

Insurance Implications of Terrorist Attacks



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Abstract

Yesterday was my son's 12th birthday but he didn't spend it unwrapping presents or gorging on ice cream and cake. Most of our evening was spent solemnly observing unspeakable horror and devastation as the events of September 11, 2001 unfolded. In this article, we'll focus on some of the possible insurance implications of these events.

Within 24 hours of the horrific attacks on the NY World Trade Center and the Pentagon building, many insurance agencies and companies began receiving insurance-related questions from their clients. Here is one such question received by our "Ask an Expert" service:

Two of our hotel accounts here in New Orleans have called regarding the large number of cancellations they are receiving because of the airport shutdown. I also think a lot of people are afraid to fly. But getting back to the original point, do think the standard CIVIL AUTHORITY coverage provided under Business Income will provide coverage?

Back in 1998, we had a hurricane bearing down on the city and the mayor ordered evacuation. The airport was also shut down. Some companies paid for business interruption and some didn't.

First, I'll present a quick response to this specific question, then we'll look at some of the other issues involved. Here's is our response to this question:

Here is what the ISO CP 00 30 form says [emphasis added]:

Civil Authority. We will pay for the actual loss of Business Income you sustain and necessary Extra Expense **caused by action of civil authority that prohibits access to the described premises** due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.

The coverage for Business Income will begin 72 hours after the time of that action and will apply for a period of up to three consecutive weeks after coverage begins.

The coverage for Extra Expense will begin immediately after the time of that action and will end:

- (1) 3 consecutive weeks after the time of that action; or
 - (2) When your Business Income coverage ends;
- whichever is later.

As you can see, the operant wording is "caused by action of civil authority that prohibits access to the described premises." The action of civil authorities in New York and elsewhere do not affect access to the "described premises" which would be the hotels in question. This coverage effectively requires that the subject property (e.g., the hotels) be in close proximity to damaged property such that an order of civil authority affects access to the described premises and not just the damaged premises. This coverage might apply, though, to the airports and vendors themselves since they were closed by civil authorities due to damage elsewhere. In addition, business interruption losses resulting from orders of civil authorities in other locations (e.g., the Sears Tower evacuation) might result in valid claims.

Note that there is a 72-hour waiting period before coverage attaches. Even if coverage applied, it wouldn't begin for three days, though that period can be reduced by endorsement. Absent such endorsement, many of these claims would be precluded by this waiting period.

Prior to the NYC/DC terrorist attacks, the worst (in terms of insurance loss) "man-made" disaster in industry history was the Piper Alpha oil platform explosion which cost \$2.75 billion. It appears that the current disaster will not only vastly exceed this amount, but may also surpass the worst catastrophe on record, Hurricane Andrew, which cost the industry over \$18 billion.

The types of claims that can be expected include:

Direct property damage. Billions of dollars in claims can be expected for damage to the WTC complex, plus collateral damage to surrounding properties from dust and debris.

Indirect property damage. Claims for business income losses and extra expenses can be expected to be staggering, perhaps even surpassing direct damage claims. The potential for contingent business income claims (many, perhaps most, uninsured) from undamaged businesses will also be significant.

Liability claims. It is to be expected that liability claims will be made via lawsuits and/or subrogation claims against a number of parties involved in the airline and construction industries to name just two. There is also the possibility of directors and officers claims that could arise from otherwise uninsured business losses.

Workplace injuries. Workers compensation and other employment related claims, along with life, health and disability claims, will undoubtedly be in the hundreds of millions of dollars, if not billions. Persons injured while on the job during these attacks would be entitled to workers compensation benefits...the "war" exclusion (see below) that applies to many policies, does not apply to the NCCI workers comp policy.

Auto damage. It is likely that hundreds, if not thousands, of vehicles, both commercial and personal, will have been destroyed or damaged.

Homeowners property damage. While these types of claims might not be significant relative to other claims, it is likely that there will be some claims for damage to personal property and any condo/co-op properties in the affected area.

The biggest issue in these types of losses is whether or not the policies involved will respond to the claims on the basis of the losses being caused by covered perils. There are, of course, other issues such as whether the attacks constituted one or more "accidents" or "occurrences." In addition, with widespread damage and contamination by dust and debris, it is conceivable that someone might be inclined to point to "pollution" exclusions in both property and liability policies with respect to damage resulting from such "contamination." The later issue is of particular future relevance if any subsequent terrorist attacks were to employ chemical or biological agents.

With regard to covered perils, in most cases, the direct cause(s) of property loss involve aircraft, fire, explosion, falling objects, etc. These are all perils normally covered by the vast majority of property policies, both named peril and "all risk." Other peripheral "action-oriented" perils to which these losses may be attributed include theft (of the aircraft), vandalism (deliberate destruction of property), and others. Again, these are perils typically covered by most property policies.

