By Dennis T. D'Antonio

When War is Not War

Since September 11, 2001, that word has been increasingly uttered in homes, newspapers and by the President of the United States himself. With in excess of 6,400 lives lost and estimates of insured losses from $30 billion [1] to $72 billion [2], the attack on the 12 million square foot World Trade Center complex has tragically risen to become the worst man-made and indeed overall, insurance loss in history. [3] A critical part of any recovery will be the insurance available to rebuild or start over.

However, in the wake of the political pundits declaring that in the attack was an "act of war"[4], the frequently ignored insurance provisions pertaining to the "acts of war," "war-like operations" and related exclusions have come under close scrutiny. A reasoned analysis of the case-law reveals that these exclusions have no effect on the losses suffered as a result of the attack.

All Risk Policies of Insurances

Contracts of insurance have been referred to as 'Contracts of Adhesion' in view of the disadvantageous bargaining position that generally exists between the parties and, under such circumstances, are narrowly construed against the insurer.[5] Generally, when an insurer wishes to restrict certain coverage within its policy obligations, it must do so in clear and unmistakable language. [6] Such limitations or exception from policy coverage must be specific and clear in order to be enforceable, and they are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction. Thus, the insurance company bears the burden of establishing that the restrictions apply in a particular case and that they are subject to no other reasonable interpretation. [7]

Almost every policy providing coverage to victims of the attack, is an all-risk policy. The burden on the insured in an all-risk policy is very low. In order for an insured to recover under an all-risk policy of insurance, plaintiff must only prove the existence of the policy and a fortuitous loss to covered property.[8] Having made such a *prima facie* showing, the insured is not obliged to prove the cause of the loss. [9]

Once the assured has made the requisite showing, an insurer wishing to avoid or limit liability bears the burden of proving that the loss falls under some exclusion or limitation in the policy.[10] Generally, language in a policy of insurance should be afforded its plain meaning as a matter of law. [11] Similarly well recognized is the general rule that ambiguities in an insurance policy are to be construed against the insurer, particularly when found in an exclusionary clause or limitations provision. [12] In fact, where the policy is ambiguous, and no extrinsic evidence is offered from which it may be concluded that the policy should be interpreted in favor of the insurer, the policy must be narrowly interpreted in favor of the insured. [13] Any attempt to apply the "acts of war" "war-like operations" "insurrection," "civil commotion" or "riot" exclusions, will meet with defeat as the acts of September 11, 2001 quite clearly do not fall squarely within their narrow confines, leading to the

inevitable conclusion that coverage must be afforded to insured's as more fully set forth below. The courts have long recognized the difficulty surrounding the exclusions pertaining to war. Thus, where the terms are susceptible to more than one meaning, the doubt must be resolved in favor of the insured. The burden is on insurance companies to establish not only that its interpretation of the coverage and limits provisions are reasonable, but also that its interpretation is the **only** one that can fairly be placed thereon. [14]

War-Related Exclusions

Insurance policies of all varieties have long contained exclusions for war and war-like operations. The courts have addressed these provisions quite differently. For example, some courts have found that there is no war until an official declaration by the governing body authorized to declare a war.[15] Other courts have ruled that there need exist no official proclamation, since the common understanding of war was the conflict between the armed forces of two nations under authority of their respective governments. [16] There has even been discussion of the point at which war ceases for purposes of insurance policy exclusions, finding a cease-fire was tantamount to an end to a war, despite the absence of a treaty of peace or a complete conquest with annexation. [17] All of the foregoing cases recognized that for there to be war, the conflict must be between the armed forces of two nations under authority of their respective governments.

Pan Am v. Aetna and
Holiday Inns v. Aetna

In stark contrast to these cases discussing wars, stand the cases addressing terrorism. The two leading cases, Pan Am. World Airlines, Inc. v. Aetna Cas. & Sure Co [19] and Holiday Inns, Inc. v. Aetna Ins. Co. , essentially define the universe for discussions of one-sided unprovoked acts like those of September 11, 2001. Holiday Inns, the more recent of the two cases, tracks the analysis of Pan Am., coming to the same conclusions, albeit on different facts, thus it will not be separately discussed herein. Their respective discussions of the very provisions likely to be relied upon by insurance companies, leave no doubt that the losses suffered in the World Trade Center attack are entitled to full coverage.

