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Business As Usual: Insurance and September 11

Richard John Hawkins[†]

While the monetary impact on the American insurance industry remains unparalleled, the legal impact of September 11, with regards to war risk exclusion, remains as always: business as usual.

Despite their differences in virtually every aspect, George W. Bush and Osama Bin Laden hold strikingly similar opinions on matters of war. According to a 1998 statement by Bin Laden, “what we do care for is to please God . . . by doing jihad in his cause and by liberating Islam’s holy places from those wretched cowards.”¹ Several years and four devastating hijackings later, President Bush unequivocally declared that “on September the 11th, enemies of freedom committed an act of war against our country.”² Both Bush and Bin Laden consider the other’s actions acts of war; both are defending their nations and people; both have declared war against the foreign enemy, both agree that a state of war exists.

The House Financial Services Committee and Insurance Subcommittee, however, disagree with both the President and Bin Laden. In a September 2001 letter addressed to the National Association of Insurance Commissioners, the Committee stated: “Through necessity our government is expressing America’s outrage through words of war, but this rhetoric reflects the passion and determination of our country, not the legal reality of Tuesday’s

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¹ George W. Bush, Address to a Joint Session of Congress and the American People, 20 September, <<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.htm>>, 2 December 2002.

² John Miller, ABC News Interview with Osama Bin Laden, May 1998, <http://abcnews.go.com/sections/world/DailyNews/transcript_bindladen3_981228.html>, 2 December 2002.

destruction. Any attempt to evade coverage obligations by either primary insurers or reinsurers based on such legal maneuvering would not only be unsupportable and unpatriotic—it would tear at the faith of the American people in the insurance industry.”³ As far as the House Finance Subcommittee was concerned, no war existed and the insurance industry was to conduct business as usual.

Even as the nation confronted the worst disaster in U.S. history, the insurance industry confronted the worst monetary disaster in its history. Before the attack, Hurricane Andrew ranked as the most expensive insurance disaster at \$20 billion.⁴ Early damage estimates of September 11 ranged from \$40 billion to \$100 billion.⁵ Despite the unparalleled losses caused by this “act of war,” many insurance companies soon declared that they would not invoke the war risk exclusion as a means of denying coverage for damages related to the attacks. In other words, insurers agreed with the House Financial Services Committee that the events of September 11 were not war-like, and the industry would not deny coverage.

To understand the committee’s and industry’s response, it is important to know that a typical insurance company exempts itself from coverage for many different risks that would be too costly for the insurer to assume. For example, standard exemptions include asbestos, preexisting health conditions, and suicide.⁶ Nestled among the many exemptions is the war risk exclusion, typically denying coverage for

Hostile or warlike action in time of peace or war, including action in hindering, combating, or defending against an actual, impending or expected attack (i) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using

³ Jim Bernstein, Statement of Minnesota Commerce Commissioner Jim Bernstein, <<http://www.commerce.state.mn.us/pages/NewsReleases/Releaswes2001/News010924.htm>>, 2 December 2002.

⁴ Adjusted 2000 dollars.

⁵ Martin Katz, “The Cost of Claims,” <http://legamedia.net/legapractice/akin-gump/2002/02-0023_katz_martin_cost-of-the-claims>, 2 December 2002.

⁶ Spencer L. Kimball, *Cases and Materials on Insurance Law* (Boston: Little, Brown and Company, 1992), 340, 451–54, 422–23.

military, naval or air forces; or (ii) by military, naval or air forces; or (iii) by an agent of any such government power, authority or forces. Insurrection, rebellion, civil war, usurped powers or action taken by governmental authorities in hindering, combating or defending against such an occurrence; seizure or destruction against quarantine or customs regulations, confiscation by order of any government or public authority, or risks of contraband or illegal transportation or trade.⁷

The insurance industry's response in granting coverage after September 11 may have been motivated by humanitarian compassion and concern for national welfare, but their actions in granting coverage are also based on legal precedent set forth in two important insurance-related cases. Landmark decisions in both *Pan American World Airways, Inc. v. Aetna Casualty & Surety Company* and *Holiday Inns, Inc. v. Aetna Insurance Company* held that insurance companies were not liable for damages incurred by non-warlike activities.

On 6 September 1970, two hijackers from the Popular Front for the Liberation of Palestine took control of Pan American flight 083 in the airspace above London. The 747 aircraft, en route from Brussels to New York, was redirected to Beirut and subsequently to Cairo. After the evacuation of the passengers, explosives experts blew up the airplane. Aetna Casualty & Surety Company tried to deny coverage, invoking the war risk exclusion included in Pan American's policy. The United States Court of Appeals for the Second Circuit ruled that the war risk exclusion did not apply to the hijacking incident. According to the court, the Pan American incident did not constitute a warlike operation because it was perpetrated by a non-government entity "upon civilian citizens of non-belligerent powers and their property . . . at places far removed from the locale or the subject of any warfare." In summary, the court concluded that in the case of Pan American, "the destructive action

⁷ Couch on Insurance § 48:131, quoted in Matthew F. Adler, Deborah H. Cohen, and Edward T. Groh, "Terrorism: The 'New War' in Insurance Agreements," *The Brief* 31, no. 3 (Spring 2002): 19, 17.

is not coercion or conquest in any sense, but the striking of spectacular blows for propaganda effects."⁸

Thus, two central questions addressed by the court emerged as the standard by "which future cases would be decided. First, what constitutes an insurrection with intent to overthrow, and two, when does a group possess sovereignty or quasi-governmental status sufficient to qualify an action as an act of war?"⁹ The court denied evidence of both, and Pan American World Airways received \$25 million from Aetna.¹⁰

Nine years after the ruling in *Pan American*, the United States District Court for the Southern District of New York addressed a similar question in *Holiday Inns* over damages incurred during a six month uprising between Palestinians and Liberal Nationalists in Beirut. The court, using arguments and wording similar to the *Pan American* opinion, denied the merits of the exclusion. The insurer failed to prove sufficient sovereignty of the group to classify the events as warlike.

