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The Insurance Aftermath of September 11: Myriad Claims, Multiple Lines, Arguments Over Occurrence Counting, War Risk Exclusions, the Future of Terrorism Coverage, and New Issues of Government Role

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THE INSURANCE AFTERMATH OF SEPTEMBER 11: MYRIAD CLAIMS, MULTIPLE LINES, ARGUMENTS OVER OCCURRENCE COUNTING, WAR RISK EXCLUSIONS, THE FUTURE OF TERRORISM COVERAGE, AND NEW ISSUES OF GOVERNMENT ROLE

Jeffrey W. Stempel

I. INTRODUCTION

September 11, 2001, is an unforgettable date for many reasons. In addition to its political, social, and historical importance, it may mark a watershed of insurance history as well. The value of the insured losses due to the

1. This article's focus on insurance issues related to September 11 of necessity dwells on the World Trade Center losses more than those stemming from the attack on the Pentagon or the crash of a fourth hijacked airliner in the Pennsylvania countryside when passengers attempted to retake the plane and prevent its use as a weapon. Although these other two shocking acts of terrorism will give rise to insurance claims of considerable magnitude, they fall far below the scope and severity of the WTC terror attacks in economic and insurance terms. The author will also follow what appears to be an emerging convention of using the term "September 11" as a noun with relatively clear meaning as well as using a number of synonyms for the atrocity (e.g., attack, terrorism, disaster, incident). See James J. Kilpatrick, What Was Sept. 11?, LAS VEGAS REV.-J., Nov. 25, 2001, at 4E, col. 6 (noting that the incident has been described in a variety of ways connoting a terrorist or warlike act, as well as with terms such as tragedy, catastrophe, massacre, and disaster; also suggesting that "September 11" itself has now become a noun known to all).


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collapse of the World Trade Center (WTC) towers is estimated to total at least $35 billion and perhaps $75 billion. In addition, most of the people killed by terrorism were covered by life insurance. Many business operations were affected, invoking possible business interruption coverage. The airplanes that became weapons of destruction carried passengers whose estates are likely to press claims against the airlines operating the flights (United and American), potentially raising issues of liability coverage.

Nearly all of these policies, like almost all insurance policies, contain some type of war risk exclusion. As discussed below, these exclusions in brief state that the insurance coverage will not apply to losses caused by acts of war. War rhetoric emerged immediately in the aftermath of the disaster, with President George W. Bush and other leaders describing the terrorism as an act of war against the United States and addressing the problem of terrorism as the next war that America must prosecute and win to ensure the survival of the nation and its free society. News accounts and programming picked up the theme, frequently referring to “America at War” and a “War on Terrorism.” Concerns were consequently raised regarding whether the war risk exclusions in applicable policies would bar coverage for the September 11 losses. Many insurers and industry spokes-

doom towers into rubble; 2,000-degree fire wills steel; cave-in faster with each floor, USA Today, Sept. 13, 2001, at 1A, col. 3 (describing attacks and destruction); Vernon Loeb, A Global, Pan-Islamic Network: Terrorism Entrepreneur Unifies Groups Financially, Politically, Wash. Post, Aug. 23, 1998, at A1 (describing bin Laden’s background and terrorist network). See also John Seabrook, The Tower Builder: Why did the World Trade Center buildings fall down when they did?, New Yorker, Nov. 19, 2001, at 64, 68–71 (describing engineering aspects of disaster with extensive focus on Les Robertson, one of the lead structural engineers involved in the building of the towers); James Glanz, Why World Trade Center Towers Stood, Then Fell, N.Y. Times, Nov. 11, 2001, at B1, col. 3. See also James Glanz, Wounded Buildings Offer Survival Lessons, N.Y. Times, Dec. 4, 2001, at D1, col. 2 (discussing mechanics of fall of 7 WTC, which was not struck by one of the airplanes, and survival of nearby 90 West Street, which was constructed in 1907 using more concrete, which is more resistant to fire but otherwise heavier and not as strong as steel).

3. See Susanne Scalfane, $75 Billion? The Guessing Continues, Nat’l Underwriter (Property & Casualty ed.), Oct. 1, 2001 at 6 (noting that initial lower estimates of damage in the $35–$50 billion range were generally being revised upward by insurers); Alan Cowell & Joseph B. Treaster, Insurance losses could hit a staggering $72 billion, Las Vegas Sun, Sept. 24, 2001, at 4C (leading insurance consulting firm estimates that insured losses stemming from WTC disaster will approximate $72 billion). The Insurance Services Office website provides a relatively current tally of claims of which it is aware arising from the tower attacks. See www.iso.com/docs/news.htm.

4. But the airlines’ liability is capped at the amount of their insurance in force. See text and accompanying note 45, infra (discussing airline assistance legislation enacted by Congress in wake of tragedy). See also Michael Freedman, Waiting in the Wings; Plaintiff lawyers have restrained themselves in the wake of the September 11 attacks. That’s about to change, Forbes, Oct. 29, 2001, at 62.

persons responded to these concerns by stating that the carriers would not invoke the exclusion, an undoubtedly wise public relations move.  

Although insurer pronouncements of noninvocation of the war risk defense to coverage are comforting in the short term, the events of September 11 are probably only the beginning of further examination of the exclusion's role in policies rather than an end to uncertainty. First, to state the obvious, each insurer is different and each policy is different (even though standardized language is characteristic of the industry). Some insurers that issued policies containing standard war risk exclusions may refuse to follow the insurance industry's announced refusal to invoke the exclusion. Other insurers may have variants of the war exclusion or policies that they view as excluding terrorism or attacks other than conventional war. As a result, coverage litigation may soon follow.

The author anticipates not only questions about the war risk exclusion, but also countless case-specific disputes about the valuation of lost property, the applicability of business interruption coverage, and the legitimacy of claims. Insurers fear an avalanche of fraudulent or inflated claims. In perhaps the most publicized early coverage dispute, Swiss Re filed suit seeking a declaratory judgment that the September 11 damage to the towers was one "occurrence" rather than two, which would obligate the company to cover "only" an estimated $3.6 billion in property losses rather than the $7.2 billion sought by developer Larry A. Silverstein, who holds a ninety-nine-year lease on the affected area.  

Beyond the immediate questions of coverage and construction, the events of September 11 at a minimum suggest that insurers must reevaluate the efficacy of the standard war risk exclusion and their underwriting practices and reserves in light of the new face of terrorism. Perhaps as much as $100 billion of insurance capital was effectively eliminated on September 11 along with the lost towers, although the final tally will be slower in

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6. See Theresa Agovino, Life insurers, regulators move to quickly pay claims: War, terrorism exclusions not invoked, LAS VEGAS SUN, Sept. 24, 2001, at 4C. But see Caroline McDonald, Act-of-War Determination Will Influence Coverage, NAT'L UNDERWRITER, Sept. 17, 2001, at 5 ("The question of the day for the insurance industry and its policyholders might not simply be how many billions of dollars will be sustained in losses from last week's terrorist attack on the World Trade Center towers, but whether the action is proclaimed to be an act of war.") (suggesting that property insurers are waiting for more definitive account of persons or organizations responsible and that war risk exclusion may be invoked if tower attacks can be said to be the work of a hostile nation).

7. See McDonald, supra note 6, at 5.

8. See Stephen Labaton & Jonathan D. Glater, Twin Towers At the Center of Legal Brawl, N.Y. TIMES, Nov. 3, 2001, at C1 ("In the suit [Swiss Re] seeks to limit how much it will have to pay to cover the destruction of the twin towers. Lawyers representing the various parties involved agree that more lawsuits are likely to follow."). See also Douglas McLeod, Swiss Re sues over WTC loss amid debate on policy terms, BUS. INS., Oct. 29, 2001, at 1 (providing more extensive background on insurance coverage issues in the litigation).
coming, as will the final payment to all claimants. Only serious hurricanes or earthquakes hitting populated areas come close to rivaling these sorts of insurance losses. Notwithstanding insurer assurances of adequate capacity to pay September 11 claims, concerns remain. At a minimum, the September 11 tragedy has put pressure on insurers, including the financial health of particular carriers and the utility of common efforts to increase capacity such as reinsurance, fronting, and the use of captive insurers. If insurance underwriting and coverage remains unchanged and terrorists follow their “success” of September 11 with further similar efforts, the losses could be staggering and industry decimating. Insurers have recognized this and have began to talk about a federally backed risk pool in the aftermath of the attacks, with support from the Bush administration and others in government.

In addition to the issue of counting occurrences, the September 11 terror raises a number of potentially difficult coverage issues. Brought particularly to the forefront is the seldom-litigated war risk exclusion. September 11 will prompt further examination of the exclusion, its function, its language, and its variants. Although the exclusion may be effectively overlooked under these extraordinary circumstances, the clause remains a staple of many insurance policies. As discussed below, the current standard war risk exclusion is not likely to bar coverage for even the extreme terrorism of September 11. Historically, more specific exclusionary endorsements have been used to limit the terrorism risk, with considerable variance among policyholders, insurers, and reinsurers.

If insurers wish to avoid terrorism risk as a standard matter, rewritten standard policy forms are required. Alternatively, insurers have argued that without federal financial backing, coverage will contract or uniformly be made subject to blanket terrorism exclusions. If insurers and policyholders wish to have protection against terrorism risks in the future, underwriting and pricing will obviously be affected regardless of the level of government aid.


12. See text and accompanying notes 103–175, infra.
This article focuses on the prominent issues of occurrence counting and the current status of the war risk exclusion but also touches upon other insurance issues likely to arise in connection with September 11 claims. Part II briefly outlines the types of insurance potentially applicable to the September 11 tragedy and resulting issues that may arise. Part III addresses the issue of whether the terrorist attack was one occurrence or two, a question with an answer that implicates $3.6 billion in property insurance written on the towers. Part IV discusses the rationale, history, and function of the war risk exclusion. Part V examines key precedent about the war risk exclusion. Part VI discusses the degree to which the September 11 tragedy does or does not fit the war risk exclusion. Part VII outlines possible government and industry reactions to the problems associated with terrorism losses and the future insurance coverage for such claims.

II. POTENTIALLY APPLICABLE INSURANCE AND COVERAGE QUESTIONS PRESENTED BY THE SEPTEMBER 11 TERRORISM

In the wake of the September 11 tragedy, economic loss and insurance claims are a given. To a perhaps unprecedented degree, a wide variety of coverages is implicated, touching upon practically all major lines of coverage, many of which usually contain some type of war risk exclusion and will also be affected by other coverage questions.13

A. Life Insurance

Life insurance, of course, is triggered if the insured life is lost in a manner not excluded by coverage. As compared to property, casualty, and health insurance, life insurance tends to have more stable risk pools and steady profits. Compared to other insurers, life insurers spend proportionately less on adjusting claims and defending claims. Their inquiry is relatively confined: Did the insured life expire? How? Is there any basis for denying coverage due to an excluded cause of death or other defense such as misrepresentation?14

In the September 11 attack claims, the normal rules of life insurance were altered primarily by the difficulty of "proving" death and producing tangible physical evidence of death. Many of the bodies of the dead will

13. See Tamara Loomis, Insurance Coverage: Terrorist Attack Raises Complex Issues, N.Y.L.J., Oct. 11, 2001, at 5. In addition, other terrorist events in the fall of 2001 and the ensuing military activity in Afghanistan and the conflict in the Middle East may raise insurance coverage disputes. This article will not address those issues although all of them might fall under the broad topic of terrorism. See Diane Richardson, Anthrax Exposure Raises Cover Questions, Nat'l Underwriter (Property & Casualty ed.), Nov. 26, 2001, at 20 (discussing possible insurance issues arising out of anthrax poisoning following September 11 tragedy).

never be found in any identifiable form, a consequence of the awful collapse of two huge buildings. In response, the New York State Insurance Department issued a rule providing that insurers licensed in New York "must accept affidavits from the families of those missing as proof of death when a death certificate was not readily available," with the department providing a standard form affidavit on its website. 15

As to the possible use of the war risk exclusion, life insurers appear to be the least likely in the industry to use it and also made perhaps the strongest public assurances that they were strong enough to withstand the huge losses involved. 16 Like other industry leaders, life insurers have publicly stated that they would not invoke war risk exclusions to deny coverage. As discussed in Part VI, the war risk exclusion is unlikely to be successful even if invoked by some life insurers in response to September 11 claims. The war risk exclusion would appear to apply to any American military personnel killed in connection with retaliatory action against Taliban or terrorist organizations.

Unlike the more uniformly standardized policy forms found in property and casualty insurance, life insurance policies may vary considerably and frequently do not always contain a war exclusion, particularly if the policy is sold to a civilian who is not subject to a conceivable resumption of the military draft. For example, life insurance policies selected as representative for inclusion in the Insurance Professionals' Policy Kit do not contain war exclusions. 17 If nothing else, however, case law suggests that such exclusions are common in life insurance, perhaps more frequently when policies are issued or renewed during a time of open or prolonged hostilities.

B. Health Insurance

Many of those requiring medical care in the wake of the disaster were undoubtedly insured. Perhaps surprisingly, some health insurance policies contain war exclusions. 18 Generally, however, medical insurance is thought

15. See Agovino, supra note 6, at 4C.

16. See Agovino, supra note 6, at 4C (noting that financial consultant estimates that life insurers have net cash capital of $231 billion and that likely claims will not exceed $3 billion; giving example of MetLife, nation's largest life insurer, as estimating that it will pay $464 million in claims, a small percentage of its reserves and capital). See also Selafane, supra note 3, at 6 (noting that another consultant estimates $20 billion in liability claims related to deaths, based on assumption of 10,000 deaths valued at $2 million per person). The actual final death toll is likely to be slightly less than 3,000. See Nationalities of victims listed/494 foreigners from 91 countries lost lives on 9/11, HOUSTON CHRON., Apr. 6, 2002, available at WL 3254505.

17. See, e.g., One Year Renewable and Convertible Term Life Policy, No. AM 627E1–80, reprinted in Alliance of American Insurers, Insurance Professionals Policy Kit (2001 ed.) at 149, 151 (suicide excluded but death from war or terrorism not excluded) [hereinafter Policy Kit]. See also Flexible-Premium (Universal) Life Insurance Policy, Form 7–82 MIAC, reprinted in Policy Kit at 171, 177 (no war exclusion found in policy form).

18. See Major Medical Expense Policy No. IA 5710, reprinted in Policy Kit, supra note 17, at 139, 142 ("We will not pay benefits for any charges incurred as a result of: ... 3. war, declared or undeclared, or any act thereof.").
not to frequently contain war exclusions or to be subject to coverage defenses based on the war risk exclusion, although the presence of such an exclusion would be consistent with general insurance principles.

C. Property Insurance

First-party property insurance generally applies to loss caused by "direct physical loss" to covered property. There would appear to be unquestionable coverage for the loss of the WTC towers and their contents (including company records but not currency or negotiable instruments), as well as for the physical damage to surrounding property due to the airplane collisions. Even if a resistant (and politically tone-deaf) court were to find the collapse of the towers to be only an indirect result of the attack, the more immediate cause of the collapse was the fire that weakened the steel frame of the buildings—and fire is an unquestionably covered cause of loss in property policies. But, as with other policies, the typical property policy contains a war risk exclusion that could potentially be invoked. In addition, standard property insurance typically excludes coverage for loss resulting from en-

19. See, e.g., Building and Personal Property Coverage Form, CP 00 10 06 95 (ISO 1994), reprinted in Policy Kit, supra note 17, at 185 ("We will pay for direct physical loss of or damage to Covered Property."). Renters' insurance will present issues similar to those found with real property insurance policies. See Jay Romano, A Lesson in Catastrophe, and Renter's Insurance, N.Y. Times, Oct. 4, 2001, at C1. In the aftermath of the attacks, at least one property insurance coverage dispute has arisen related to the mechanics of contracting and adding property to coverage. See Damien Tomlinson, Aussie firm seeks cover for WTC loss, Bus. Ins., Nov. 26, 2001, at 19 (Westfield Holdings Ltd., insured by Zurich, a developer of a WTC shopping mall, signed lease in July 2001 and claims coverage as automatically added property under blanket policy; Zurich contests). This type of dispute regarding covered items and effective dates is not peculiar to property insurance and may appear in slightly different form with other lines of insurance as well.

