

A Look at Invoking War Exclusions



BY MICHAEL SEAN QUINN

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The destruction of the World Trade Center on Sept. 11, was a disaster from a variety of points of view. President Bush is right: it was the embodiment of evil, as are most terrorist attacks on civilians. It is also a national security nightmare. One that will curtail the easy comings-and-goings of Americans within their own country.

The World Trade Center terrorist attack is also an insurance catastrophe with insured losses placed insured losses as high as \$72 billion. Obviously, uninsured losses are going to be 10 times that amount or more. More than a hundred thousand jobs, for example, have been eliminated since Sept. 11. Surely, not all of those riffs were caused by the attack, even though some companies are trying to make things look that way.

Many insurance companies are taking out large ads in *The New York Times*, and elsewhere, indicating that they will pay claims on an expedited basis. Some life insurance companies are not requiring straight documentation as to proof of death. One wonders if all of these commitments will remain over time. One also worries that the insurance industry may be in for some serious difficulties.

I.

One of the commitments some insurers have undertaken is to refrain from invoking war exclusions. A number of different types of insurance policies exclude losses which result from war. Many life insurance policies have contained such exclusions. Maritime marine insurance customarily contains such an exclusion, as does marine cargo insurance. These kinds of exclusions are even found in some types of property insurance, travel insurance, and some types of umbrella coverages. It is doubtful they even arguably apply to Sept. 11.

Historically, war exclusions applied only during the interval between the declaration of war and the signing of a peace treaty. Most contemporary war exclusions are not so rigid. Most exclusions currently in use exclude otherwise covered injuries resulting from war, "whether declared or undeclared."

War has always been a state of affairs which existed between sovereign powers, i.e., countries. The only exceptions have been rebellion and insurrection. Thus, transnational terrorism not instigated by a sovereign power cannot be war. Consequently, war exclusions could not apply.

The fact that political officials in the United States, such as President Bush himself, consistently described what happened at the World Trade Center as an act of war, is irrelevant.

The attack on Pearl Harbor was an act which

initiated a state of war. There were legal controversies at the time as to whether it constituted war. Then again, the attack on Pearl Harbor is sharply distinguished from the attack on the World Trade Center. The attack on Pearl Harbor was an assault on a military installation for an obviously military purpose, whereas the World Trade Center is not a legitimate military target, and there has been no military follow-up.

Thus, it is almost certain that, notwithstanding President Bush's language to the contrary, the attack on the World Trade Center was not an act of war. War exclusions, therefore, do not apply. Of course, there is now a good deal of talk about how the United States has become embroiled in a new kind of war—about how the war on terrorism is a brand new thing. Nevertheless, given that exclusionary language, when ambiguous, is construed in favor of the policyholder, it is doubtful that war exclusions will apply.

II.

These matters do not come up in court very often. When they do come up, they can be complicated. One significant case is *Pan American World Airways v. Aetna Casualty*. This case was tried in Federal Court for the Southern District of New York and subsequently appealed to the federal Second Circuit.

On Sept. 6, 1970, a PanAm flight to New York was hijacked about 45 minutes after it had taken off from Amsterdam. The hijackers flew the plane to Beirut and then on to Egypt. The hijackers put the passengers off the plane there and then blew it up.

PanAm had purchased both all-risk aviation insurance and war-risk insurance. The question was which group of insurers had to pay. The all-risk insurers put on a huge amount of evidence regarding the history of war and political tensions in the Middle East. The war-risk insurers also introduced a good deal of evidence regarding violent controversies in the Middle East. None of that evidence was much good. The war-risk insurers also demonstrated that the all-risk insurers thought that their war exclusions might be ambiguous in the context of political hijackings.

Two sub-exclusions were significant. One of them excluded coverage for losses due to or resulting from capture or seizure of any property by any governmental authority, any military authority, or by any authority which has usurped governmental authority. The second exclusion barred coverage for losses resulting from "war, invasion, civil war, revolution, rebellion, insurrection, or war-like operations, whether there be a declaration of war or

not.]” In addition, the all risk policies excluded losses resulting from riots and “civil commotion.”

The Second Circuit thought that the all risk insurers’ best arguments were that the highjackers constituted a usurped power and that the highjackers were engaged in war-like operations. The Second Circuit rejected the former argument upon the grounds that the usurped power—such as guerilla movement—must have at least some of the indicia of sovereign power under international law.

