

Insuring Businesses Interrupted by Terrorist Attacks

How does one begin to recover from the September 11, 2001 terrorist attacks on the World Trade Center ("WTC")?

After people have begun this seemingly impossible task in their personal lives, how do the many businesses located in the now decimated buildings recover?

Insurance is a start. And most companies have business interruption coverage, usually through an endorsement or rider to their insurance policies. Assuming that there is coverage for the WTC attack-despite policy exclusions for "acts of war" (discussed below)-what is the scope of this coverage?

1. The Scope of Business Interruption Coverage

(a) Purpose of coverage

Business interruption coverage is designed to protect a company's future and continued earnings when it is unable to pursue normal operations because of physical loss or damage to the company's real or personal property.

(b) Items generally covered

The general rule is that business interruption coverage applies for as long as required to rebuild, repair, or replace the business operations with due diligence, and provides recompense for the following:

- (1) loss of net profits (i.e., gross earnings minus the cost of both production and merchandise sold);
- (2) costs incurred to reduce the loss; and
- (3) fixed charges and expenses necessarily continuing during the interruption period.

(c) Coverage for businesses not headquartered at the WTC

For example, is there coverage for a company headquartered in California that had a branch office or only leased property at the WTC? Here, coverage typically protects against losses arising from the inability to conduct business while using the company's (now lost or damaged) physical assets.¹ If the policy lists the branch office as one of its business locations, then the entire company's losses may be covered.

Even losses sustained at business locations not identified in the policy - but still interrelated and interdependent - have been held in some cases to be covered under the business interruption provision. As one court noted,

"Depending upon the language of the particular policy, such coverage [i.e., business interruption coverage] is not necessarily site specific. Where operations are found to be interrelated and interdependent, mutually dependent, or vertically integrated, courts have not confined the recoverable loss to the particular property that was damaged."²

An even more interesting issue, though, remains: Is there business interruption coverage for a company not located at the WTC that simply did business with another company that was located at the WTC? Again, one must first read the policy, to see if it is limited to damage to real or personal property owned by or on the premises occupied by the insured. If this language is contained in the policy, then there would appear to be an argument against business interruption coverage for the non-WTC company. But if there is no site-specific limitation in the policy regarding the damaged property, then it remains a question whether business interruption coverage would apply if the insured's operations were "interrelated and interdependent, mutually dependent, or vertically integrated" with a separate WTC company.

Policies may also be limited to only direct causation of losses if they contain an exclusion for "consequential or remote" losses. This exclusion has been held to allow for coverage only for losses that resulted directly from the interruption of the business operations.³ For these reasons, it is important for businesses not located at the WTC to examine the fine print of their policies to determine the scope of their business interruption coverage.

(d) Coverage when no operations are resumed

What recovery is there for a company under its business interruption coverage if it does not resume operations at all? The aforementioned ISO Business Income Coverage Form states in pertinent part, "If you do not resume 'operations,' or do not resume 'operations' as quickly as possible, we will pay based on the time it would have taken to resume 'operations' as quickly as possible." The Form defines "operations" as business activities "occurring at the described premises."

As a result, companies that had their operations terminated, not just interrupted, because of the WTC attack, will likely be entitled under their business interruption coverage to recover for their loss for as long as it would take them to resume, as quickly as possible, the business activities they conducted at the WTC.

2. Insurance claims will likely survive the "act of war" exclusion

(a) "Act of war" exclusion

Soon after the WTC attacks, news reports indicated that several carriers would not deny claims based on their "act of war" policy exclusion. Since then, however, other insurers have publicly waffled on whether they will apply the act-of-war exclusion.

When interpreting an "act of war" exclusion, or any other policy language pertinent to coverage following the WTC attack, several critical rules apply. Exclusions are strictly construed against the insurance company that drafted the policy. The parties' intent when entering into the insurance policy must be given effect. The policy's words must be given their plain and ordinary meaning. And any ambiguity in the policy must be construed for the insured and against the insurer.

The standard "act of war" clause provides for exclusions pertaining to any combination of the following terms: "war," "acts of war," "warlike action," "insurrection," "rebellion," "revolution," "civil war," "civil commotion," "riot," "blockades," "revolt," and "mutiny." As explained below, none of these, as a matter of both law and common sense, applies to the terrorist attack on the WTC.