20. Insurance law generally follows the concept of "efficient proximate cause" in determining the cause (or causes) of a loss. The determination of cause of loss is a function of both the cause nearest the loss and the dominant cause of the loss. When that determination is made, coverage then turns on whether the proximate cause (or concurrent proximate causes) is covered under the applicable policy. See Stempel, supra note 14, §§ 7.01–7.02. New York adheres particularly closely to this approach with an emphasis on the cause nearest the loss in time and space. See text and accompanying notes 65–75, infra. In the case of the towers, one can make a strong case that fire was both the cause nearest the loss in time and the dominant cause of the loss in connection with the collapse of the buildings. Although the terrorist suicide hijacking is clearly a cause-in-fact of the loss, the loss is not necessarily excluded under prevailing insurance law, even where the policy contains a terrorism exclusion, unless the exclusion is broadly worded enough to encompass remote or less significant causes.

21. See, e.g., Causes of Loss, Basic Form, No. CP 10 10 06 95 (ISO 1995), reprinted in Policy Kit, supra note 17, at 220, 222 (bold in original):

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.

   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 an
forcement of the laws, government action, nuclear hazard, utility failures, or business income losses stemming from utility service interruption.

D. Business Interruption

Business interruption, also referred to as business income or BI, coverage is usually sold as an adjunct to property coverage but is also sold separately. Such coverage typically provides payments for lost earnings (and sometimes payroll, rent, insurance premiums, utility bills, and taxes) to businesses that are forced to close or slow down significantly due to a covered first-party property loss. The September 11 attacks present pronounced business interruption claims because most of the property damage occurred in the core of one of the world’s leading business centers. Unlike other

actual or expected attack by any government, sovereign or other authority using military personnel or other agents.
(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

22. See id. at 221, excluding coverage for losses resulting from:

a. Ordinance or Law
The enforcement of any ordinance or law:
(1) Regulating the construction, use or repair of any property; or
(2) Requiring the tearing down of any property, including the cost of removing its debris.

This exclusion, Ordinance or Law, applies whether the loss results from:
(1) An ordinance or law that is enforced even if the property has not been damaged; or
(2) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to that property.

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.

d. Nuclear Hazard
Nuclear reaction or radiation, or radioactive contamination, however caused.
But if nuclear reaction or radiation, or radioactive contamination, results in fire, we will pay for the loss or damage caused by that fire.

e. Utility Services
The failure of power or other utility service supplied to the described premises, however caused, if the failure occurs away from the described premises.

But if the failure of power or other utility service results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

This exclusion does not apply to the Business Income coverage or to Extra Expense coverage. Instead, the Special Exclusion in paragraphs b.3.a(1) applies to these coverages.

23. See, e.g., id. at 222 (excluding business income coverage from loss of utility services unless utility failure brings about another, covered cause of loss).


25. See Dave Lenkus, Securities firms seek coverage for shutdown: Claims will test interruption
large historical losses from earthquakes or hurricanes, virtually all destruction on September 11 affected commercial enterprises.

To some extent, business interruption coverage issues will resemble straight property loss claims in that any claim excluded under the basic property policy is likely to be excluded under the business interruption coverage. In addition, business interruption coverage has additional prerequisites that must be satisfied. Such policies typically require a “necessary suspension” of the business “operations” due to the loss for a “period of restoration” of the physical damage. At a minimum, the towers themselves and surrounding businesses near the Ground Zero area that were physically damaged would appear to meet this prong of coverage. Beyond this, the precise contours of business interruption coverage are harder to ascertain and may vary considerably by policy, policyholder, and situation.

A common standard BI form does provide limited BI coverage from restricted access to the insured business because of physical damage that occurs but is not on the policyholder’s premises. This type of coverage usually requires a seventy-two-hour waiting period and typically carries a common benefit limit of $250,000 for up to three weeks of such closure.

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26. Some policies may, however, provide business interruption coverage, even when there is no physical loss to covered property. See, e.g., Sloan v. Phoenix of Hartford Ins. Co., 207 N.W.2d 434 (Mich. Ct. App. 1973) (coverage for movie theater that, although undamaged itself, was closed due to curfew imposed in response to urban riots). See text and accompanying infra.

27. See Business Income and Extra Expense Coverage Form, No. CP 00 30 06 95, reprinted in Policy Kit, supra note 17, at 237.

28. See Reidy & Carter, supra note 24, at A23; Hsieh, supra note 25, at 21 (“If you were in the World Trade Center, there’s no question you had a direct physical loss. But if a guy owns a sandwich shop or dry cleaner 12 blocks away, and his place is covered in half a foot of crud, does he have a direct physical loss?”), quoting policyholder attorney Lorelie Masters, who also noted possibility of separately applicable policy provisions concerning dust and debris.

29. See Susanne Sclafane, FC&S Ponders Business Income Claims, Nat’l. Underwriter, Oct. 8, 2001, at 51 (recording in-house discussion/debate of staff members at Fidelity Casualty & Surety regarding existence of business interruption coverage under variant scenarios from WTC loss with substantial disagreement and uncertainty). See, e.g., Two Caesars Corp. v. Jefferson Ins. Co., 280 A.2d 305 (D.C. 1971) (policy language provided for coverage for riot losses if there was direct physical damage to insured property; no coverage where business was lost due to government curfew occasioned by physical damage to property of others stemming from urban riots triggered by assassination of Martin Luther King).

30. See Hsieh, supra note 25, at 21 (noting property insurance coverage for “contingent business interruption” when policyholder’s business is disrupted by direct physical loss to supplier or customer and that this type of coverage “has the potential to apply across the country,” according to one policyholder attorney).

31. See Business Income and Extra Expense Coverage Form, No. CP 00 30 06 95, reprinted in Policy Kit, supra note 17, at 238:

b. Civil Authority. We will pay for the actual loss of Business Income you sustain and
For example, the Reagan National Airport serving Washington, D.C., was closed by government order for nearly a month after the September 11 attacks. Businesses at the airport probably have coverage under this policy provision but perhaps not nearly enough to provide full indemnity. After reopening, traffic was down at Reagan and other airports. This continuing, long-term business slowdown may become the subject of claims for additional coverage but the policyholder is unlikely to prevail unless it obtained special BI endorsements or an uncapped amount of benefits.\textsuperscript{32}

In addition, notwithstanding the spirit of unity evidenced in the aftermath of the attack, there will be policyholder-insurer disputes as to valuation of claims and the validity of claimed extra expenses occasioned by the business interruption.\textsuperscript{33} Claims may also arise under a relatively frequent endorsement providing “contingent” BI coverage where the policyholder has a major supplier or customer that is lost through direct physical damage. For example, a policyholder with such coverage might have had a supplier or customer in the towers, in which case the coverage is probably triggered. Coverage may not be applicable where a peripheral business was impacted only indirectly without its own physical damage.\textsuperscript{34} Contingent BI coverage may also apply to losses brought about by damage to a service provider such as in a case of suspended utility services or may, depending on policy language, apply to suspension of operations required by government action in the wake of the tragedy such as the cordonning off of a restricted area.\textsuperscript{35}

\textsuperscript{32} See id. at 53 (coverage unlikely); Hsieh, \textit{supra} note 25, at 21 (coverage likely according to policyholder attorney if policyholder can show property loss to key customer, supplier, distributor, or manufacturer).

\textsuperscript{33} See id. at 53 (coverage unlikely); Hsieh, \textit{supra} note 25, at 21 (coverage likely according to policyholder attorney if policyholder can show property loss to key customer, supplier, distributor, or manufacturer).

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\textsuperscript{35} See id. at 53 (coverage unlikely); Hsieh, \textit{supra} note 25, at 21 (coverage likely according to policyholder attorney if policyholder can show property loss to key customer, supplier, distributor, or manufacturer).

\textsuperscript{32} See Scalfane, \textit{supra} note 29, at 52, 54.

\textsuperscript{33} See Scalfane, \textit{supra} note 29, at 54. Some policyholders may also have purchased specific ordinance or law coverage by endorsement. See Ordinance or Law Coverage, Form CP 04 05 06 95 (ISO 1994), \textit{reprinted in Policy Kirt, supra} note 17, at 256.

\textsuperscript{34} See Scalfane, \textit{supra} note 29, at 53, 54.

\textsuperscript{35} See Hsieh, \textit{supra} note 25, at 21. Corollary to this type of coverage may be the question of whether a business was “forced” to shut down because of government action or merely did so voluntarily for a variety of reasons. See Lenkus, \textit{supra} note 25, at 1, 62 (coverage for stock exchange company claims of business interruption may hinge on whether shutdown was in fact required by government restrictions on access to lower Manhattan).
In the past, courts have divided on whether there must be a complete stoppage of business or whether a significant and demonstrable showdown might suffice.36 The most recent Insurance Services Office form for BI coverage provides that a slowdown of the business constitutes a suspension,37 but much of the potential post-disaster coverage may be written on older forms that may give rise to litigation over this question. In addition, issues may arise over whether companies that lost income due to the tragedy but whose own facilities were not physically harmed will have coverage. Physical damage is a requisite, but courts may differ as to the quantum of physical damage required. The current standard policy contains rather clear language conditioning coverage on a causal relationship to physical damage rather than simply a connection to physical damage.

A debate may also arise over whether the business is really stopped or constricted if other production capacity is available.38 This type of coverage dispute may arise during the processing of September 11 claims due to the large number of affected businesses that have offices at other locations in addition to those directly affected by the collapse of the towers. For example, tenants such as insurance brokers Aon and Marsh & McLennan and the law firms Cleary Gottlieb Steen & Hamilton and Sidley Austin Brown & Wood have other offices, backed-up data, and access to temporary services. All were undoubtedly affected in their business by the tragedy. Whether they were affected enough could become a litigated question if their insurers choose to dispute business interruption claims.

E. Automobile Insurance

Although overlooked in most of the discussion to date, many automobiles were destroyed or damaged in the September 11 disaster. Owners with comprehensive auto coverage can make valid claims that fall within coverage, although standard personal and business auto policies contain a war risk exclusion.39


37. See Sclafane, supra note 29, at 54. The treatment of a business slowdown as a "suspension" is not accomplished through a specific definition in the policy but follows from the policy's general treatment of lost income as covered under certain conditions, with coverage reduced or lost when income is at predamage levels. See, e.g., Form CP 00 30 06 95, reprinted in Policy Krt, supra note 17, at 237–40.

38. See, e.g., Fold-Pak Corp. v. Liberty Mut. Fire Ins. Co., 784 F. Supp. 49, 54 (N.D.N.Y. 1992) (to collect policy proceeds, business must produce evidence that it was unable to meet customer needs through alternative facilities).

39. See, e.g., Personal Auto Policy No. PP 00 01 06 98 (ISO 1997), reprinted in Policy Krt, supra note 17, at 11 (loss excluded if due to "War (declared or undeclared) . . . Civil war
F. Liability Insurance

Although most of the insurance focus in the aftermath of the September 11 disaster has been on property and life claims, there are significant liability insurance issues, although some may have been truncated by legislation. The four large planes that were the subject of the coordinated terrorist attack all appear to have been hijacked with relative ease, paving the way for nonfrivolous claims by passengers’ estates and ground victims. In what is popularly referred to as the airline bailout act, Congress not only provided direct financial aid to the industry but limited liability to the insurance carried by the airlines.40 The enactment eliminates many but perhaps not all of a number of interesting tort law and liability coverage issues that would otherwise emerge from September 11.

The seemingly obvious theory of tort liability against American and United would posit that the airlines were negligent in their screening (or nonscreening) of passengers and in failing to take reasonable steps to prevent hijacking and use of the planes as weapons. As common carriers, the airlines are strictly liable to passengers, and monetary recovery for injury or death to domestic passengers is not limited by the Warsaw Convention as is the case with international flights.41 Because all four hijacked planes were on domestic routes, the claims for these hundreds of dead passengers will undoubtedly be significant, although probably not sufficient to imperil the solvency of any insurers if the recovery is limited to claims by the passengers’ families.

... Insurrection ... or Rebellion or revolution); Business Auto Coverage Form No. CA 00 01 07 97, *reprinted in Policy Kit, supra* note 17, at 498, 503:

1. We will not pay for “loss” caused by or resulting from any of the following. Such “loss” is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the “loss”.

b. War or 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.


As to claims against the airlines by those injured on the ground, airlines would argue that the claims are farfetched as to foreseeability. Perhaps, but perhaps not. Hijackings, although uncommon in the United States for twenty-five years, have been shown to be a past and continuing menace. A reasonable jury could find that the pre-September 11 status quo of metal detector walk-throughs, perforatory security screening of employees, permissible carryon bags containing four-inch pen knives, and failure to conduct background checks on passengers was an accident waiting to happen. The suicidal piloting of the craft into buildings caught people by surprise (which explains the lack of passenger resistance until passengers on the fourth flight found out what had happened in the previous three assaults). But a jury could find the risk to nonpassengers from inadequate security to be foreseeable. After all, Tom Clancy foresaw it in a best-seller.

Although not in aircraft, suicide bombings by motor vehicle or in person have occurred with some frequency outside the United States, the attack on U.S. Marines in Lebanon in 1983 being perhaps the most prominent to Americans.

Although hindsight can be said to be twenty-twenty, it is hardly beyond question that airlines could be held liable to persons other than their passengers for lax security leading to the September 11 hijackings and carnage. At a minimum, such claims could survive motions to dismiss or summary judgment motions and require substantial defense under the duty-to-defend policies of commercial airline insurance. The airline protection act makes such claims far less likely by establishing a fund for victims to be administered by a special master with access to the fund requiring a waiver of otherwise available court actions. In light of the limited liability also conferred in the Act, prospective claimants are unlikely to elect to pursue the airlines. In addition, the standard commercial general liability, or CGL,
policy contains a war risk exclusion, as do most airline liability policies.\textsuperscript{46} But by its terms, the exclusion “applies only to liability assumed under a contract or agreement.”\textsuperscript{47}

In other words, airline liability insurers bear substantial exposure, but probably not catastrophic exposure, particularly when victims can turn to the government fund rather than attempt to litigate exceptions to the Airline Stabilization Act’s ban on punitive damages, limitation on recovery, or the constitutionality of the legislation.\textsuperscript{48} Ground victims of September 11 may have perfectly valid negligence claims against the airlines but there may be no insurance to pay the claims if successful, particularly if policies are exhausted by the claims for passenger claimants, and if there is another source of compensation.\textsuperscript{49} A combination of economics, public relations, and poor likelihood of legal success may explain why these insurers are unlikely to raise the war exclusion. Notwithstanding the legislative protection, the airlines themselves have seen a substantial drop in passengers and could face bankruptcy or consolidation, making them less attractive litigation targets.\textsuperscript{50}

G. Product Liability, Errors and Omissions, or Professional Liability Coverage
Claims could conceivably be made against the professional who designed the airplanes or the buildings in question, although the likelihood of such

\textsuperscript{46} The CGL exclusion states that the policy does not apply to:

i. War
“Bodily injury” or “property damage” due to war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution.

See CGL Policy Form No. CG 00 01 07 98 (ISO 1997), \textit{reprinted in Policy Kit, supra} note 17, at 460. Airline liability coverage is usually written on forms other than the standard CGL because the CGL contains an Aircraft Exclusion that would obviously be inconsistent with a commercial airline policyholder. In other regards, however, the language of the typical airline policy and the standard CGL is the same or similar.

\textsuperscript{47} Id.

48. The airline passengers and tower occupants arguably acquired causes of action on September 11. To the extent that Congress truncated or eliminated these causes of action eleven days later, the Airline Stabilization Act has the uncomfortable look of a taking of a property right without due process or a civil version of an ex post facto law. To be sure, Congress has in the past acted to limit tort claims and to replace the tort system with an administrative remedial scheme. In these instances, there was known to be a potential batch of claims of varying magnitude and merit. With the Airline Stabilization Act, Congress acted to remove litigation rights that were fully vested for a discreet, identifiable (if large) group. The merits of the claims are arguably strong and nonspeculative, especially for the airline passengers and crew. As to the crew, despite workers’ compensation laws, the airlines arguably committed intentional wrongdoing in that they were repeatedly warned by crew members (as was the government) of the inadequate security system governing air travel.