The appellate judges appear to believe that the argument based upon war-like operations had some plausibility. On the other hand, the panel thought that in order for there to be war-like operations, there had to be a war, even if an undeclared one. To be sure, war-like operations could occur in regions geographically remote from the area of the war. There still must be a war, and the war-like operations must be a means for waging that war.

In the end, the Second Circuit said, “there is no basis whatsoever for any claim that the insured of PanAm was involved in any war-like operation. It carried no cargo of military stores. It carried no cargo destined for a theater of war. Its owner was not the national of any Middle Eastern belligerent. Pan American serves no routes to any Middle Eastern belligerent. When the war occurred, the aircraft was not near or over the territory of any belligerent or any theater of war.”

The reasoning in the PanAm case applies to the World Trade Center problems.

III.

In another, more recent case, International Multi-Foods Corporation sued Commercial Union Insurance Company arising out of an incident in which the Russian police seized a shipment of frozen food incident to its investigation of black-market bribery and customs evasion. A federal court in the Southern District of New York decided this case in 2000.

CU had issued Multi-Foods’ property insurance and tried to invoke a war risk exclusion. One of the provisions of that exclusion barred coverage for losses caused by “capture, seizure, arrest, restraint, or detention (piracy excepted).” The insurer thought that the concepts of capture and seizure applied.

The district court thought otherwise. This language, it observed, appeared in the context of an exclusion entitled “War Exclusion Clause,” and amidst a group of other exclusionary words which were clearly restricted to situations or war.

IV.

One hears a good deal of loose talk these days about exclusions for terrorism. I have

never seen one, and there are no reported cases involving such an exclusion.

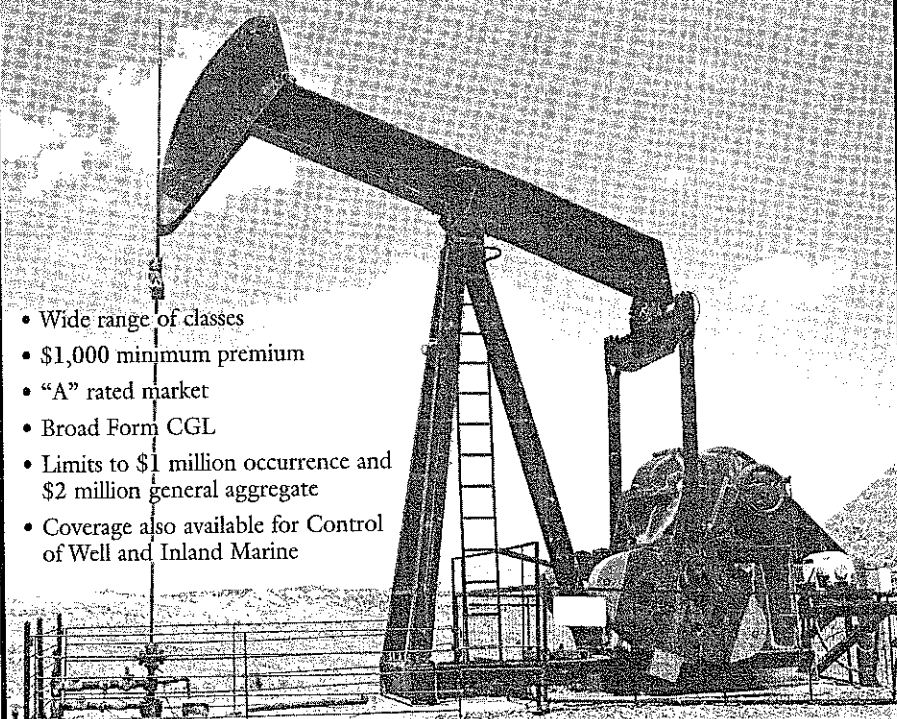
With less than a month having passed since the attack, it would be surprising if any lawsuits have been filed involving insurance disputes. We all know, however, that they will come. Business interruption evaluation will be a sticky problem. Moreover, we have no idea what kind of problems will come up under liability policies. And issues of reinsurance will

be even more intractable. Of course, most of them will be subject to arbitration. ■

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