Pan Am. V. Aetna

In Pan Am, three Boeing 747s owned by the insured were hijacked while making regularly scheduled transatlantic flights. The hijackers were self-proclaimed members of the Popular Front for the Liberation for Palestine (the 'PFLP'). As stated by the hijackers, the intent of the PFLP in taking such action was to draw attention to what it deemed the wrongful provision of aid to Israel in the form of fighter jets and used to attack Palestine. The insurer relied upon several exclusions in the policy to deny coverage. They include: capture, seizure or taking of property by any military or usurped power, lawful or unlawful; war, civil war, revolution, rebellion, insurrection or warlike operations, whether there be a declaration of war or not; and riots or civil commotion.

After a discussion of dominant efficient cause of the loss, finding that the loss was occasioned by hijacking as opposed to any of the events following the hijacking (additional persons coming aboard, placement of explosives aboard, etc.), the court addressed each of the relied-upon exclusions in turn. In discarding the first defense, capture by a military or usurped power, the court found that to constitute a military or usurped power, the power must be at least that of a de facto government. Because the PFLP was not a de facto government in the sky when the planes were taken, there was no loss due to or resulting from a military or usurped power. In reaching that conclusion, the court noted that to constitute a de facto government, the insurers had failed to show as required, that the PFLP assumed 'the power of government by giving laws and punishing for not obeying those laws.'[20]

Similarly, the suspected organizer of the World Trade Center attacks on September 11,2001, al Qaede, backed by Usama bin Laden, can, by no stretch of the imagination be called a de facto government. Quite the contrary, al Qaede eschews law in favor of terrorist aims. It supplants law and order with religious extremism, thereby exhibiting none of the tenets of government in any normal sense of the word.

Addressing next the exclusion of losses occasioned by "war", the court noted again that the PFLP could not be considered a de facto government. It went on to rely on case law and treatises to find that "war is a course of hostility engaged in by entities that have at least significant attributes of sovereignty."[21]

The court clearly stated "[I]n the present case, the criminal acts of [the hijackers] were the proximate cause of the loss of the 747, not a remote conflict between warring states."[22] While noting that tics and undeclared de facto war may exist between sovereign states, the court in Pan Am., gave several indicators militating against a finding of any sovereign or even quasi-sovereign status for the PFLP. These included a failure of any recognized state to negotiate with the PFLP on equal terms, the failure of any Arab state to recognize the PFLP, the lack of any insignia on the clothes of the hijackers and their failure to openly carry arms. The court additionally noted that the mere fact that the PFLP received financial support from several states was insufficient to qualify the PFLP as the quasi-sovereign.

Here too, al Qaede does not enjoy the recognition of a single state as a sovereign. Here too, the hijackers acted not as a sovereign, but, clandestinely in plain clothes so as to avoid detection, cloaking their weapons and acting as subversive zealots. Indeed, even the funding does not come from recognized states, but instead from criminal enterprises and a single wealthy individual, Usama bin Laden.

Moving to an exclusion for war-like operations, the court noted that while this term is broader than "war," it ruled there was no basis to find that the insured was involved in war-like operations. In coming to this conclusion, the court again noted several no cargos of military stores or cargo destined for a theater for war.[23] The owner of the planes, the insured, was not the nationality of, nor served any routes to any Middle Eastern belligerent.

[24] Finally, at the time of the loss, the airplanes were not near or over the territory of any belligerent or any theater of war. [25]

The flights involved in this most recent hijacking are even further removed. All four hijacked flights were domestic flights scheduled to fly only over domestic airspace. The flights carried civilians on regularly scheduled routes for commercial purposes. The airlines involved were commercial concerns, with no military ties.

Turning next to insurrection, it should be noted that if the loss was not caused by Insurrection, then it could not have been cause by any of the other civil disorders made part of the exclusion, including civil war, revolution or rebellion, since there other terms are all progressive stages of the most basic civil unrest - insurrection. In order to find that the losses were the result of an insurrection, the court found that there needed to be 1) a violent uprising by a group or movement 2) acting for the specific purpose of overthrowing the constituted government and seizing its powers.[26] For purposes of this exclusion, any intent, no matter how quixotic, was sufficient, since it was a subjective, not an objective, standard that governed the "intent" analysis. Affirming the district court's findings, the Pan Am., Court noted the insurers failed to show that at the time of the loss the PFLP intended to overthrow King Hussein. Alternatively, the court noted that there was ample evidence that any insurrection was not the proximate cause of the loss, since the hijacking had nothing to do with Jordan, and was instead an attack solely on the Unites States in retaliation for selling Phantom jets to Israel.