49. See Airline Stabilization Act, \textit{supra} note 40, § 405(b)(5) (prohibiting awards of punitive damages in claims against victim compensation fund); \textit{American Airlines to claims $2.3 billion, Bus. Ins., Oct. 29, 2001, at 1 (noting legislation and that American Airlines parent company said that it expected the claims paid by its insurers to total $2.3 billion).}

50. \textit{See As Big Losses Widen, an Airline Shake-Up Appears Unavoidable, Wall St. J., Nov. 6, 2001, at A5.}
claims being successful is slight. The theory of such claims would be that the airplane was improperly designed as to security features (e.g., the cockpit door that could be penetrated) or flammability of fuel. The designers and builders of the towers would be accused of failing to design against impact and fire of the type seen on September 11. These sorts of claims appear farfetched because both the airplanes and the towers appear to have been state of the art at the time of their design and manufacture. Most observers describe the towers as having held up for an amazingly long time in view of the tremendous impact and fire that occurred. In addition, the manufacture and construction involved took place years and even decades before the incident, making it likely that statutes of limitation or repose under applicable state law would foreclose such claims.

H. Directors & Officers Coverage

The typical Directors & Officers, or D & O, policy provides coverage if a director or officer is sued for a wrongful act, usually defined as "any act, error, omission, misstatement, misleading statement, or neglect or breach of duty by the individual insureds solely in their capacities as directors and/or officers of the Company insured." Policy language may vary but the concept is the same: director or officer negligence that causes injury may be covered. Claims of negligence against the airlines and others associated with poor security could include director and officer defendants as well. As with the claims implicating general liability insurance, D & O coverage may be strained but is not likely to be in financial disarray from such claims, provided the relevant policies have aggregate limits, which is highly likely.

51. See generally Prosser & Keeton on Torts (describing elements of product liability claims and available defenses).

52. Seabrook, supra note 2, at 64. Ironically, Osama bin Laden is reputed to have been videotaped telling associates that he expected only the top portion of the towers to fall. See also Walter Pincus & Karen DeYoung, New bin Laden tape described as incriminating; U.S. officials mull whether and who to release video, Las Vegas Rev.-J., Dec. 9, 2001, at 3A, col. 5 (tape in U.S. possession but authorities have not determined whether to release contents publically). Bin Laden's opinions and expectations, of course, are probably irrelevant to the legal issues presented save for some marginal impact on the question of whether September 11 qualifies as an excluded war risk.


54. See, e.g., Directors and Officers Reimbursement Indemnity Policy, reprinted in Policy Krt, supra note 17, at 579, 581.

55. Liability insurance written without an aggregate limit would expose the insurer to the possibility that the September 11 losses would be considered more than one "occurrence" under the policy, requiring the insurers to pay considerable amounts. However, the general approach to counting liability insurance occurrences is to focus on the cause of the loss rather than the effects. See Štěpěl, supra note 14, § 2.06[h]. Applied to the September 11 tragedy, this strongly argues for a relatively limited number of occurrences (e.g., each plane hijacked, the impact on each building) rather than a potentially bankrupting determination of thousands of occurrences (e.g., each death or injury).
I. Miscellaneous Types of Coverage

Although not of the magnitude of mainstream property insurance, a market exists for insurance covering planned events such as plays, sports contests, and concerts. In the wake of the September 11 tragedy, major sports leagues suspended operations for approximately a week, a pattern replicated for some entertainment events. These policies are usually triggered, however, only by government-imposed cancellation or physical damage that precludes the event (e.g., a collapsed building, an injured soloist). Because most of the September 11-related cancellations were voluntary, these policies may not be triggered.56

In the main, then, it appears that if the war risk and related exclusions are to have a significant role in post-September 11 coverage battles, their impact will be in the area of property insurance.57 Property insurance is the likely battleground both for the war risk exclusion and for counting occurrences. Although the insurance industry appears to have the financial strength to withstand the blow of September 11,58 any additional disasters of such magnitude in the near future could imperil the solvency of the industry.59 Should these future contingent risks involve terrorism, it is worth examining the efficacy of a war risk exclusion should insurers wish to assert it in the future or reconsider its application to some September 11 claims if their financial future begins to cloud.

III. HOW MANY OCCURRENCES?

As noted above, the most newsworthy case to date appears to be the battle between twin towers owner Larry Silverstein and Swiss Re, which wrote property coverage on the towers.60 Silverstein, who holds a long-term lease

57. See Christopher E. Mandel, Impact of attacks felt across all lines, Bus. Ins., Oct. 15, 2001, at 10 (most conservative realistic total loss estimate is $41 billion, most in property lines):

A consensus seems to have emerged about which lines will be hardest hit by this event. Direct property losses will likely be in the range of $8 billion to $12 billion, including claims for the World Trade Center itself ($3.5 billion in real property values alone) and surrounding properties, including an untold number of personal autos. Liability, indirect property or business losses and contingent business interruption losses ($4 to $7 billion) will add to the total.

Id.

58. See id. (estimated property and casualty capital worldwide is $300 billion, “$200 billion of which is on the commercial side,” but according to Standard & Poor's, insurance system is at risk if September 11 losses exceed $50 billion).
59. See id. (after September 11, insurance industry cannot “afford a major natural catastrophe of the magnitude of Hurricane Andrew or the 1994 Northridge earthquake, due to the impact on reinsurance treaties now so much at risk.”).
60. See McLeod, supra note 8, at 1; Labaton & Glater, supra note 8, at C2. See also Dave
on the WTC and suffered not only the destruction of the towers but also physical damage to other WTC property, has stated an intent to rebuild on the site, contending that he is obligated to rebuild under the lease as well as inspired to rebuild as a reaction to the attack.61 The Swiss Re suit has been described as "a clear effort to put pressure on the alliance [of Silverstein, the Port Authority of New York and New Jersey, Silverstein's lenders, and co-investors] and possibly prompt some of the investors or lenders to pressure Mr. Silverstein to walk away from a rebuilding effort."62 Despite the destruction at Ground Zero, Silverstein "has pledged to continue to pay his mortgage and ground rent,"63 although the property will not be a money-maker anytime soon.

Thus, the stakes of the Swiss Re/Silverstein dispute are high in and of themselves. The matter is also a potentially high-stakes dispute in that it may set precedent for other claims or future cases involving the determination of the number of occurrences under an insurance policy. However, the public contentions of the parties suggest that the WTC dispute may turn more on particularized policy language or contracting behavior by policyholder and insurer. A final insurance policy for the property was not in place on September 11, making binders and other evidence of insuring intent potentially important to a final adjudication or settlement of the issue.64 As one account put it, Swiss Re and Silverstein "cite entirely dif-
ferent sets of coverage terms” as controlling the outcome of the dispute.\textsuperscript{65}

To the extent that the WTC coverage dispute is typical, the Swiss Re position appears ill taken. Standard property insurance policies define covered perils but usually do not define what constitutes a “loss” or “occurrence” or the number of occurrences. Liability insurance typically contains language defining an occurrence as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”\textsuperscript{66} This definition, in place largely since 1966 (when the language embellishing “accident” was added),\textsuperscript{67} is designed to make clear that a covered occurrence need not be abrupt or confined in scope. At the same time, neither are damages befalling a property or all claims against a policyholder designed to be batched together unless they are sufficiently connected.\textsuperscript{68}

provide coverage. A policy was formally issued by Travelers, a Citigroup subsidiary, on September 14, after a flurry of e-mails and phone calls among the lawyers negotiating the terms of the policy, but other carriers are keeping quiet about whether they will agree to be bound by those terms or by others. Swiss Re executives say that the case turns on a tightly scrawled note on one of the binders that strikes some language and replaces it with the phrase “subject to wording to be agreed.” In its complaint, the insurance company asserts that the crashes are a single event under the language in effect on September 11.

This type of rolling or late documentation of an insurance agreement is not unusual for such risks. See E.E. Mazier, \textit{Swiss Re WTC Lawsuit Analyzed}, \textit{Nat'l Underwriter} (Property & Casualty ed.), Nov. 5, 2001, at 46 (comments of insurance coverage attorneys Vince Vitkovsky and Laurie Kamaiko of New York office of Edwards & Angell, LLP).

\textsuperscript{65} See McLeod, \textit{supra} note 8, at 1:

Swiss Re says it is bound under a property form that broker Willis Group Ltd., developed and that features a restrictive definition of “occurrence” that precludes the two-event argument.

Silverstein, on the other hand, contends the entire program is governed by a form used by a primary insurer, Travelers Property/Casualty Corp., that does not define occurrence. Under these circumstances, it says, New York law would treat each tower’s loss as a separate event.

Muddying the waters further, insurance and legal sources say that other insurers on the program may have used other variations of coverage wordings on their own participations, including different definitions of occurrence.

Although Swiss Re is the lead insurer on the WTC property, the total coverage package involves approximately twenty carriers with varying percentages of the risk. Most significant are Swiss Re (20.9 percent), Lloyd’s (19.3 percent), Allianz (15.6 percent), ACE (8.4 percent), Chubb (7.2 percent), Westport (6.7 percent), Travelers (5.9 percent), and Royal (5 percent), with another fourteen insurers comprising the additional 11 percent of the risk. Swiss Re has also contended that Silverstein purchased insufficient insurance on the property. See McLeod, \textit{supra} note 8, at 1, 27 (describing history of placement negotiations and amounts in question at various times).

\textsuperscript{66} See CGL Policy Form CG 00 01 07 98 (ISO 1997), \textit{reprinted in Policy Kit, supra} note 17, at 468.


\textsuperscript{68} See Stempel, \textit{supra} note 14, \$ 2.06[h].
The number of occurrences taking place under a policy of insurance is generally determined according to a "cause" test rather than an "effects" test. The focus is on the number of causes of loss rather than on the number of injuries. For example, a policyholder could not seriously suggest that every decedent or injured worker constitutes an "occurrence" under an applicable liability policy or that each damaged component of the towers is an occurrence.

Nor would policyholders want such a liberal approach to counting occurrences, due to deductibles or self-insured retentions that normally far exceed the loss of any one element of insured property and often exceed the value of individual liability claims. However, policyholders do have an interest in an approach to counting occurrences that is not too restrictive should they be faced with potentially catastrophic losses and limited to a single occurrence of insurance coverage.

Case law on the determination of insurance tends to strike a moderately pro-policyholder balance in close cases. For example, where there are liability claims stemming from a manufacturing problem, a court is likely to find occurrences based on wholesale shipment or episodes of loss created by the product rather than calling the product defect a single occurrence stemming from defective design, a problem at the home plant, or mislabeling. The bulk of case law takes a similar approach regarding not only shipments but also injury from defective products and damage to property.

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70. See STIMPEL, supra note 14, § 2.06[h]; JERRY, supra note 69, § 65[c]; see also, e.g., Mich. Chem. Corp., 728 F.2d at 374 (applying Michigan law) (number of occurrences in connection with claims arising out of contaminated/mislabeled livestock feed determined according to number of deadly shipments of material to farmers who later became claimants, resulting in four occurrences rather than one occurrence from the mislabeling problem or hundreds of occurrences due to number of dead cattle); Maurice Pincofs Co. v. St. Paul Fire & Marine Ins. Co., 447 F.2d 204 (5th Cir. 1971) (applying Texas law) (similar facts involving contaminated bird seed; court finds eight occurrences based on sales rather than one occurrence from contamination or 100 occurrences due to 100 dead birds).

71. See, e.g., Dicola v. Am. Steamship Owners Mut. Prot. & Indem. Ass'n (In re Prudential Lines, Inc.), 158 F.3d 65, 77-79 (2d Cir. 1998) (asbestos exposure inflicting bodily harm constitutes multiple occurrences even if root cause of problem is injurious quality of asbestos); H.E. Butt Grocery Co. v. Nat'l Union Fire Ins. Co., 150 F.3d 526, 533 (5th Cir. 1998) (two employee sexual assaults on children are two occurrences, not one occurrence stemming from...
Where the cause of loss is part of a system or policy, courts have found but one occurrence.\textsuperscript{72} These precedents provide some support to the WTC insurers that undoubtedly will argue that the September 11 terrorism emanates from but one al Qaida/bin Laden master plan. Although this appears to be true, the fact remains that the plan had two rather discrete and separate episodes: driving one plane into the North Tower, and driving a completely separate plane, operated by another airline and crew, into the South Tower, both planes commandeered in separate hijackings rather than launched as parts of one fleet.

\textsuperscript{72} See, e.g., Appalchian Ins. Co., 676 F.2d at 56 (applying Massachusetts law) (employment discrimination resulting from company policies is one occurrence rather than multiple occurrences based on number of affected employees); Transp. Ins. Co., 487 F. Supp. at 1330 (applying Texas law) (same); Interstate Fire & Cas. Co. v. Archdiocese of Portland, 747 F. Supp. 618 (D. Or. 1990) (negligent supervision of priest who committed child abuse is one occurrence) (note that this case and its progeny are contra to H.E. Butt Grocery Co., 150 F.3d at 526 and its limb of cases cited in note 71, supra). Accord Postr v. Ranger Ins. Co., 975 S.W.2d 329 (Tex. App. 1998) (damage to cotton plantings from single herbicide spraying is one occurrence); Phillips v. Ostrei, 481 So. 2d 1241 (Fla. Dist. Ct. App. 1985) (common plan of fraud is one occurrence despite separate overt acts carrying out fraud). In particular, the WTC insurers may invoke the reasoning of Bethany Christian Church v. Preferred Risk Mutual Insurance Co., 942 F. Supp. 330 (S.D. Tex. 1996), which held that embezzlement by a church employee over a period of time was but a single course of conduct and hence a single occurrence under the relevant employee dishonesty policy.

However, the legal rule enunciated in Archdiocese of Portland could have been used to support a finding of multiple occurrences. 747 F. Supp. at 622 (Application of the cause theory depends upon whether there was one proximate, uninterrupted and continuing cause which resulted in all of the injuries and damage for which the claimant seeks coverage.). By this yardstick, the two separate airplane crashes into the North and South Towers, separated by thirty minutes and two different hijackings, would appear to constitute two occurrences by any reasonable definition. The Archdiocese of Portland result can most effectively be explained in that there were multiple instances of abuse but a single child victim. See also Interstate Fire & Cas. Co. v. Archdiocese of Portland, 35 F.3d 1325 (9th Cir. 1993) (reversing trial court and finding that, notwithstanding single child victim and common modus operandi of perpetrator, instances of injury during different policy periods constituted different occurrences).
Courts have found but one occurrence where the damages are linked to an essentially unbroken chain, such as when a car leaves the road and brushes against a row of parked cars. Insurers will undoubtedly invoke these precedents to argue that the WTC losses are the result of a similar sort of careening collision. This argument seems distinctly less persuasive than the “common scheme” argument asserting that the WTC loss resulted from a single terrorist initiative. The fall of the towers may have been a chain reaction, but it was indisputably the product of two separate collisions involving two separate vehicles and is thus rather readily distinguishable from the cases involving careening automobiles or a derailed train of many components.

Thus, a case like American Indemnity Co. v. McQuaig would seem apt precedent. There, the court found that two gunshots by the policyholder that were separated by two minutes were two distinct occurrences. Similarly instructive is Goose Creek Consolidated I.S.D. v. Continental Casualty Co., in which the court found that arson inflicted on two different school buildings constituted two occurrences despite the seeming commonality of the arsonists.