In 1974, the Second Circuit Court of Appeal, applying New York law, held that an American airline whose plane was hijacked over London and subsequently blown up in Cairo by members of a Palestinian terrorist group was entitled to recover under its all-risk policy, since the damage did not fall under the policy exclusion for losses due to or resulting from war, warlike operations, insurrection, civil commotion, or riot.⁴ The court reasoned that none of these terms applied for the following reasons:

War: There was no existing war between recognized sovereign states.

Warlike Operations: The terrorist acts were by a political group against nonbelligerent civilians at a place removed from any conflict.

Insurrection: The record did not establish any intent to overthrow a government.

Civil Commotion: The terrorist acts were not local and domestic in nature, that is, did not occur among fellow citizens or within the limits of one community.

Riot: The hijacking, initially by only two individuals, was not a local or domestic disturbance carried out (as it is typically done) by a mob.

These distinctions made by the Pan American court apply with equal force to the WTC attack.

Further support for this conclusion is found in the 1983 U.S. District Court case of *Holiday Inns, Inc. v. Aetna Ins. Co.*, involving the virtual destruction of a Holiday Inn in Beirut.⁵ The court found coverage under an all-risk policy despite the exclusions of loss or damage from war, because "war" referred to and included only hostilities carried on by entities that constituted governments at least de facto in character. The court would not accept that the Palestinian Liberation Organization ("PLO") was sufficiently sovereign or unified in structure. In any case, the damage to the Holiday Inn was not caused by any "war" that the PLO was conducting with another governmental entity.

Likewise, it appears that the parties responsible for the WTC attack were not by any means a "government" with a sufficiently unified structure or purpose. And even if the group that carried out the WTC attack could be considered a de facto government, or a group sponsored by a full-fledged government, the attack on civilians at their workplace, removed from any conflict, demonstrates that the WTC attack - contrary, perhaps, to the attack on the Pentagon - was not an act of "war" against the U.S., at least for insurance purposes. This conclusion was further supported by statements made by President Bush on September 18, 2001 that our enemy, terrorism, "knows no borders" and "has no capitals."

The law provides that the term "war" implies physical conflict between two geographically representative bodies:

"War . . . is not a mere contest of force, but must be an armed struggle carried on between two political bodies each of which exercises de facto authority over persons within a determinate territory, and its existence is determined by the authorized political department of the government."⁶

Thus far, it appears that the terrorists were in no way exercising de facto and government-authorized authority over persons within a determinate territory when committing their atrocities.

Finally, it is difficult to imagine anything resembling a "war" when one side does not even reveal its identity to the other. For this reason, too, no "act of war" exclusion should apply to the WTC attack.

The question still remains, though, whether the WTC attack would be excluded from business interruption coverage, if not as an act of war, then at least as an act of terrorism? To answer this question, see if there is a specific exclusion for "terrorism" in the policy. Certainly, because of the 1993 terrorist bombing of the WTC, if insurers wanted to exclude specifically terrorism (as opposed to the more general "act of war"), they could have done so thereafter when issuing policies to their WTC insureds. Then again, if WTC businesses wanted protection from terrorist attacks following the 1993 bombing, they, for their part, could have included coverage against such a happening in their policies.

And while there may be an exclusion for, among other things, "terrorism" in the main part of the policy, businesses should look further see if there is an endorsement or rider that may "bring back" some or all of this otherwise excluded terrorism coverage.

3. Conclusion

The "act of war" exclusion in a business interruption policy should not bar coverage for losses directly arising from the WTC attack. On the contrary, multiple items are recoverable under such a policy, although the recovery, like all insurance recoveries, largely depends on the actual language contained in the policy.

1. See *Citizens Sav. & Loan Ass'n v. Proprietors Ins. Co.*, 435 N.Y.S.2d 303, 380 (1981).
2. See *Wood Goods Galre, Inc. v. Reinsurance Ass'n of Minnesota*, 478 N.W.2d 205 (Minn.Ct.App. 1991), emphasis added; see also *Nat'l Union Fire Ins. Co. v. Anderson-Prichard Oil Corp.*, 141 F.2d 443 (10th Cir. 1944); see also *Studley Box & Lumber Co. v. Nat'l Fire Ins. Co.*, 154 A. 337 (1931).
3. See *Pacific Coast Engineering Co. v. St. Paul Fire & Marine Ins. Co.*, 9 Cal.App.3d 270 (1970).
4. See *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989 (2d Cir. 1974).
5. See *Holiday Inns, Inc. v. Aetna Ins. Co.*, 571 F.Supp. 1460 (S.D.N.Y. 1983). 6. *Id.* at 230 (emphasis added).