On this exclusion, surely it cannot be argued that by hijacking four flights traveling solely within the United States of America, that the hijackers ever intended to overthrow the government of Afghanistan, the suspected homeland of al Qaede. And just like in Pan Am., any insurrection was merely a consequence of the hijacking that was intended as an attack solely on the United States in retaliation for its entrance upon supposed Holly Land in Saudi Arabia during the Persian Gulf War and its support of Israel.

Addressing the final category of exclusion, i.e. strikes, riots or civil commotion, the court commented on the "domestic flavor" that contrasts sharply with the previously discussed exclusions. Riots and civil commotion are purely local, domestic disturbances.[27] The court explicitly found "civil commotion does not comprehend a loss occurring in the skies over two continents." [28]

Here again, the attacks on New York and Washington, D.C. had nothing to do with a domestic disturbance, but instead was a terrorist attack bye non-American persons, for the specific purpose of implementing destruction on our country.

In discussing the last exclusion relied upon by the insurers, that of riot, the court noted that there were at least three schools of legal thought on the issue. From the outset, the court noted that in the case before it, because only two persons hijacked the plane, there could, per se, be no riot since a riot requires three or more persons with a common purpose. Moving past this bright line disqualification, the court went on to discuss the alternate definitions of riot. These included that a riot by accompanied by a tumult of commotion at

the time of the taking or that it be a tumultuous assembly a multitude of people.[29] Noting the legal maxim of contra proferentum, the court declined to select a single definition and found that the insurers, as the drafters of the Biguous. Thus, after addressing each exclusion relied upon by the insurers, the Pan Am. Court affirmed the District Court decision and the insurers were obligated to afford coverage to Pan Am.

In this most recent case, it has been reported that there were from three to five operators on each of the hijacked planes, taking it beyond the bright line rule noted in Pan Am. This is however of little moment, since there remains no resolution of the definition of riot and indeed the domestic flavor of the term cannot be ignored. It remains the Insurers' burden to show not only that its characterization of these hijackings constitute a riot, as they define it under the policy, but that theirs is the only reasonable interpretation of the policy. This is a task the insurers are not up to.

Terrorism Exclusions

The final exclusion worthy of note has yet to be tested in the courts. Since the terrorist bombing of 1994 at the World Trade Center and the bombingin Oklahoma City in 1995, a very few insurance carriers have inserted exclusions for losses occasioned by terrorism.[30] However, for additional premium, these policies are often endorsed with provisions obviating this terrorism exclusion. It should be noted that several leading U.S. Insurance carriers have affirmatively declared that they would pay claims related to the September 11, 2001 attacks. [31] However, this does not mean that reinsurers, the insurance companies behind the insurance companies, will not attempt to invoke the provisions, since they stand to carry the lion's share of the billions of dollars of coverage arising out of the attacks. [32]

Conclusion

As noted above, a careful reading of the legal interpretations of the exclusions commonly associated with actions like those of September 11, 2001 leads to the inevitable conclusion that the losses will find coverage in almost any policy in effect on that date. Indeed, it is evident that for purposes of their use in the context of insurance policy interpretation, the terms bandied across the television and in all the headlines are not governing. Confronted with such strong legal precedent, the insurers will likely fall back on more familiar ground of challenging losses on the basis of valuations, Regardless, this nation will do well to work amicably toward a resolution on insurance claims so that we can focus collectively on the greater threat of terrorism that has brought us shockingly into a new era of democracy.

*Dennis T. D'Antonio is a managing partner with the law firm of Weg and Myers; P.C.

[1] Omaha World-Herald, Sept 18,2001; Wall Street Journal, Col. 4. p3, Sec A. Sept 17, 2001.

[2] New York Times, Col 6., P.8, Sept. 21, 2001.

[3] New York Times, Col 6, p. 8, Sept 21, 2001; Omaha World-herald, Sept 18, 2001. Sacramento Bee, Sept 13, 2001 (losses in recent history in order of magnitude of insured losses: 1992-Hurricane Andres, $19.1 billion: 1994-Northridge, California earthquake, $16 billion: 1992-Los Angeles Riots, $775 million; 1993 - World Trade Center bombing, $510 million; 1995 - Oklahoma City, Oklahoma bombing $125 million).

[4] Sept.12, 2001. CNN Report, President George W. Bush; Sept 11, 2001, CNN Report Senator John McCain and Senator John Kerry.

[5] Eagle Star Ins. Co., LTD. V. Int'l Proteins Corp., 45 A.D.2d 637, 360 N.Y.S.2d 648 (1st Dept. 1974) *aff'd* 38 N.Y.2d 861,382 N.Y.S.2d 481 (1976) *citing*4 Williston on Contracts, Third Edition ,§626, at pp. 855-857.