In the case cited to reports, the WTC policyholders’ counsel argues that New York has clearly embraced a view favorable to policyholders.77 In Arthur

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73. See, e.g., St. Paul–Mercury Indem. Co. v. Rutland, 225 F.2d 689 (5th Cir. 1955) (applying Georgia law) (truck hitting train and causing derailment of sixteen cars belonging to fourteen different owners is one occurrence); Olsen v. Moore, 202 N.W.2d 236 (Wis. 1972) (policyholder’s car hit two cars in two opposite lanes; one occurrence); Wessolowski, 305 N.E.2d at 907 (careening car that hits two other vehicles in rapid succession creates one insured occurrence). But see State Farm Mut. Auto. Ins. Co. v. Lawrence, 26 P.3d 1074 (Alaska 2001) (separately injured victims of automobile’s path are each entitled to separate policy limits for occurrence under auto policy).

74. But see Great Lakes Dredge & Dock Co. v. City of Chicago, 260 F.3d 789 (7th Cir. 2001) (damage caused by 1993 Chicago flood when tunnel wall breached stems from one occurrence).

75. 435 So. 2d 414 (Fla. Dist. Ct. App. 1983). But see Koikos v. Travelers Ins. Co., 240 F.3d 1331 (11th Cir. 2001) (trial court finds two shots fired in “nearly concurrent” fashion to be one occurrence; viewing trial court as in tension with McQuaig, appellate court certifies to Florida Supreme Court question of whether instant case involved one or two occurrence under restaurant owner’s liability policy). The Florida Supreme Court heard oral argument on Koikos on Nov. 8, 2001. As of this writing, the court has not rendered a decision.


77. See Labaton & Glater, supra note 8, at C14:

Mr. Silverstein’s lawyers maintain that New York state law, which governs the case, makes clear that each crash and collapse was a separate insurable event. In 1959, they note, the New York Court of Appeals found that the collapse of two walls in adjoining buildings owned by one person, 50 minutes apart, were distinct events.

Id.
A. Johnson Corp. v. Indemnity Insurance Co., 78 one wall of a building collapsed due to heavy rainfall. Almost an hour later, another wall collapsed with "no suggestion that the collapse of the first wall caused the failure of the second." 79 The Court of Appeals, New York's highest court, considered the events as two separate occurrences, triggering higher property insurance coverage. 80 New York case law on liability insurance is similar. 81
Swiss Re argues that the WTC property coverage is not undefined or

78. 64 N.E.2d 704 (N.Y. 1959).
79. Id.
80. See id. See also Kuhn's of Brownsville v. Bituminous Cas. Co., 270 S.W.2d 358 (Tenn. 1954) (excavation designed to combine buildings but resulting in the collapse of each building two days apart constitutes two occurrences).

The efficient proximate cause approach is applied with particular emphasis on the temporal element in New York. See, e.g., Album Realty Corp. v. Am. Home Assur. Co., 607 N.E.2d 804 (N.Y. 1992) (cause of loss is covered break of pipes leading to water damage rather than the freezing that caused pipes to rupture); Bird v. St. Paul Fire & Marine Ins. Co., 120 N.E. 86 (N.Y. 1918) (ship damaged by concussion of explosion rather than the fire that led to the explosion); Home Ins. Co. v. Am. Ins. Co., 537 N.Y.S.2d 516 (N.Y. App. Div. 1989) (electric arcing considered cause of loss, leading to coverage even though arcing was product of steam causing electrical equipment to short out). In Bird, Justice Cardozo enunciated the approach to insurance causation that prevails in New York and other states to this day and also enunciated the precursors to the modern "reasonable expectations" approach to insurance coverage.

General definitions of a proximate cause give little aid. Our guide is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract. It is his intention, expressed or fairly to be inferred, that counts. There are times when the law permits us to go far back in tracing events to causes. The inquiry for us is how far the parties to this contract intended us to go. The causes within their contemplation are the only causes that concern us. . . . The same cause producing the same effect may be proximate or remote as the contract of the parties seems to place it in light or shadow. That cause is to be held predominant which they would think of as predominant. A common-sense appraisement of everyday forms of speech and modes of thought must tell us when to stop.

. . .
This view of the problems of causation shows how impossible it is to set aside as immaterial the element of proximity in space. The law solves these problems pragmatically. There is no use in arguing that distance ought not to count, if life and experience tell us that it does. The question is not what men ought to think of as a cause. The question is what they do think of as a cause. We must put ourselves in the place of the average owner whose boat or building is damaged by the concussion of a distant explosion, let us say a mile away . . . when the fire is at all times so remote that there is never exposure to its direct perils, and that exposure to its indirect perils comes only through the presence of extraordinary conditions, the release and intervention of tremendous forces of destruction.


Applied to the deaths and property damage at Ground Zero, the facts of the attack and resulting damage would tend to indicate a reverse-Bird situation. The concussion or impact with the airplane came first and caused significant damage directly flowing from the crash. Greater damage resulted, however, from the resulting fire that became the efficient proximate cause of the demise of the towers.
81. See cases cited in note 71, supra.
covered by analogy to the standardized definition of occurrence found in liability insurance policies. Rather, Swiss Re argues that the controlling language is that of the “WilProp2000” form used by the broker. The form defines an “occurrence” as “damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses will be added together and ... will be treated as one occurrence irrespective of the period of time or area over which such losses occur.”

Although this language is more restrictive than a complete absence of definition and appears more restrictive than the standard CGL definition of an occurrence as “substantially the same exposure to the same general conditions,” the WilProp2000 language does not foreclose a finding of two occurrences in connection with the WTC losses. Even under the language preferred by Swiss Re, the issue is far from clear. In fact, the better argument appears to be that there were two occurrences even if the issue is governed by the form.

Coverage under the WilProp2000 would hinge on whether the collapse of the towers is due to a “series of similar causes.” The two aircraft crashes into two separate buildings are clearly not one cause. The two events are similar, but it is far from clear that they are of a series. The modus operandi of the airline hijackings was similar and the two seizures were coordinated. But were they one series? One dictionary defines a “series” as:

1: a number of things or events of the same class coming one after another in spatial or temporal succession <a concert [series] =>the hall opened into a [series]
- of small rooms> b: a set of regularly presented television programs each of which is complete in itself 2: the indicated sum of usual infinite sequence of numbers 3 a: the coins or currency of a particular country and period b: a group of postage stamps in different denominations 4: a succession of volumes or issues published with related subjects or authors, similar format and price, or continuous numbering ... 6: a group of chemical compounds related in composition and structure ... in series: in serial arrangement.

“Similar” is defined as

1: having characteristics in common: strictly comparable 2: alike in substance or essentials: corresponding <no two animal habitats are exactly [similar]

82. See McLeod, supra note 8, at 27. Although the disputants give different versions of what happened and what constitutes the contract of insurance, at least one observer finds that Swiss Re’s claim to incorporating the WilProp2000 form “does not withstand scrutiny.” See Mark Geistfeld, Number of Attacks Is Key in Sept. 11 Dispute, N.Y.L.J., Dec. 21, 2001, at 8. Professor Geistfeld reaches this conclusion based on the uncontested statements in the parties’ pleadings and concludes as a matter of law that Swiss Re cannot assert that the contract was incomplete until acceptable wording was agreed upon in light of the nondebatable facts of the transaction, insurance placement custom, and Swiss Re’s failure to insist upon more restrictive language in the binder that it issued. By contrast, Travelers did insist upon using its form, which contains no definition of “occurrence.”

... 3: not differing in shape but only in size or position ([similar] - triangles-[similar] - polygons.

**similar, analogous, parallel** mean closely resembling each other. Similar implies the possibility of being mistaken for each other <all houses in the development are similar>.

"Cause" is defined as "1 a: a reason for an action or condition: motive b: something that brings about an effect or a result . . . an agent that brings something about." The literal definitions of terms in the text of even the more restrictive WilProp2000 definition are not conclusive but suggest that a series of events is something more uniform and tightly bound that the WTC plane crashes of September 11. A series implies replication of the same product in a rather direct and unvarying pattern. For example, when the South Tower collapsed, the falling concrete floors did not comprise 104 separate occurrences. The collapsing floors were of one series as the building pancaked in a domino effect when the steel support gave way and floor upon floor collapsed due to the cascading weight of the concrete.

By contrast, the two airplane collisions with the buildings were arguably separate events rather than part of the same sequence. The planes took off separately on separate routes. They were seized by separate teams of terrorists. They were flown in separate patterns toward two separate targets (the North Tower and the South Tower). They created two separate fires and had two separate, although similar, destructive effects on the two different buildings. Under these circumstances, it is not unreasonable to view the collapse of the towers as two separate occurrences even under the WilProp2000 language. They could not be mistaken for one another as might an assembly line of bricks that fall in sequence.

One could argue from the dictionary definitions that there is only one occurrence because the WTC losses were "caused" by Osama bin Laden and al Qaida. But if this reasoning is accepted, then the Pentagon and Pennsylvania plane crashes are also part of this one occurrence. If all events had been insured by Swiss Re, the insurer could then argue that it was subject to only one policy limit, a result that seems absurd. Although suggesting that all havoc wreaked at the WTC had but one cause (bin Laden) has a less obviously absurd ring to it, it is also a farfetched contention. Even a resourceful, ruthless, and empowered terrorist cannot cause damage until he or she produces a damage-causing event. Even if we give one person or

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84. Id. at 1093.
85. Id. at 1092.
86. See Seabrook, supra note 2, at 64 (describing WTC construction, design, and engineering, and process by which towers collapsed); James Glanz, Why Trade Center Towers Stood, Then Fell, N.Y. TIMES, Nov. 11, 2001, at B1 (same).
organization all "credit" for the plane hijacking scheme (forgetting that it was carried out by nineteen murderers), the losses caused by the scheme stemmed from two separate airplane crashes. If there had been only one plane flown into one tower, there would have been considerably less damage—probably not half as much but nonetheless a distinctly lower order of magnitude of insured loss.

In addition, there are other facts suggesting that it is more appropriate to characterize the demise of the towers as more than a single occurrence. For example, 7 WTC, a forty-seven-story structure in the complex, collapsed late the next day "as a result of a fire that apparently ignited shortly after the towers were hit." The Silverstein group did not hold a lease on 7 WTC. If it had, the policyholder arguably would have suffered physical damage from three separate occurrences, suggesting that the North Tower and South Tower collapses were distinct enough to be separate occurrences even under the WilProp2000 form.

If the WilProp2000 form applies, there is a rub for the policyholder, however. If a court finds both the insurer and policyholder interpretations of this more restrictive language to be reasonable, the hornbook rule of insurance law in New York as elsewhere is that uncertainties are resolved against the drafter, which is usually the insurer or its agents. But if Swiss Re is correct, the Willis form definition of an occurrence may be viewed as language chosen by the policyholder through its agent, the broker, in which case the insurer could find itself in the rare position of being able to utilize the ambiguity principle in its favor.

Further complicating things is that New York is what one might call a weak or, at most, moderate, ambiguity state (as opposed to a strong am-

87. See Lieberman, supra note 2, at 1A, col. 3 (also noting that One Liberty Plaza, a nearby building, "partially caved in" late in the day of Wednesday, September 12). Although the language of the WilProp2000 form has not been litigated, similarly unifying contract language has been found not to make all asbestos-related injuries one occurrence when they stem from exposure to different sources of asbestos. See, e.g., Babcock & Wilcox Co. v. Arkrift-Boston Mfg. Mut. Ins. Co., 53 F.3d 762, 767-68 (6th Cir. 1995), cert. denied, 516 U.S. 1140 (1996). But see Geisfeld, supra note 82 (arguing that if WilProp2000 form controls, damage to towers is one occurrence resulting from series of related terrorist attacks). As reflected in the discussion in this article, I disagree with Professor Geisfeld on this point. The hijacking terrorism directed at the towers was sufficiently separated that it does not constitute the same series of events in the manner of earthquake aftershocks or gusts of the same hurricane.

88. See Complaint of World Trade Center Properties LLC v. ACE Bermuda Ins. Ltd. & XL Ins. Ltd., No. 01 CV 9731 (Nov. 5, 2001) at ¶¶ 5-10 (The Silverstein group leased the buildings at 1, 2, 4, and 5 WTC.).

89. See Stempel, supra note 14, § 4.08.

90. A broker is usually regarded as the agent of the policyholder for most purposes, although the broker is often considered the insurer's agent for purposes of processing premium payments, notices, or claims. See Stempel, supra note 14, § 6.01. Despite the general rule, a broker's status may hinge on the facts of the instant case as to the broker's duties, responsibilities, and source of compensation. Id.
bigness state), i.e., one where the court invokes the ambiguity doctrine only as a last resort when other indicia of meaning fail to clarify the construction of the policy. In the WTC dispute, a court may find that negotiation conduct and the context of the risk placement argue more strongly in favor of one side or the other. For example, a court might find that in light of premiums paid relative to similar risks, the parties tacitly intended to treat the $3.6 billion figure as the absolute aggregate limit of liability for the risk. Alternatively, there may be no external indicators of the outer limit of coverage or the degree of separation required for separate occurrences.

Elements of the “drafting history” of the standard occurrence definition found in the CGL policy, however, suggest that the notion of a “series” of “related” events is what insurers sought to embody in the basic standard form, which implies that the WilProp2000 really has no more restrictive definition of the number of occurrences than does the standard CGL. If this is the case, a policyholder could claim two occurrences in the WTC property loss rather than one.

Another means for assessing the debate over the more restrictive occurrence definition is to ask whether the two plane crashes wrought distinct damage. It appears that they did, a fact that suggests that there were two occurrences rather than one. Although the September 11 tragedy can be laid at the feet of a particular heinous plot by a seemingly coordinated group of psychotics, the fact remains that the incident would have been far different without the second airplane crash. Insurers can perhaps argue that, as a matter of physics and fact, the collapse of the North Tower (that was a foregone conclusion after the first collision) would have brought down the South Tower. This possible argument seems inconsistent with the facts. Each tower came down independently and at separate times due to separate airplane attacks and separate resulting fires. Although the initial collapse of the South Tower shook the earth, the North Tower remained standing for another half-hour and appeared to collapse because fire weakened the steel support, not because the earlier fall of the South Tower had undermined the integrity of the North Tower (although the earlier collapse hardly helped). Depending on the factual evidence adduced if the coverage

91. See Stempel, supra note 14, § 4.08[g] (describing nuances of different versions of ambiguity analysis and dividing states into strong, moderate, and weak versions of the ambiguity approach).
92. See Anderson, Stanzer & Masters, supra note 67, § 9.02[A], at 9–10 (quoting INA executive Lyman J. Baldwin that 1966 definition of occurrence, which used “accident or exposure to conditions” language, was designed to treat as one occurrence a “related series of events” and providing additional drafting history).
93. See Mazier, supra note 64, at 46, 50 (paraphrasing assessment of insurer attorney Laurie Kamaiko that courts could consider whether one airplane could have caused all damage, whether collapse of WTC 7 “hours after the twin towers fell” was distinct occurrence, and relationship between tower collapses and damage to particular adjacent property).
dispute is tried, the court may find that the second tower would have survived with comparatively minimal damage if not for the second aircraft strike. If that is the scientific case in fact, this strongly argues for a finding of two occurrences. Conversely, a finding that the fall of the one tower would have surely brought down the second tower even in the absence of a second airplane strike argues for the insurer's position, but that position seems undercut by the observable facts of the disaster.

IV. THE HISTORY AND RATIONALE OF THE WAR RISK EXCLUSION AND RELATED EXCLUSIONS

Insurance, of course, is simply a form of risk shifting and risk spreading among people. Modern risk management has evolved from merchants dividing precious goods among horses or ships (so that the entire cargo would not be lost if one went down) to sophisticated interlocking insurance products designed to provide indemnity and often defense if property is lost or the policyholder sued.

Insurers, of course, make their money by distributing risk. The very reason for having insurance is to spread risk. People or businesses purchase insurance as a way of spreading risk among a wide group of similarly situated policyholders. By doing this, the policyholder agrees to accept a certain loss (the payment of the premium) in return for obtaining protection should it experience a large but unpredictable loss. The nature of insurance realistically requires that the happening of insured events—or at least their severity and time of occurrence—be contingent and comparatively isolated rather than certain or widespread in order to create an environment in which private insurers will want to operate and in which other entities will want to purchase insurance.

