texas at El Paso. He is married to Juanita Rincon and they have three children, Samantha age 11, Michael age 7 and Jacob - 6 months.