[6] Gaetan v. Firemen's Ins. Co. of Newark, 264 A.D.2d 806, 695 N.Y.S.2d 608 (2d Dept. 1999) *citing* Seaboard Surety Co. v.Gillette Co., 64 N.Y.2d 304, 486 N.Y.S.2d 873 (1984)

[7] *See*, Gaetan, *supra*. (emphasis added).

[8] Allied Van Lines International Corp. v. Centennial Insurance Company, 685 F.Supp. 344 (S.D.N.Y. 1988).

[9] *In re Balfour MacLaine Int'l Ltd*, 85 F. 3d 68 (2d Cir. 1996).

[10] *See, e.g., Maurice Goldman & Sons, Inc. v. Hanover Ins. Co.,* 80 N.Y.2d 986, 592 N.Y.S.2d 645 (1992).

[11] Ace Wire & Cable Co., Inc. v. Aetna Casualty & Surety Company, 60 N.Y.2d 390, 469 N.Y.S.2d 655, (1983).

[12] Handlesman v. Sea Ins. Co., Ltd., 85 N.Y.2d 96, 623 N.Y.S.2d 750 (1994); Lavanaant v. General Acc. Ins. Co., 79 N.Y.2d 623, 584 N.Y.S.2d 744 (1992); Breed v. Ins. Co. of North America, 46 N.Y.2d 351, 413 N.Y.S.2d 352 (1978).

[13] *See generally*, Tri Town Antlers Found, v. Fireman's Fund Ins. Co., 76 N.Y.2d 841, 560 N.Y.S.2d 124 (1990); Hartford Ace & Indem. Co. v. Wesolowski, 33 N.Y.2d 169, 350 N.Y.S.2d 895 (1973).

[14] Sincoff v. Liberty Mutual Fire Ins. Co., 11 N.Y.2d 386, 230 N.Y.S.2d 13 (1962); *citing* Hartol Products Corp. v. Prudential Ins. Co., 290 N.Y.44 (1943), Bronx Sav. Bank v. Weigandt, 1 N.Y.2d 545, 154 N.Y.S.2d 878 (1956).

[15] Pang v. Sun Life Assurance co., 47 Haw. 208, 1945 WL 5596 (1945); Rosenau v. Idaho Mut. Ben Ass'n, 65 Idaho 408, 145 P.2d 227 (1944).

[16] New York Life Ins. Co. v. Bennion, 158 F.2d 260 (10 th Cir. 1946); Stankus v. New York Life Ins. Co., 312 Mass. 366 44N.E.2d 687 (1942).

[17] Shneiderman v. Metropolitan Cas. Co. of New York, 14 A.D.2d 284, 220 N.Y.S.2d 947 (1 st Dept. 1961).

[18] 505 F.2d 989 (2d Cir. 1974).

[19] 571 F.Supp 1460 (S.D.N.Y. 1983).

[20] Pan Am., 505 F.2d at 1010 *citing* Drinkwater v. The Corp. of the London Assurance, 95 Eng.Rep.863 (C.P. 1767).

[21] Id. at 1012.

[22] Id. at 1013.

[23] Id. at 1017.

[24] Pan Am., 505 F.2d at 1017.

[25] Id.

[26] Id.

[27] Id. at 1019.

[28] Pan Am., 505 F.2d at 1020.

[29] Id. at 1021.

[30] Sacramento Bee, Sept. 14.2001.

[31] *Wall Street Journal,*Col. 6.p.2, Sept. 20, 2001 (Ace Ltd. States they will not invoke act of war exclusions to avoid paying claims from the WTC attacks); United Press International, Sept.19, 2001 (Douglas W. Leatherdale, Chairman of The St. Paul Co.s, "We are not going to hide behind the war exclusion for these acts of terrorism"): Sacramento Bee. Sept. 14,2001 (Emily Daly, spokeswoman for Allstate Ins. Co. "The war and warlike acts exclusions will not apply for the events on September 11, [2001]); New York Times, Col 3, P.1, Sept.13,

2001 (Dean R. O'Hare, Chief Executive of the Chubb Corporation, "If it's terrorism, it's absolutely covered").

[32] *New York Times*, Col.6.p.8, Sept.21, 2001 (Berkshire Hathaway Reinsurance Group estimates losses at $2.2 billion: Munich Re estimates losses at $1.95 billion; Swiss Re estimates losses of $1.25 billion); New York Times Col. 5. p.1 Sept. 15,2001 (Employers Reinsurance Corp. estimates losses of $600 million).