The ability to give up a comparatively small amount of certain loss (the premium) in return for a large amount of protection (the policy limits) should a large loss occur makes insurance an attractive concept. Insurers are able to offer this product by virtue of spreading the risk of the contingent loss (e.g., fire, hurricane, flood) among a large group of policyholders. More important, the group (or risk pool) of policyholders must be sufficiently large and variegated that the pool of policyholders as a whole is not too greatly damaged by any one incident or series of related incidents.

94. See Stempel, supra note 14, § 1.01.

Insurers seek to cover "uncorrelated" risk and to avoid "correlated" risk. For example, providing homeowners' insurance to more than a million policyholders randomly distributed across the continental United States creates a risk pool upon which a property insurer can profitably operate, provided that it charges adequate premiums and otherwise engages in sound underwriting. Because risk distribution and pooling are so central to insurance, the underwriting process seeks to achieve a large but sound and uncorrelated pool of policyholders. Insurance policies are written to provide defenses to coverage and grounds for rescission should the policyholder's conduct tend to undermine maintenance of a sound risk pool.

Property insurance forms commonly exclude war risks or similar dangers. Liability policies typically contain a similar exclusion but may provide that the exclusion "applies only to liability assumed under a contract or agreement." The purpose of these exclusions is to prevent the insurer from becoming responsible for the coverage of a large and correlated risk. For example, if war comes to Elm City, it will bring areawide property damage, thereby destroying the risk spreading and law of averages used by insurers to make money. Even a bad hailstorm or tornado will usually cause only confined or episodic damage. By contrast, a peril such as war tends to bring widespread damage to all policyholders in a region over an extended period of time. Life insurance policies frequently exclude war as a cause of death so that they are not faced with an avalanche of claims should the population be mobilized. Courts have enforced well-drafted war risk exclusions where the insurer has been careful not to mislead the policyholder or were the policyholder is reasonably sophisticated. Because most courts look for the cause nearest the loss to determine if coverage exists,

96. See text and accompany notes 19–25, supra (reproducing war risk exclusionary language and reviewing case law), Commercial Property Policy No. CP 10 20 06 95 (ISO 1994), reprinted in Policy Kit, supra note 17, at 174.


(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.

See Commercial Property Policy No. CP 10 30 06 95 (ISO 1994), reprinted in Policy Kit, supra note 17, at 222.

98. See Commercial General Liability Policy No. CG 00 01 07 98 (ISO 1997), reprinted in Policy Kit, supra note 17, at 461.
policyholder counsel may be able to turn the confusion of riot-related or perhaps even war-related destruction to their advantage by arguing that the real cause of the loss was fire or simple theft, smoke damage, water damage, etc., that may merely have had its initial roots in the excluded event.\textsuperscript{99}

In a similar vein, property insurers typically exclude coverage for flooding or "earth movement" (a/k/a earthquakes or mudslides) for reasons of protecting the risk pool. Specific flood policies are available from the federal government,\textsuperscript{100} and earth movement coverage may be obtained by endorsement or through government-supported insurance.\textsuperscript{101} The additional coverage is available at an additional premium and is made feasible by the widespread risk underwriting made possible by the government or an alliance of insurers. These types of arrangements are not being urged to permit insurers to offer coverage against terrorist acts in the future. In addition, insurers, particularly liability insurers, may exclude certain risks not so much because they are universal in scope when they take place but because they occur with sufficient frequency and severity so as to make underwriting and pricing very difficult. For example, the standard CGL policy, in a reaction to poor claims experience in the past, now broadly excludes coverage for pollution liability and often excludes asbestos-related claims.\textsuperscript{102}

The war risk exclusion thus has been a staple of insurance for decades or even centuries and has been used in some form even before its rationale was firmly articulated by insurance theory. Disputes over the effect of hostilities on coverage have been part of the insurance scene since at least the days of Lloyd's Coffee House and the Barbary Pirates. As the scope and lethality of war have increased, there have been further skirmishes between policyholder and insurer with mixed results. As discussed below, courts construing the common war risk exclusions tend to have protected policyholders, denying coverage only when the loss is quite clearly closely intertwined with military activity. Where the loss is only a collateral consequence of hostilities, coverage has usually been found.

V. KEY CASES CONSTRUING THE WAR RISK EXCLUSION

During World War I, commercial ships were occasionally the collateral victims of the war for control of the shipping lanes. Losses ensued, result-

\textsuperscript{99} See Stempel, supra note 14, at ch. 7. Nuclear Incident exclusions provide another example of an exclusion designed to further the insurer's goal of covering varied and unrelated risk in the nuclear disaster. This exclusion is usually made part of insurance policies by endorsement and is found in both property and liability policies. The exclusion provides that the insurance does not apply to any loss resulting from "nuclear material." See CGL Endorsement No. IL 00 21 04 98 (ISO 1997), reprinted in Policy Kit, supra note 17, at 486.


\textsuperscript{101} See text and accompanying notes 193-205, infra (discussing government programs to aid catastrophic insurance markets).

\textsuperscript{102} See Stempel, supra note 14, § 14.11.
ing in a leading case, *Queen Insurance Co. v. Globe & Rutgers Fire Insurance Co.* in which the Court found that the collision of two commercial vessels was not excluded by the war risk exclusion even though the ships were part of two separate convoys bringing supplies to assist the war effort of the Allies. Because the commercial ships brought each other down and no military craft were involved, the Court found the exclusion inapplicable even though the convoys would not have been sailing "but for" the war. Furthermore, the convoys were traveling in the dark without lights in order to avoid detection and one convoy had changed course because of an earlier submarine attack. No matter, the collision itself was still not considered a sufficiently direct war casualty even though the policy language at issue was quite broad in that it excluded "all consequences . . . of hostilities or warlike operations." This case rather neatly illustrates the insurance law distinction between a cause in fact and a sufficiently proximate cause (in time or dominance) to trigger or preclude insurance coverage. The *Globe & Rutgers* Court relied on this principle and saw that it was well established in both American and English insurance law.

103. 263 U.S. 487 (1924).
104. Writing for the Court, Oliver Wendell Holmes noted that the insurer had urged "with plausibility that the collision would not have happened but for the proceedings thus prescribed as an essential part of the conduct of war." Holmes also noted (but ultimately rejected) the insurers' argument that the purpose of policy and the differing nature of war risk argued for application of the exclusion. "[The insurer] states that, while the premiums upon war risk insurance were greatly increased, those upon marine risks underwent but little change." See *id.* at 491–92.
105. The Court's description of the scene of the loss certainly sounds more like something out of a John Wayne war movie than business as usual in the shipping industry:

The Napoli sailed from New York for Genoa with a cargo of which a part was intended for the Italian Government and a small part was munitions of war. All of it was contraband. At Gibraltar she joined a convoy, as it was practically necessary to do although nor [sic] ordered by the military powers. The convoy sailed with screened lights, pretected [sic] by British, Italian and American war vessels, and navigated by an Italian commander on the Napoli, subject to the command of a British captain as the senior naval officer present. . . . At about midnight July 4 another convoy similarly commanded met this one head on. It was seen only a very few minutes before the meeting, there was much confusion, and one of its vessels, the Lamington, a British steamship, struck the Napoli and sank her.

*Id.*
106. *Id.* at 490. In another case close in time, where the direct and immediate cause of the loss was seizure, the Court had no difficulty finding for the insurer. See *Standard Oil Co. v. United States* (the Llama), 267 U.S. 76 (1925) (proximate cause of loss was seizure from war). *Aecord* Magoun v. New England Marine Ins. Co., 16 F. Cas. 483 (No. 8,961) (C.C. Mass. 1840) (Storey, C.J.) (seizure by foreign authorities excluded from coverage).
108. See *Globe & Rutgers*, 263 U.S. at 492:

*[The common understanding is that in construing these policies we are not to take broad views but generally are to stop our inquiries with the cause nearest to the loss. This is a
Life insurance cases arising out of World War I were consistent with this approach: if life was lost due to an accident, coverage obtained even if the activity was spurred by the war effort; but where life was lost as a direct result of a hostile act, the war exclusion applied.\textsuperscript{109}

Also during World War I, there arose disputes between policyholders and life insurers as to coverage when servicemen afflicted with influenza during the great epidemic of 1918–19 died. Decisions in these cases divided, as one court summarized:

It is . . . recognized that there is a diversity in the holdings, arising not because one group of states follows one line of decision and another group follows another, but because of the difference in the wording of the policies themselves. The cases fall, broadly, into two groups, one holding that the status of the insured as a soldier or sailor is determinative, the other that the cause of death is determinative.\textsuperscript{110}

During World War II, similar disputes arose and there were also a number of life insurance claims centering on the issue of whether the death at issue was the result of war or another, insured factor.\textsuperscript{111} Life insurers generally enjoyed some success defeating claims related to the death of military personnel.\textsuperscript{112} But life insurers were generally unable to take advantage of

settled rule of construction, and, if it is understood, does not deserve much criticism, since theoretically at least the parties can shape their contract as they like.

See also Britain Steamship Co. v. The King, 1 A.C. 99 (1921), affording 2 K.B. 670 (1919). For a more recent application of this principle in setting, see York Ins. Co. v. Williams Seawood of Albany, Inc., 544 S.E.2d 156 (Ga. 2001) (cause of loss is covered sinkhole collapse rather than excluded flood that led to collapse); Medine v. Geico Gen. Ins. Co., 748 So. 2d 532 (La. Ct. App. 4th Cir. 1999) (parade exclusion does not apply when vehicle leaves parade and automobile mishap occurs; injury caused by ordinary accident rather than parade accident).

For a detailed discussion of the treatment of efficient proximate cause in New York, see footnote 80, supra.

109. See, e.g., Stankus v. N.Y. Life Ins. Co., 44 N.E. 2d 687 (Mass. 1942); Vanderbilt v. Travelers’ Ins. Co., 184 N.Y.S. 54 (N.Y. 1920); Riche v. Metropolitan Life Ins. Co., 84 N.Y.S.2d 832 (Sup. Ct. Cayuga Co. 1948) (presenting interesting twist in application of concept of efficient proximate cause; insured dies from antiaircraft fire while flying military mission; policy had aeronautic exclusion but not war risk exclusion; court held for coverage, finding that insured died of covered cause (war) and not the uncovered cause of ordinary plane flight).


111. The presence of war risk exclusions in life insurance policies prompted Congress to enact the Servicemen’s Group Life Insurance Act in 1965. Veterans of conflicts prior to the Vietnam War were obviously unaided by the Act. Even today, the maximum death benefit is only $20,000. See 38 U.S.C. §§ 765–776 (2000).

112. See, e.g., New York Life Ins. Co. v. Bennion, 158 F.2d 260 (10th Cir. 1946) (deaths arising out of Pearl Harbor attack excluded under war risk provisions of policy even though Japan did not formally declare war against United States before attacking). Captain Mervyn Bennion was in command of the Battleship West Virginia at Pearl Harbor and died at his post when hit by bombs dropped by Japanese military planes in an attack on a U.S. military installation. See id. at 261. It would be hard to imagine a more direct loss from an act of war.
the exclusion after hostilities ceased in 1945, even if military personnel died under circumstances occasioned by the war effort (e.g., the argument that the decedent would never have been in Europe to have a mishap if not for the war). The same approaches governed Korean War insurance claims notwithstanding the fact that war was never declared.

World War II property insurers, acting under the precedent of *Rutgers & Globe*, assumed that commercial losses were covered even if craft were operating under blackout mode or attempting to evade warships. This

Nonetheless, Capt. Bennion’s estate received the support of a dissenting judge, who found the exclusion insufficiently clear to preclude coverage. See id. at 266 (Huxman, J., dissenting) (War “is a word of many meanings. It cannot be said that it has but a single meaning. . . . In a legal sense, we are not and cannot be at war with another nation until Congress has declared war.”). *Accord* Caruso v. John Hancock Mut. Life Ins. Co., 53 A.2d 222 (N.J. 1947), *Contra* Pang v. Sun Life Assur. Co., 37 Haw. 208 (1945) (death of fireman stationed near Pearl Harbor due to bombing was not death caused by act of war).

A closer case for the exclusion was presented in *Coit*, 168 P.2d at 163, where the insured soldier died in an army hospital after an appendectomy. The *Coit* court nonetheless found this to be a death incident to service during time of war and denied coverage. But see id. at 170 (Carter, J., dissenting) (finding that although decedent was in military service, his death was “in no way connected with, caused by or the result of that military service or war” and that policy language excluded only war risks, not risks causing injury to soldiers). See also *Laurendeau* v. Metropolitan Life Ins. Co., 71 A.2d 588 (Vt. 1950) (policyholder denied double indemnity recovery pursuant to policy terms where insured killed in 1943 automobile accident while on furlough).

113. See, e.g., *Stinson* v. N.Y. Life Ins. Co., 167 F.2d 233 (D.C. Cir. 1948) (exclusion loses force after actual fighting stops even though there had not been a formal declaration of the end of hostilities; insurer must provide coverage for soldier who accidently fell to death from window of Hotel du Nord in Reims, France, on October 2, 1945, five months after German surrender of military forces). Where death results from combat, the war risk exclusion generally applies irrespective of other legal issues surrounding the theater of war. See, e.g., *Carson* v. Equitable Life Assur. Soc., 317 A.2d 474 (Conn. Super. Ct. 1973) (no coverage where soldier died during combat on reconnaissance patrol in Vietnam that occurred while cease-fire truce was supposed to be in effect). But see *Riche*, 84 N.Y.S.2d at 832 (where insurer issued policy with flight risk but not war risk exclusion; court construed exclusion strictly against insurer and declares coverage where insured killed by enemy anti-aircraft fire). See also *Pearce* v. Am. Defender Life Ins. Co., 330 S.E.2d 9 (N.C. App. 1985) (insurer required to cover death stemming from 1979 training flight accident largely on grounds of estoppel due to unclear communication with opinion not definitive as to interpretation of war risk exclusion).

114. See, e.g., *Goodrich* v. John Hancock Mut. Life Ins., 234 N.Y.S. 587 (N.Y. App. Div. 1962) (Korean Conflict clearly war and soldier’s death, although result of accidental discharge of firearm rather than conflict with enemy, was incident to military service; case remanded on issue of whether war exclusion was sufficiently prominent in policy as required by state insurance regulations); *Lynch* v. Nat’l Life & Accident Ins. Co., 278 S.W.2d 32 (Mo. 1955) (war exclusion enforced against soldier claiming benefits after being maimed and losing foot in Korean Conflict); *Stanbery* v. Aetna Life Ins. Co., 98 A.2d 134 (N.J. Super. Ct. 1953). As the *Goodrich* court put it:

We are not so far removed from reality but to recognize that in the language of the average person, the conflict in Korea was considered a war, not by declaration but by the fact that our armed forces were sent there and participated in the fighting and our soldiers were wounded and died on the battlefields of Korea.

rationale appeared to hold during the Vietnam War, where one court found coverage when a commercial aircraft collided with a military plane. Although the planes were over Vietnam only because of the conflict, the efficient proximate cause of loss was deemed due to air travel rather than to an act of war and the exclusion did not bar coverage.\(^{116}\)

One commentator has read *Globe & Rutgers* as demonstrating that "courts will relegate the war exclusion to a nonperforming role if it can be shown that damage to covered property can otherwise be attributed to some specified cause of loss."\(^{117}\) If this assessment is literally correct, policyholders who suffered losses by fire or other perils that emerged only as a consequence of the attack (and not from the initial impact) may be able to successfully argue that they are covered even if the September 11 terrorism is deemed an act of war (which, as discussed below, it is not). This seems plausible for policyholders on the periphery of Ground Zero and for policyholders with losses more attributable to fire than to the physical impact of the airplanes. It took an hour or so of raging fire culminating in building collapse (both covered causes of loss in the standard commercial property form) to cause the loss of the great bulk of the towers. However, efficient proximate cause analysis may not provide an avenue for coverage for losses caused by the initial airplane impacts if the crashes come within the war risk exclusion.