With legal precedent set in both *Pan American* and *Holiday Inns*, there appears to be little that insurers can do to avoid coverage. Yet, the type of attacks perpetuated on September 11 is unprecedented historically and distinctly different from the past events challenged in court, wherein the exemption did not apply.

Several characteristics of September 11 differentiate the event from previous isolated hijackings and uprisings examined by the courts with regard to war risk exclusion. First, the attack was composed of four separate, but coordinated attacks aimed at destroying the financial, military, and, we assume, political centers of the United States. Second, the attacks were perpetrated by foreigners on American soil, unlike any previous attack since Pearl Harbor. Third, no hijacking or uprising has matched the September 11 attacks in

⁸ *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.* 505 F2D (2d Cir. 1974), 1015-1016.

⁹ Adler, Cohen, and Groh, 19.

¹⁰ "Insurance Industry Begins to Sort Out WTC Tangle," *Long Island Business News*, 21-27 September 2001, <<http://www.quadrinoschwartz.com/LIBN-SEPT-2002.htm>>, 2 December 2002.

magnitude of either civilian life lost or monetary damage done. Fourth, the attacks resulted in a U.S. retaliatory overthrow of the Afghanistan Taliban government and similar threats against other governments suspected of funding terrorist cells. There is even evidence that at one time Osama Bin Laden may have been appointed Defense Minister under the Taliban.¹¹ Fifth, the al Qaeda organization responsible for the attacks is not a small group of independent radicals. Rather, it is a vast network of tens of thousands of adherents, often referred to as an army because of extensive military and philosophical training.¹² Lastly, in 1998 Bin Laden declared an official jihad against the United States and allies of Israel, which led one scholar to wonder how the declaration of a "holy war" by a religious body is any different than the declaration of war by a legislative body.¹³ Consequently, the circumstances surrounding September 11 differ significantly from those surrounding either *Pan American* or *Holiday Inns*.

The application of the war risk exclusion to the September 11 attacks has some limited legal precedent of its own. The United States District Court for the District of Delaware allowed for the application of the war risk exclusion in *TRT/FTC Communications, Inc. v. Insurance Company of the State of Pennsylvania*. On 20 December 1989, one day after the U.S. invasion of Panama, TRT/FTC Communications was burglarized by eight armed but civilian-dressed individuals in the business district of Panama City. The court decided that

the eight men who robbed the TRT facility in Panama City on December 21, 1989, were part of some arm of the Panamanian government's forces involved in the war effort. However, regardless of whether the men were part of the Panamanian forces or a band of looters, there is ample evidence to support the conclusion

¹¹ Carl J. Pernicone and James Deaver, "T. H. Insurance Implications of the World Trade Center Disaster," *The Brief* 31, no. 3 (Spring 2002): 26.

¹² Adler, Cohen, and Groh, 19.

¹³ Randy J. Maniloff, "The War Risk Exclusion—Looking beyond the Events of September 11th," <<http://www.cpmj.com/articles/war.html>>, 2 December 2002.

that their actions against TRT were enabled by the military hostilities occurring between Panama and the United States.¹⁴

Thus, if the insurers can prove that the attacks of September 11 were provoked by military hostilities occurring during the Afghanistan bombings in 1998, or the ongoing Iraqi conflict, whether the attackers constituted a part of any nation's government forces or not, denial of coverage would not be unprecedented.

Although cases challenging the war exemption seem unlikely, the courts should see no shortage of insurance cases related to the September 11 attacks. Most cases and claims will involve business interruption coverage. A drawn-out dispute determining whether the attacks constituted one occurrence¹⁵ as the insurers argue, or two occurrences as the insured claim, should also keep the owners and insurers of the World Trade Center involved for years to come.¹⁶ Barring the invocation of the war risk exclusion, the court's future decision on the one-two occurrence issue will constitute the most important legal impact of September 11 on the insurance industry.

With no insurance companies willing to test the war risk exclusion precedents set forth by *Pan American* and *Holiday Inns*, there is little prospect of any redefinition of the terms sovereignty, insurrection, or act of war by the courts. Any future attacks could qualify under war risk exclusion because insurers could argue that they are retaliatory actions in response to American hostilities in Afghanistan and the Middle East. With no insurer willing to risk commercial suicide over such an extremely sensitive and nationalistic

¹⁴ *Ibid.*

¹⁵ Swiss Re, one of the building's policy insurers, included a coverage limit on any individual occurrence. The policy states that "occurrence" shall mean all losses or damage that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occur." The limit would restrict coverage to \$3.6 billion total, as opposed to \$3.6 billion for each tower. See Michael F. Aylward, "Twin Towers: The \$3.6 Billion Question Arising from the World Trade Center Attacks," *Defense Counsel Journal* (April 2002): 169-71.

¹⁶ Ten years after the 1993 bombing of the World Trade Center, many of the 500 lawsuits and insurance claims filed are still unsettled. See Katz, "The Cost of Claims."

event as September 11, the opportunity to reexamine and invoke the war risk exclusion of the nation's insurance policies may well have passed. Indeed, the November 2002 passage of the Terrorism Risk Insurance Act which extends coverage, limits insurers' losses, and provides for federal bailout for terrorist acts may well render the issue irrelevant. While the monetary impact on the American insurance industry remains unparalleled, the legal impact of September 11, with regards to war risk exclusion, remains as always: business as usual.