So, the issue is whether or not there are any exclusions that might apply. Clearly, there are some specific exclusions such as off-premises power failure that will affect some claims, but more important are any exclusions that could conceivably be applied on a widescale basis. Most standard policies (both property and liability) have some sort of "war" exclusion designed to preclude losses of a catastrophic nature. In addition, many policies also have a "governmental action" exclusion. In this article, we'll use the ISO commercial property causes of loss forms to illustrate these exclusions. The ISO exclusions say [emphasis added]:

B. EXCLUSIONS

1. We will not pay for loss or damage caused directly **or indirectly** by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes **concurrently or in any sequence** to the loss.

c. Governmental Action

Seizure or destruction of property **by order of governmental authority**.

But we will pay for loss or damage caused by or resulting from acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread, if the fire would be covered under this Coverage Part.

f. War And Military Action

(1) War, including **undeclared** or civil war;

(2) **Warlike action by a military force**, including action in hindering or defending against an actual or expected attack, by any government, sovereign **or other authority using military personnel** or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

Alarming, our office learned today (09/13/01) that at least two insurers were considering denying SOME claims, citing the "war" exclusion. So, let's examine each provision above.

Governmental Action. At this time, we do not know with any certainty who is behind these attacks. IF it is determined that property was destroyed by order of a government, this exclusion becomes material. Note that the exclusion does not refer to a specific government. The exclusion has often been explained to apply to claims such as seizure of property by law enforcement agencies or condemnation orders for unsafe property; however, the exclusion is not specific to those types of losses and may be broadly interpreted to apply to other types of government actions, including those involving non-U.S. authorities.

War And Military Action - Provision (1). It is unfortunate, from a purely insurance perspective, that some U.S. government officials have referred to these attacks, not as terrorism but as "acts of war." According to most dictionary definitions, and a number of court cases, a "war" is a state of armed conflict between nations or governments. IF it is determined that another government was behind these attacks, this exclusionary provision could also be triggered in the eyes of some interpreters.

War And Military Action - Provision (2). The applicability of this provision hinges on the meaning of the terms "military force" and "military personnel." Webster's New Collegiate Dictionary defines "military" to include "of or relating to armed forces." It then defines "armed forces" as "the combined military, naval, and air forces *of a nation*." This is rather a circular definition, but implies that "military" is most often synonymous with the armed forces of a government. Again, at issue is whether or not a government was behind these attacks.

War And Military Action - Provision (3). It is highly unlikely that this provision is applicable to this situation as it refers specifically to civil, or intra-governmental unrest and actions.

So, do these governmental/war exclusions apply to "terrorist" attacks? As indicated above, if a foreign government is determined to be involved in these losses, it is conceivable that these exclusionary provisions could be applied. Whether such application would be successful largely depends on: (1) whether they have been in the past, as determined by any applicable court decisions, and/or (2) whether they might be upheld today given the current mindset and predisposition of governing authorities.

With regard to the first premise, the International Risk Management Institute ([IRMI](#)) cites the following court cases, though they do not appear to be specifically applicable to the current situation (but do explore the meaning of the term "war" and "warlike"):

[Younis Bros. & Co. v. CIGNA Worldwide Ins. Co.](#), 899 F. Supp. 1385 (ED Pa 1995)

[Sherwin Williams Co. v. Insurance Co. of State of Pa.](#), 863 F. Supp. 542 (ND Ohio 1994)

[TRT/FTC Communications, Inc. v. Insurance Co. of State of Pa.](#), 847 F. Supp. 28 (D Del 1993)

The National Underwriter's Fire, Casualty & Surety Bulletins ([FC&S](#)) cites the following court cases that have examined some of these issues:

[Holiday Inns, Inc. v. Aetna Insurance Co.](#), 505 F.2d 989 (2nd Cir. 1974). This case is also discussed in Kenneth Wollner's excellent book [How to Interpret Insurance Policies](#)...explaining how the court used the interpretive principle of *noscitur a sociis* in a case involving the hijacking of a Boeing 747 by men purporting to act on behalf of the Popular Front for the Liberation of Palestine. The court concluded that the war risks exclusion did not apply, in part, because the hijackers did not wear insignia, did not openly carry arms, were agents of a radical group rather than a sovereign government, and their acts had criminal, rather than military, overtones.

[Holiday Inns, Inc. v. Aetna Insurance Co.](#), 571 F. Supp. 1460 (1983)

[Holiday Inns, Inc. v. Aetna Insurance Co.](#), 151 So. 2d 276 (1973). In this case, a plane was hijacked to Cuba and shot down by the Cuban air force. The court ruled that the efficient proximate cause of the loss was theft, not "war."

Also, keep in mind that some proprietary (non-ISO) policies may specifically exclude acts of terrorism which is common for non-U.S. exposures and/or insurers outside the U.S. On the other hand, some policies specifically exempt terrorism from their "war" exclusion(s) with wording such as, "This insurance does not apply to Loss caused by or resulting from a declared or undeclared War. Declared or undeclared War does not include acts of terrorism."

In light of the above discussion, it would seem highly unlikely (absent a specific terrorism exclusions) that an insurer would attempt to invoke a similar "war" exclusion to deny the claims that will arise out of this disaster. The public relations fallout would be catastrophic for the carrier and the insurance industry, and it would not be surprising if regulatory authorities refused to permit an insurer from applying the exclusion.

As we gather more information, we'll continually update this article.