In what appears to be the first reported case in a hijacking coverage dispute, an intermediate appellate state court ruled that a plane hijacked to Cuba was stolen rather than commandeered in a war. Hence, the theft coverage of the plane was applicable. The war risk exclusion was never seriously discussed as the insurer defended largely on the grounds that the plane had been borrowed rather than permanently taken.\(^{118}\) The Florida Supreme Court reached this holding even though the hijacking had elements of military engagement.\(^{119}\) This holding is consistent with the de-

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\(^{117}\) See Massman, *supra* note 115, at 45.

\(^{118}\) See Am. Fire and Cas. Co. v. Sunny S. Aircraft Serv., Inc., 151 So. 2d 276 (Fla. 1973).

\(^{119}\) After the passenger hijacked the small plane, the pilot was forced to land in Cuba in a pasture. When the pilot attempted to return to the United States, the plane was attacked by Cuban military aircraft and damaged by the gunfire. The pilot "escaped and made a forced landing. Rebel forces [apparently paramilitary troops backing the then-insurgent Fidel Castro rather than the soon-to-be deposed Juan Battista, but the opinion is ambiguous on this point] hid him and the plane for several days, after which he took off and returned to his point of departure in Broward County. *See id.* at 277."
finitive modern case on the exclusion in Pan American World Airways v. Aetna Casualty and Surety Co.,\textsuperscript{120} in which the policyholder’s airplane was hijacked and later totally destroyed as a result of armed hijackers claiming to be acting on behalf of a Palestinian liberation group motivated by political disputes with Israel.

In Pan Am, the district court found the policy’s version of the war exclusion inapplicable, as were the exclusions for government seizure and rebelling or insurrection.\textsuperscript{121} The Second Circuit affirmed in an opinion that is a tour de force in limiting the reach of these war risk exclusions.\textsuperscript{122} The Pan Am court described the hijack and the plane’s odyssey and ultimate destruction by members of the Popular Front for the Liberation of Palestine (PFLP).\textsuperscript{123} Ironically, the PFLP action, like the terrorist operations of September 11, involved efforts to seize multiple planes at approximately the same time.\textsuperscript{124} Unlike the September 11 tragedy, the PFLP hijacked planes were “only” removed and destroyed rather than deployed as suicide bombs. Passengers were used as hostages as the PFLP bargained for the release of prisoners but this aspect of the drama was apparently resolved without any deaths.

The Pan Am court reasoned that the war risk exclusions, although lengthy, were ambiguous regarding the appropriate characterization of this event: whether the two gun-toting plane thieves were garden-variety hijackers, soldiers in an ongoing war of liberation, part of a “seizure” by a quasi-government, an incident of insurrection, or something else. Faced with the uncertainty, the court applied the ambiguity principle to find for the policyholder.\textsuperscript{125} On a deeper level, the court assessed the language, purpose, and background of the war risk exclusions and concluded that they were not intended to apply to this type of event.\textsuperscript{126}

Of particular interest to the court was the history of hijacking and the lack of specific exclusionary language in the all-risk policies held by Pan Am.\textsuperscript{127} In particular, the availability of specific hijacking exclusions used by

\textsuperscript{120} 505 F.2d 989 (2d Cir. 1974) (applying New York law).
\textsuperscript{122} Pan Am, 505 F. 2d at 998.
\textsuperscript{123} Id. at 998–1000.
\textsuperscript{124} Id. at 999. On the same date as the Pan Am hijacking, September 6, 1970, the PFLP hijacked TWA Flight 741 originating in Frankfurt and Swissair Flight 100 originating in Zurich. An attempt to hijack El Al Flight 219 was “foiled in the air by El Al security personnel.” On September 9, a BOAC airplane was also hijacked as part of this connected activity.
\textsuperscript{125} See id. at 999–1001.
\textsuperscript{126} See id. at 999–1004.
\textsuperscript{127} See id. at 1000 (noting that “between 1960 and 1970 over 200 commercial aircraft were hijacked, eight of which belonged to Pan American”). In addition, the PFLP in 1969 hijacked a TWA plane to Damascus and damaged it through detonation. “The [Pan Am] all risk insurers took no steps to clarify their exclusions even after the Damascus loss made it clear that the London market did not consider the PFLP hijackings to be within the terms of [the standard war risk exclusions]."
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insurers prompted the court to make the negative inference that the standard war exclusion was therefore not a hijacking exclusion unless the plane was taken by uniformed army personnel or a more obviously paramilitary group for a purpose resembling more traditional warfare activity.\footnote{See id. at 1000–01 (noting availability of London market forms for aviation policies that specifically excluded wrongful seizure by nongovernment entities, the AV-48 endorsement, and the AV-48A endorsement that specifically excluded “hijacking” and “acts for political or terrorist purposes’’).} Insurers were aware of both the terrorist risk and the availability of specific exclusions to bar coverage of the risk, prompting the court to conclude that when Pan Am’s insurers “failed to exclude ‘political risks in words descriptive of today’s world events,’ they acted at their own peril.”\footnote{Id. at 1001.}

The \textit{Pan Am} court also assessed the case in light of the well-established insurance law doctrine of looking to the “efficient proximate cause” of the loss to determine coverage.\footnote{See id. at 1006–07. The \textit{Pan Am} court used the arguably disparaging term “mechanical” to describe the historically narrow New York law focus on temporal proximity between cause and loss. See id. at 1007–08. Whatever the apt term, the Second Circuit was sure that “for insurance purposes, the mechanical cause of the present loss was two men, who by force of arms, diverted Flight 093 from it intended destination.” Id. at 1007.} By analogy, the court found Pan Am’s loss similar to the loss in \textit{Globe and Rutgers},\footnote{See Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co., 282 F.2d 976 (2d Cir. 1922), \textit{aff'd}, 263 U.S. 487 (1924), discussed at text and accompanying notes 104–114, \textit{supra}, and by the \textit{Pan Am} court, \textit{Pan Am}, 505 F.2d at 1007.} in which the Court refused to bar coverage where the loss was only an indirect consequence of hostilities rather than a direct casualty of military activity directed at the policyholder.\footnote{See \textit{Pan Am}, 505 F.2d at 1005–07 (citing Britain S.S. Co. v. The Kin, 2 K.B. 670 (C.A. 1919), \textit{aff'd}, 1921 1 A.C. 99 (1920) (convoy lost because it took different route to avoid hostilities); Ionides v. Universal Marine Ins. Co., 143 Eng. Rep. 445 (C.P. 1863) (ship running aground because Confederate military forces had extinguished Cape Hatteras lighthouse was covered marine peril rather than excluded war peril); Standard Oil v. United States, 340 U.S. 54 (1950) (commercial ship’s collision with minesweeper was covered marine peril even though minesweeper was in harbor only because of war activities necessitating patrol for mines)). See also Welt v. Conn. Mut. Life Ins. Co., 48 N.Y. 34 (1871), cited in \textit{Pan Am}, 505 F.2d at 1013 (death of insured during railroad robbery covered because four uniformed perpetrators could not be established as soldiers in Civil War conflict raging at time of decedent’s death); \textit{Contra Int”l Dairy Eng. Co. v. Am. Home Assur. Co.}, 352 F. Supp. 827 (N.D. Cal. 1970), \textit{aff'd}, 474 F.2d 1242 (9th Cir. 1973) (warehouse fire in Vietnam ignited by U.S. military parachute flare excluded war risk because of direct flow from hostile military act); Hamdi & Ibrahim Mango Co. v. Reliance Ins. Co., 291 F.2d 437 (2d Cir. 1961) (loss of auto parts due to mortar shelling during Battle of Haifa excluded war risk loss) (both cases cited in \textit{Pan Am}, 505 F.2d at 1017).} Although the terms “insurrection,” “rebellion,” or “usurped power” all connote something less widely and militarily disruptive than a “war,”\footnote{See Home Ins. Co. v. Davila, 212 F.2d 731, 736 (1st Cir. 1954) (discussing terms as progression of hostility moving toward war) (cited in \textit{Pan Am}, 505 F.2d at 1017).} the \textit{Pan Am} court found that even these lesser terms required more than the
isolated acts of even a fairly large number of miscreants. Rather, there must be an effort to depose or replace a government and to offer something of an alternative (although anarchy might in some circumstances constitute the alternative). 134 Because the court found that the PFLP lacked sufficient indicia of a sovereign entity, it also found that the taking of the Pan Am plane constitute an excluded “seizure.” 135

The Pan Am holding and rationale is persuasive. The purpose of the war risk exclusion is to prevent insurers from being wiped out by correlated claims (those emanating from one source or affecting a discreet group rather than a cross-section or large population) that inflict abnormal losses throughout society. An act of terrorism, even repeated acts of terrorism, does not inflict the countrywide correlated losses of a state of armed conflict (be it civil commotion, insurrection, civil war, or war between established nations). Even where the conflict does not involve conventional troops or established governments, there is a difference between the occasional act of terror (e.g., a car bomb at a Jerusalem intersection) and the hostilities of insurrection, militias, or guerilla troops (e.g., raids throughout the countryside in Peru by the Shining Path rebels).

Although terrorist initiatives make normal loss prediction much more difficult, they do not pose the same risk calculation and risk distribution problems presented by more dispersed, semi-constant war. Although terrorism can of course strike anywhere or anytime, it tends not to engulf or affect entire regions on a sustained basis. For example, the WTC attack, although horrific, was relatively isolated in geography and intense hostilities (only two “shots” were fired). As of this writing, months have passed without similar incident and most people in New York and environs have returned to an essentially normal existence. Persons in other regions of the country are relatively untouched, at least in the sense of physical or financial loss. If, instead, September 11 had seen the emergence of guerilla forces based in the Catskills and raiding throughout the Northeast, there would be a different problem. The area involved would be large and consistently affected. The risk pool maintenance function of the war risk exclusion is not imperiled when it does not bar coverage for what is essentially an isolated crime, albeit one with political overtones.

In addition, there would usually be an element of civil war or insurrec-

134. See Pan Am, 505 F.2d at 1010–11 (suggesting that the usurped power exclusion would only apply in situations similar to Charles the Pretender’s occupation of Derby in an effort to wrest the throne of England for himself and his followers). Despite the political agenda of the PFLP, the Pan Am court did not see such a concrete political objective emanating from the PFLP terrorism. See also id. at 1011 (“a de facto government is necessary to constitute a usurped power”); id. at 1014 (using 1916 Easter Rebellion in Dublin as example of civil war or usurped power).
135. See id. at 1008–10, 1013–15.
tion associated with this hypothesized state of affairs. As the Second Circuit observed in *Pan Am*, the hijackers of that airplane were not part of an effort to overthrow or establish a government. They just wanted to destroy the property of a Western corporation. In related fashion, the bin Laden forces wanted to kill Westerners (many of the dead were not Americans) and destroy Western property for political ends (e.g., forcing U.S. troops out of Saudi Arabia, reducing or eliminating support for Israel, and driving a wedge between the West and more moderate Islamic elements). The September 11 terrorists did not want to conquer the United States (war), depose the government (insurrection), or support a faction during domestic strife (civil war). The September 11 terrorism, despite its awful magnitude, is more properly seen as a gruesomely heightened version of the *Pan Am* hijacking rather than an incident of war.

The function of the war exclusion could, of course, be seriously jeopardized if courts construe it not to apply to widespread acts tantamount to armed conflict. When in doubt, courts dealing with either the war or riot exclusions should take a functional approach rather than a hypertextual one, asking whether granting the coverage claim would defeat the purpose of the exclusions and expose the insurer to dangerous losses outside the contemplation of the parties to the policy.

But courts at times have taken an extremely narrow view of the exclusion. For example, one's first intuition might be that war exclusions would presumably apply if the unfortunate residents of Sarajevo (during the Bosnia crisis), Mogadishu (during the time of warlord feuding), or Beirut (during the late 1970s and 1980s) brought claims since those cities seemed at certain times essentially in the throes of ongoing military and paramilitary conflict despite the absence of a formal declaration of war. That intuition is apparently wrong, at least according to one prominent decision, *Holiday Inns, Inc. v. Aetna Insurance Co.*, 136 a case arising out of Lebanese hostilities.

The Holiday Inn was one of the most prominent buildings in Beirut. The hotel became embroiled in a running battle between Christian and Muslim factions in Lebanon. The hotel "was severely damaged by events occurring during a period from October, 1975, to April 9, 1976." 137 On October 25, 1975, "a battle began for the possession and control of the Kantari district" near the hotel. 138 The conflict marked the emergence of a new fighting force on the streets of Beirut. This was the Mourabitoun, the militia force of the Independent Nasserite Organization. The existence of the Independent Nasserite Organization was well known; it was one of numerous groups comprising what may generally be

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137. Id.
138. Id. at 1467.
described as the "Moslem left" (as opposed to the Christian right). What had not been realized was the Independent Nasserite Organization had a large and effective militia. These were the Mourabitoun. On October 25, 1975, the Mourabitoun organized an attack from one of the Moslem suburbs to the south, driving west into Kantari toward the sea front.  

In their attack upon the Kantari district, the Mourabitoun were joined by some Saiqa militiamen. The Saiqa was a Palestinian commando organization, backed by Syria [as well as militia from the PFLP]. The opponents of these forces consisted of militiamen from the Phalange and the Party of Liberal Nationalists ("P.N.L."). The Phalange was organized along paramilitary lines in the mid-1930s. It drew most of its support from the Christian population of Lebanon, although some Moslems were also to be found in its ranks. . . . Its militia, called the Tigers, numbered at least 3,500 men in 1975.  

As the fighting in Kantari progressed, the bells of the Christian churches were rung, and all Phalangists in the area turned out to resist the Mourabitoun. In other parts of Kantari, the Phalangists were able to repel the attacks; the quick seizure of the Murr Tower constituted the Mourabitoun's main success of the night.

Having seized the Murr Tower [the tallest building in the neighborhood and indeed the tallest building in Beirut], the Mourabitoun installed sand bags and heavy machine guns on the top floors. By doing so, the Mourabitoun were able to harass Phalangist street movements in several directions.

The court's description certainly sounds like something out of a war movie. From October 1975 to April 1976 this fighting continued, resulting in shelling that damaged the Holiday Inn, which was occupied by Phalangists during the course of continued fighting. Shots and hostilities were exchanged between the Holiday Inn occupants and opponents in other hotels.

The Holiday Inn was finally wrested from Phalangist hands during fierce fighting between March 21 and 26, 1976. . . . During this fighting the Holiday Inn changed hands several times. By March 23, however, it was occupied by Moslem and Palestinian leftists. "This time the Inn was properly and effectively garrisoned, and ceased to be fought over, though it was frequently used as a sniper position."  

Notwithstanding this environment sounding like a theater of war, the court found that the Beirut conflict did not qualify as "war" under the standard war risk exclusion because the conflict surrounding the Holiday

139. Id. at 1468, citing JOHN BULLOCH, DEATH OF A COUNTRY (1977).
140. Id.
141. Id. at 1469 (citations omitted).
142. Id. at 1471 (citations omitted).
Inn was not one between governments or quasi-governments. For similar reasons, the fighting was not civil war or insurrection. It could be seen as more ganglike than a true political movement. At least the court could not with certainty describe the Beirut bloodshed as war, civil war, or an insurrection against a specific government. In the face of the ambiguity (a reasonable person could call the incidents one big gang battle or label it a civil war between factions competing to be quasi-governments), the insurer lost because it had the burden of establishing with clarity the applicability of the exclusion.

In reaching its decision in favor of coverage, the Holiday Inns court was strongly influenced by the Pan Am case, which was cited throughout the Holiday Inns decision. The Holiday Inns court was also influenced by a British decision involving insurance coverage and Lebanese hostilities. In Spinney's v. Royal Insurance Co., the court faced the similar question of whether damage to commercial property stemming from the street fighting of the era was covered as an ordinary loss akin to vandalism or whether the loss resulted from war or civil war, making the exclusion applicable. The English court, in an opinion by the prominent Lord Michael Mustill, an acknowledged expert on insurance, concluded that it "cannot find that by January, 1976, matters had advanced between massive civil strife and virtual anarchy to the state of a civil war. Perhaps they did later, but that is not for decision here."

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143. See id. at 1498–99. Without doubt, however, there was plenty of fighting and bloodshed in the region. See id. at 1472–85 (reviewing tortured history of conflict in Lebanon and the Middle East).

144. Id. at 1494: "Insurrection' presents the key issue because 'rebellion,' 'revolution,' and 'civil war' are progressive stages in the development of civil unrest, the most rudimentary form of which is 'insurrection.'" (quoting Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1017 (2d Cir. 1974) (emphasis that of the Holiday Inns court; Pan Am court citing Home Ins. Co. v. Davila, 212 F. 2d 731, 736 (1st Cir. 1954), and The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 633, 666 (1862)).

145. See id. at 1503:

Aetna, as an all risk insurer, had the burden of proving that the damage to the Holiday Inn was caused by a peril whose consequences were excluded by the policy. . . . Having failed to sustain that burden, Aetna is liable under the policy. The Holiday Inn was damaged by a series of factional "civil commotions" of increasing violence. The Lebanese government could not deal effectively with these commotions. The country came close to anarchy, but the constitutional government existed throughout; the requisite intent to overthrow it has not been proved to the exclusion of other interpretations; and there was no "war" in Lebanon between sovereign or quasi-sovereign states.


147. See Holiday Inns, 571 F. Supp. at 1487, citing Spinney's, 1980 1 Lloyd's L. Rep., at 432 (emphasis added). Holiday Inns Judge Haight added:

I do not cite the English court's judgment in Spinney's, on this point or any other, as precedent for findings of fact in my own judgment. That is because the evidence in the record of this trial constitutes the basis for this Court's findings, not the evidence adduced.
The *Holiday Inns* decision suggests that American courts would be reluctant to find even guerilla troops in the Catskills to meet the terms of the standard war risk exclusion. Where there is a more distinct effort to overthrow a particular government, however, courts have characterized this as civil war. In some cases a battle of "quasi-sovereign" forces for control of land can constitute a state of war. Where regular troops of a sovereign government are involved, the war risk exclusion has been held to preclude coverage, even where the loss is not caused by the direct actions of the troops. For example, in *TRT/FTC Communications, Inc. v. Insurance Company of the State of Pennsylvania*, the court denied coverage for merchandise removed from a store at gunpoint by armed men in civilian clothing because the loss took place in a commercial sector of Panama City during the disruption caused by the U.S. military operation against former Panamanian dictator Manuel Noriega. Where troops are irregular but the context establishes civil war or its equivalent, losses sufficiently related to the conflict have been found excluded by language barring coverage for insurrection or civil commotion. For example, merchants with stores looted during factional fighting for control of Liberia were not covered.

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before another tribunal at a different trial. But I am free, as in the point of relevance under discussion, to accept Justice Mustill's legal analysis; or to adopt as useful his characterization of conditions in Lebanon if it conforms to the evidence in the trial before me.

*See id.* at 1487, n. 125. Despite the disclaimer and the utility of the *Pan Am* precedent, Judge Haight was clearly comforted by knowing that a respected English judge had viewed essentially the same imbroglio and found it to fall short of war.


149. *See*, e.g., *Hamdi & Ibrahim Mango Co. v. Reliance Ins. Co.*, 291 F.2d 437, 442 (2d Cir. 1961) (clashes between armed and organized Arabs and Jews for control of Palestine (now Israel) constituted state of war; loss of cargo damaged by mortar fire in port of Haifa excluded from coverage under war risk exclusion). *See also* Int'l Rescue Comm. v. Reliance Ins. Co., 646 N.Y.S.2d 112 (N.Y. App. Div. 1996) (whether Somalia in 1993 was in a state of war was a question of fact precluding summary judgment for insurer in claim arising out of injury by land mine); but see *id.* at 114-115 (Ellerin, J., dissenting) (Somalia was in midst of civil war and insurrection as a matter of law during time of injury and injury clearly stemmed from warlike activity).

150. 847 F. Supp. 28 (Del. 1993).

151. *See id.* at 30-31. But see *Sherwin-Williams Co. v. Ins. Co. of State of Pa.*, 863 F. Supp. 542 (N.D. Ohio 1994) (policyholder with looting losses arising out of Panama conflict covered where it had specifically added "civil commotion" coverage by endorsement). But see *also* Sherwin-Williams Co. v. Ins. Co. of State of Pa., 105 F.3d 258 (6th Cir. 1997) (reversing in part for remand to require policyholder to prove inability to access primary coverage before it may recover from excess insurer).

152. *See* Younis Bros. & Co., Inc. v. Cigna Worldwide Ins. Co., 91 F.3d 13 (3d Cir. 1996). The court reached this view even though some of the losses were due to fire, which arguably
Similarly, the seizure of ships owned by Nicaraguan dictator General Anastasio Somoza was deemed proximately caused by "ongoing civil war in Nicaragua," an excluded peril. Short of these situations, however, case law, particularly the relatively recent precedents of *Pan Am* and *Holiday Inns*, suggests that the war risk exclusion is inapplicable.

### VI. THE WAR RISK EXCLUSION AND ITS POTENTIAL APPLICATION TO CONTESTED SEPTEMBER 11 COVERAGE CLAIMS

In light of the history of war risk exclusion litigation, insurers can hardly be accused of making a gratuitous gesture in the aftermath of the Septem-

was a covered cause of loss nearer in time and more dominant than the de facto civil war raging in Liberia at the time. The losses took place during the June-October period of 1990 and in the court's view all stemmed from the "state of insurrection [that] existed in Liberia during the relevant time period; and, that the insurrection caused [the] losses." See id. at 14. The court cited *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.* approvingly, suggesting that it viewed the case of Liberian civil war as different than the terrorist actions in *Pan Am*. See also *Home Ins. Co. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954) (defining "insurrection or rebellion" as "movement accompanied by action specifically intended to overthrow the constituted government and to take possession of the inherent powers thereof," a feature absent in the September 11 attacks).

153. See *OPE Shipping*, 521 F. Supp. at 342. The *OPE Shipping* holding is both fact specific and debatable. It is arguably at odds with New York law on efficient proximate cause, which tends to focus on the cause closest to the loss to a greater degree than other states. In *OPE Shipping*, the immediate cause of the loss was the seizure by their own crews, apparently including the captains or masters of the voyage, which would ordinarily qualify as "baratry," a covered cause of loss under most marine insurance policies. The crews took the ships to Cuba and Panama, countries friendly with the Sandinistas, the anti-Somoza group that eventually deposed Somoza. The court found more than ordinary baratry, however, because the crew members spearheading the seizure were Sandinista supporters who acted "on direct orders from Sandinista authorities as agents of the insurrection and rebellion." See id. at 343. See also *Productos Carnic*, S.A. v. Central Am. Beef and Seafood Trading Co., 621 F. 2d 683 (5th Cir. 1980) (upholding injunction pending resolution of claims arising from Sandinista seizure of meat packing plant formerly owned by Somoza); *Republic of China v. Nat'l. Union Fire Ins. Co. of Pittsburgh*, 151 F. Supp. 211 (D. Md. 1957) (defection of ship's crew alone is not covered loss due to baratry; for baratry, master of ship must defect or betray vessel owner).


[War is] a course of hostility engaged in by entities that have at least significant attributes of sovereignty. Under international law war is waged by states or state-like entities.

English and American cases dealing with the insurance meaning of "war" have defined it in accordance with the ancient international law definition: war refers to and includes only hostilities carried on by entities that constitute governments at least de facto in character. *Acord* N. Bay Sch. Ins. Auth. v. Indus. Indem. Co., 10 Cal. Rptr. 2d 88 (Cal. Ct. App. 1992) (vandalism of school by group of juvenile delinquents is not "riot" for purposes of triggering policy language regarding calculation of number of occurrences; although loss is not a riot, the holding is a victory for insurer, preventing attachment of coverage due to lack of aggregation of losses). But see id. at 92 (White, P.J., dissenting) (arguing that "riot" is ambiguous under the circumstances and that uncertainty should be resolved in favor of policyholder).
ber 11 tragedy.\textsuperscript{155} If insurers with standard war risk exclusions attempt to invoke the exclusions as a basis for denying coverage, they are likely to lose in courts of law as well as in the court of public opinion.\textsuperscript{156} Case law, although limited, has carved a fairly clear demarcation between real "wars" and even the most bellicose, deadly, and destructive terrorist acts.

The key case, of course, is \textit{Pan Am}, in which the Second Circuit found that a hijacking and the destruction of an airliner was an act of larceny rather than an act of war. Neither could the episode be fairly characterized as the product of civil war, revolution, or domestic insurrection. Although the destruction of two skyscrapers is of greater magnitude than the destruction of an airplane, the analogy would likely be controlling should any war risk coverage litigation ensue from the September 11 episode. In both cases, the perpetrators were politically motivated but were not military employees of a foreign power. None were in the military or affiliated with any recognized government. Nor can they be said to have been guerrilla fighters.

If anything, one can characterize the September 11 hijackers as less political than those who took the Pan Am plane thirty years earlier. The PFLP, however deplorable its methods, by comparison looked more like a political-governmental movement than al Qaida. The former had an avowed political goal: a separate Palestinian state carved from (or perhaps through the eradication of) Israel. The closest thing to a political platform for al Qaida seems to be the removal of American troops from Saudi Arabia. Osama bin Laden has not argued publically for a separate al Qaida nation, although his remarks can be interpreted to advocate the overthrow of certain Middle East governments. But to be replaced with what? Only after the United States began bombing Taliban positions in Afghanistan did bin Laden belatedly suggest that a Palestinian state was part of his goal, perhaps giving him as much geopolitical definition as the PFLP, which the Second Circuit nonetheless found not to be a government or military entity engaged in war.

\textsuperscript{155} See, e.g., Christopher Oster, \textit{On War Question, Insurers' Front Is Hardly United}, \textit{Wall St. J.} Sept. 19, 2001, at B1, col. 3 (quoting AIG CEO Maurice Greenberg: "I don't think anybody in their right mind would [invoke the war risk exclusion]. [A] member of the administration termed it a war... but it's not a war in the conventional sense of the word. No one is going to deny claims on that basis."). \textit{But see} Randy J. Maniloff, \textit{The War Risk Exclusion — Looking Beyond the Events of September 11th}, \textit{Mealey's Litig. Rep.: Ins.}, Sept. 25, 2001, at 37, 39 (attorney representing insurers arguing that standard war risk exclusion is potentially applicable to September 11 claims) ("cases make clear that, if their only consideration had been sanctity of their policy language, the insurance industry would not have been beyond the pale to have reserved their rights with respect to claims arising out of the September 11th attacks"). With due respect to this author, I am constrained to disagree.

\textsuperscript{156} It appears that some insurers may attempt to invoke the war risk exclusion, notwithstanding the many public pronouncements to the contrary. See, e.g., Oster, supra note 155 (ACE Ltd. refrains from disavowal of exclusion and Arab Insurance Group appears to suggest that it is applicable). \textit{But see} Oster, supra note 155 (quoting AIG CEO Maurice Greenberg).
Unless insurers can distinguish their situation from that of Aetna in the *Pan Am* case, they are unlikely to prevail in a coverage dispute about the September 11 attacks. Even critics of some of the *Pan Am* court’s interpretations must concede that the court is correct in its general approach to insurance policy construction. Exclusions are strictly construed against the insurer, any ambiguity is resolved against the insurer that drafted and implemented the relevant policy language. According to these normal axioms of insurance policy construction, unless a terror situation clearly rises to the level of war, the policyholder should prevail.

The insurer position in seeking to enforce a standard war risk exclusion is further undermined by two significant factors: (1) an exclusion clearly excluding terrorism can be drafted; and (2) despite the passage of considerable time, insurers have failed to reword the general war exclusion to exclude terrorism.

As to the first factor, and perhaps stating the obvious, an insurer can draft an exclusion that bars coverage for terrorism. Insurers have in fact drafted and used such exclusions. A specific terrorism exclusion was available in 1970 at the time of the *Pan Am* hijacking. This was of significant import to the Second Circuit, which correctly reasoned that it seemed erroneous to read the war exclusion as a terrorism exclusion when there was available a separate and clear terrorism exclusion that was not used in the policy. This type of thinking is but common sense and a corollary to the ambiguity rule of contract law. If language is arguably unclear but could easily have been made clear if intended to have the result asserted by the drafter, the contra proferentem principle of construing ambiguities against the drafter takes on particular force.

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159. In one case arising out of the 1993 bombing of the WTC, the war risk exclusion issue was not raised, apparently because the case involved a contractual indemnity agreement between the WTC and Hilton Hotels, although Hilton’s liability insurer was involved after having apparently paid claims by patrons injured in the bombing. See Nat’l Union Fire Ins. Co. v. Port Auth., 690 N.Y.S.2d 260 (N.Y. App. Div. 1999) (finding indemnity agreement in lease inapplicable as “[i]t is plain that the planting of the bomb whose detonation led to the claimants’ injuries, in a portion of the World Trade Center over which respondents indisputably exercised no control was not in any way attributable to the use of occupancy of the premises respondents leased and managed”).

160. See text and accompanying notes 129, *supra*.

Regarding the second factor arguing against treating the war risk exclusion as a terrorism exclusion, the Pan Am case was decided more than a quarter of a century ago. During that time, terrorism has increased in magnitude, refinement, and deadliness. Palestinian terrorists murdered a dozen Israeli athletes at the 1972 Olympics in Munich.\footnote{162} Subsequent acts ratcheted up the death toll for terrorism: 241 Marines in Lebanon in 1983;\footnote{163} thirty-two American soldiers in Somalia in 1993;\footnote{164} nineteen Americans killed with the Khobar Towers bombing in Saudi Arabia in 1996;\footnote{165} 224 killed and 4,500 wounded when the U.S. embassies in Kenya and Tanzania were hit by car bombs in 1998;\footnote{166} and thirty-two sailors killed in the suicide speedboat bombing attack on the U.S.S. Cole in 2000.\footnote{167} In addition, suicidal terrorists proved that not even well-guarded chief executives of nations were safe.\footnote{168} Of particular relevance is that insurers were constructively aware of a similar suicide bomb attempt to attack the Eiffel Tower that was thwarted by authorities.\footnote{169} Even more relevant is the


\footnote{165} See Editorial, The Bombing at Khobar, WASH. POST, June 27, 1996, at A28 (“Beirut, Oklahoma City; now add Khobar Towers to the bloody list . . . As the attack on New York City’s World Trade Center showed, even civilians are not exempt from such risks today.”).

\footnote{166} See Ian Johnson & Alfred Kueppers, Until Last Month, a Traveler from Sudan Stumped Investigators, WALL ST. J., Oct. 19, 2001, at A1 (summarizing damage and widely held view that truck bombings of embassies were projects of bin Laden and al Qaida); William Clahrborne, Bombs at 2 U.S. Embassies in Africa Kill 81; 8 Americans Among the Dead, WASH. POST, Aug. 8, 1998, at A1.

\footnote{167} See Maitz & Melrio, supra note 44, at 9A.

\footnote{168} See Coll, supra note 44, at A1 (Rajiv Gandhi killed by suicide bomber who approached him at campaign rally with explosives hidden in basket of flowers); Susan B. Glasser, Alliance: U.S. killed al-Qaida leaders, LAS VEGAS SUN, Dec. 5, 2001, at 1A, 12A (Egyptian Premier Anwar Sadat killed by fanatical Muslims in his personal guard who were in turn killed by guards loyal to Sadat; assassination of Sadat is generally thought to have been masterminded by Ayman al-Zawahri, an Egyptian doctor and founder of Islamic Jihad, later thought to have become Osama bin Laden’s chief deputy in al Qaida and possible mastermind of September 11 terrorism).

\footnote{169} See Gregory Katz, Algerian militia key to al-Qaida; Arrests suggest failed ’94 hijacking was blueprint for attacks, LAS VEGAS REV.-J., Oct. 20, 2001, at 10A, col. 1.
fact that insurers had seen the WTC itself victimized by a 1993 terrorist bomb that killed several and injured more than 1,000, a near miss that probably should have been recognized as a harbinger of more heinous acts to come.

Terrorism has not abated since 1974 and, if anything, appears to have accelerated. But the standard war risk exclusion of 2001 reads almost exactly as did the 1970 exclusion that was insufficient to preclude coverage in the Pan Am case. Further, almost everyone in liability insurance or related legal services is or reasonably should be aware of the Pan Am case. It is a famous case decided by a prominent federal appeals court that sits in the commercial heart of America, perhaps not more than a mile from Ground Zero. For more than twenty-five years, insurers have been on notice that the standard war risk exclusion would almost certainly not preclude coverage for losses caused by terrorism.

In deciding that the losses connected to the 1975–76 battle in Beirut were not excluded acts of war, the Holiday Inns court was strongly influenced not only by the ambiguity doctrine and the insurer’s burden to prove the applicability of an exclusion but also by the insurer’s failure to revise its war risk language in the wake of Pan Am v. Aetna.

The Second Circuit decided Pan Am on October 15, 1974. At that time Holiday Inn was negotiating, through brokers, with present defendant Aetna the all-risk policy forming the subject matter of the case at bar. The policy issued under date of March 11, 1975. The “Aetna” involved in Pan Am was a different company. But the Second Circuit, in a scholarly, thirty-three-page opinion by Judge Hays, with encyclopedic citation of authority, placed the insurance industry on notice when it declared certain principles of insurance law applicable to, and defined terms appearing in, all-risk property policies. It often happens that insurers and their insureds, litigating the question of coverage, draw analogies to judgments of prior centuries. The Second Circuit performed that historical analysis in Pan Am, updating the ancient insurance phrases within the general context of this century’s tragic Middle East strife, and it did so during the gestation period of the very policy in suit.

170. See William M. Carley, Explosive Theory: Bombing in New York Bears Some Hallmarks of Mideast Terrorists: A Motiv Remains Unclear in Blast that Killed Five and Injured 1,000 or More: Businesses Find New Offices, WALL ST. J., Mar. 1, 1993, at A1, col. 6 (“tremendous power of the bomb, its strategic placement to knock out much of the lighting, power and communications in the World Trade Center, and its huge success in disrupting lower Manhattan bear all the characteristics of a professional terrorist operation”).

171. See News Summary, The FBI Determined that a bomb caused the World Trade Center explosion, WALL ST. J., Mar. 1, 1993, at A1, col. 3 (“Bomb, which left a four-story hole below New York’s 110-story twin tower complex, may have contained as much as 1,500 pounds of explosives. Terrorism analysts said Friday’s nighttime attack had all the markings of certain Mideast terror groups.”); News Summary, Bomb Inquiry Focuses on Links to Muslim Cleric, WALL ST. J., Mar. 8, 1993, at A1, col. 3.

Despite this notice and the ready availability of clearly exclusionary language, insurers made no significant changes in the standard exclusion. Under these circumstances, insurers are in a difficult position when attempting to argue that the war exclusion is also a terrorism exclusion. Policyholders can argue that insurers with only a standard war exclusion are effectively estopped to provide coverage when terrorism causes losses. If otherwise valid September 11 coverable claims are opposed solely on the basis of the standard war risk exclusion, policyholders should win on summary judgment.173 If insurers are to avoid covering the aftermath of September 11, they must incorporate more specific terrorism exclusions into their policies or have other valid grounds of defense (e.g., business loss that does not flow from physical damage).

Insurers can argue with some force that September 11 was a quantum leap not only in terrorist impact but also in the response, both rhetorical and military, to terrorism. Within one day, political leaders and news organizations referred to the events as an “act of war” that placed America at “war” with al Qaida and with countries that aid or abet its activities. The ensuing weeks have seen continued references to “America at War,” the “War on Terrorism,” and the like. Much of this rhetoric has come straight from the top. Political leaders and the media of course condemned the Pan Am hijacking but the incident stirred no similar war rhetoric.

Nor did the United States respond to the 1970 hijacking with much more than rhetoric and diplomacy. By contrast, the killings of September 11 stirred the federal government into action. Hundreds of suspected terrorists or collaborators were detained or arrested. Diplomatic efforts to forge an anti-bin Laden, anti-Taliban coalition went into overdrive. Military forces were deployed. Afghanistan was bombed.

These responses give insurers fuel for arguing that there really was something different about this terrorist event that vaulted it from the ordinary into an excluded event of war. Although such arguments could give a court pause, they are unlikely to remove any September 11 coverage disputes from the precedential force and factual analogy provided by Pan Am. In

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173. See Fed. R. Civ. P. 56 (judgment may be entered for moving party, even party bearing burden of persuasion, if there is no genuine dispute of material fact and movant is entitled to judgment as a matter of law). Conceivably, a war risk coverage dispute could have something more to raise a genuine dispute of material fact, such as communications between the parties that indicated a policyholder’s understanding that terrorism losses were excluded or that a premium was reduced based on this understanding. Absent special facts like this (that are unlikely), however, September 11 policyholders should prevail on war risk issues without the need for full trial of the dispute.

For a different view making thoughtful arguments and invoking my own writings to argue that the September 11 terrorism is sufficiently distinct from the Pan Am terrorism to come within the exclusion, see Randy J. Maniloff, The ‘War Risk’ Exclusion: Distinguishing Between ‘War’ and ‘Terrorism’ After September 11, 16 MEALEY’S LITIG. REP.: INS. 6, Dec. 11, 2001, at 1, 8–9.
addition, the theory and rationale of the war risk exclusion suggests that the exclusion cannot be appropriately applied to the September 11 losses.

As discussed above, the risk distribution rationale for the war exclusion is in the way that war changes the actuarial rules of insurance. In peacetime, fortuitous, isolated, episodic losses (even if large) do not fundamentally alter the law of averages, historical trends, and the law of large numbers. A prudent insurer can achieve a large pool of uncorrelated risk and price its products profitably even if the risks insured include even dangerous natural phenomena (e.g., wildfires, hurricanes, earthquakes) affecting miles of land and millions of people. During wartime, all risk is to a degree correlated, sometimes severely. Think of London or Dresden during World War II for property insurance; Normandy Beach for life insurance; and the Gulf War, where charred Iraqi and Kuwaiti vehicles appeared to dot the road to Baghdad, for auto insurance.

Similarly, war changes the equation of risk fundamentally in that it engages hordes of people, usually at the government’s behest, in intentional acts of death and destruction. Without war, actuaries and underwriters need worry only about individuals or relatively small groups that may inflict injury upon insureds. Even if these groups are rather large, widely dispersed across the country, or disproportionately and troublesomey concentrated in certain areas, the havoc that these groups can wreak, however large, is not as systemic as war and does not alter the norms of risk distribution as much as does war.

The insurance industry’s historical practices confirm this distinction. Insurers never exclude coverage for losses resulting from thugs, even organized bands of thugs, much less the Cosa Nostra or other criminal organizations. These domestic groups have many “members,” perhaps more than al Qaida and other terrorist organizations. Domestic gangs can be extremely destructive, acting with deliberate, far-flung, and sustained malice. Yet insurance policies do not exclude their damage except perhaps in cases where their activity rises to the level of a full-blown riot with looting and the policy contains a riot exclusion. In addition to covering such human-generated losses, insurers have also historically been willing to cover hurricanes and similarly widely dispersed natural disasters. Only with Hurricane Andrew’s severe losses in 1992 was Florida required to take government action to make the risk insurable through a windstorm pool. Earth movement has historically be excluded in the standard policy but can be purchased with relative ease at premiums that are not particularly high. Floods have been excluded but are insurable under the government program.

From a contract construction and insurance law perspective, all of these examples tend to vindicate the accepted view (expressed in Pan Am) that the war risk exclusion does not apply to terrorism losses. These other ex-
clusions (windstorm, flood, earth movement) are all more clear and comprehensive than the war risk exclusion. Some of the limitations on coverage are in the insuring agreement itself (e.g., they are not covered perils in a property policy). In those cases, the policyholder will not even enjoy the benefit of the legal rule that requires strict construction of an exclusion against an insurer. But for the war risk exclusion, the legal rules of insurance in construing ambiguous policy language and exclusions should result in policyholders winning any such coverage battles.

From a structural or instrumental perspective, the treatment of these other risks also suggests that real war is different and that terrorism, even the awful new terrorism of the post-September 11 world, is not enough like real war to meet the purpose and objective of the war risk exclusion. Put another way, one can address the war risk exclusion by asking what the September 11 terrorism most resembles: fire, crime, hurricane, earthquake, flood, or war? One can make decent arguments for any as the favored analogy but war seems the least likely. Although the September 11 horror was a terrible loss, it is probably more like the Northridge earthquake, Hurricane Andrew, or the Galveston Hurricane of 1906. These disasters caused great loss of property and life but were within the scope of insurance coverage. Put another way, Manhattan was dealt a terrible blow by the terrorists, but Manhattan is a long way from becoming Kabul.174

174. The generally excluded cause of loss most like the WTC attack is probably earthquake. The tragedy involved terrible destruction based on physical collapse of buildings and support—but destruction relatively confined (unlike the miles often affected by hurricane or flood). Although the earthquake risk is usually excluded in the standard policy, it is excluded with a clarity not found in the war risk exclusion, another factor suggesting the inapplicability of the war risk exclusion to bar coverage.

But see Manillof, supra note 173, at 8–9. Manillof argues with some force that September 11 is a sufficiently different terrorist incident because its magnitude and dispersion give it the risk management problems normally associated with a conventional war. In making this argument, Manillof notes that my prior writings can be invoked to support his position. See Manillof, supra note 173, at 8–9 (quoting an excerpt of Law of Insurance Contract Disputes, supra note 14, § 1.02[a], which states that the “[p]urpose of the war exclusion is to prevent insurers from being wiped out by correlated claims . . . . that inflict abnormal losses throughout society. The function of the war exclusion would be seriously jeopardized if courts did not construe it to prevent widespread terrorist acts tantamount to armed conflict.”).

The Manillof article makes a strong argument for insurers against the tide of popular opinion opposing application of the war risk exclusion. Nonetheless, I am constrained to disagree with Manillof’s analysis for two reasons. First, although the September 11 terrorism was indeed something tragically more than a car bomb or a deranged armed intruder, it nonetheless was a concentrated event—or at most four concentrated events. Severe as the damage may have been, it does not resemble the widespread but correlated loss inflicted when a nation is in a state of war. Again, the Manhattan versus Kabul comparison is instructive if perhaps corny. As also stated in my treatise (and fairly quoted by Manillof), the function of the war exclusion “is not imperiled when it does not bar coverage for what is essentially an isolated crime, albeit one with political overtones.” Manillof, supra note 173, at 8–9 (quoting Law of Insurance Contract Disputes, supra note 14, at 1–12 and 1–13). September 11 took terrorism to a new level but the hijackings of that awful day were not widespread enough.
The Insurance Aftermath of September 11

Terrible as it was, the nature of the September 11 loss is simply not all that close to that of war, even the low-tech brutality of guerilla war. Again, a comparison of Manhattan and Kabul is instructive as is a comparison with the United States and Afghanistan during much of the past twenty-two years. Since September 11, the news media have made much of fear gripping the United States. Notwithstanding that the national perspective has been changed by the atrocities of September 11, most of America has been engaged in business as usual in the months after the tragedy and is likely to continue to proceed with a high degree of normalcy. This would not be the case in the aftermath of the first battle of anything resembling a real war, civil war, rebellion, or insurrection. Compare the United States in September 2001 with the former Yugoslavia during September of any year between 1989 and 1995, and the distinction becomes clearer. The terrorists “achieved” a considerable amount on September 11 but they did not ignite a situation sufficiently similar to war to alter risk management axioms.

The insurance industry essentially acknowledged the weakness of the war exclusion when so many of its members so quickly announced that they would not defend claims on the basis of the exclusion. Some, like AIG Chief Executive Officer and industry giant Maurice Greenberg, were openly dismissive of the possibility that the exclusion could apply to the September 11 losses. In effect, insurers eschewing the war risk exclusion gave up almost nothing in the way of legal leverage in order to obtain useful, positive public relations. This is not to say, however, that the September tragedy will not change the insurance business for insurers and policyholders alike.

to rise to the level of “war.” Something like the Manhattan-wide terrorism portrayed in the movie Siege, if continued long enough in substantial degree, might qualify as terrorism cum war.

Second, the continued passage of time with no insurance industry revision of the war exclusion has led me to conclude that it would simply be unfair under the ground rules of contract law to construe the term “war” so broadly, particularly in light of the case law and the insurance norm that exclusions are construed narrowly and to the detriment of the insurers, even if the insurers’ argument is reasonable. The language quoted by Maniloff was written in 1993 for the 1994 First Edition of my treatise. Further passage of time has made me less sympathetic to insurers’ failure to revise the exclusion and more receptive to the policyholder argument that continued terrorism during the intervening years makes it less responsible to give insurers the benefit of any doubt as to the applicability of a war exclusion to terrorist losses. In retrospect, I should have seen this more clearly even in 1993 (ironically, the year of the WTC car bombing). It is also, of course, possible that the horror of September 11 and a desire to see victim policyholders compensated have unduly influenced my thinking. On balance, however, although I stand by the broad analysis cited by Maniloff, I do not think that it applies to the September 11 losses.

175. See Oster, supra note 155.
VII. INSURANCE INDUSTRY AND GOVERNMENT REACTION; PROSPECTS FOR FUTURE COVERAGE OF TERRORISM LOSSES

Regardless of how they are characterized, the September 11 losses are dramatic. Covering them will put significant strain on insurers at all levels and may produce insolvencies. As discussed above, the case law of the war risk exclusion suggests that insurers will not avoid payment on this basis for the September 11 losses and that the standard war risk exclusion will not protect insurers from similar claims in the future.

But precedent, history, and practice also show that insurers can deploy a clear terrorism exclusion that precludes coverage. After September 11, insurers are likely to make this exclusion much more common as an endorsement or perhaps even in revised forms for standard coverage. The weakness of the war risk exclusion and the ravages of September 11 may prompt an industry shift to reduced coverage overall. Already, insurers have announced that they are canceling coverage, will not renew coverage absent specific terrorism exclusions, are raising premiums, or are withdrawing from certain markets. Even venues far afield of the United States or obvious terror targets are affected. For example, the slated insurer of the 2002 World Cup soccer tournament withdrew coverage in the wake of September 11.

176. See Sally Roberts, Market hardening rapidly: Intermediaries warn cedents of big rate hikes, tighter conditions in wake of attacks, Bus. Ins., Nov. 5, 2001, at 10, 33, 34 (September 11 disaster unique in history of insurance loss not only because of magnitude but because it cut across virtually all lines of insurance); Meg Fletcher, Sept. 11 creates challenges for work comp, Bus. Ins., Nov. 5, 2001, at 1, 60 (September 11 largest workers' compensation insurance loss in history due to concentration of employees at core site of disaster); Some European insurers seek to cancel policies, Bus. Ins. Online, available at businessinsurance.com (visited Oct. 4, 2001). The strain will be logistical as well as financial because of the need to quickly process a large volume of claims and ward off claimant opportunism without inviting a public relations problem. See Mark Maremont & Christopher Oster, Insurers Gird for Disaster-Related Fraud, Wall St. J., Sept. 27, 2001, at B2 (quoting one industry insider as expecting "a wave of workers' compensation and disability claims" from persons not actually at site of the tragedy); New York Moves to Combat Insurance Fraud After Terror Attacks, Best's Ins. News, Oct. 4, 2001, at 2.


178. See Roberts, supra note 176, at 10, 33–34; UN Pulls Staff Out of Somalia After Losing Insurance Coverage, Dow Jones Int'l News Wire, Sept. 24, 2001, available at Westlaw ALLNEWSPLUS database; Coverage shortfall threatens airport operations, Bus. Ins. Online, available at www.businessinsurance.com/index.php3?action=view&id=959 (Sept. 25, 2001) (airports that are not government owned have liability limits ranging from $30 million to $1 billion, the higher amount difficult to keep in place or increase in aftermath of September 11).

179. See Sarah Veysey, Berkshire steps in to cover World Cup: FIFA replaces cancelled AXA-led cover, Bus. Ins., Nov. 5, 2001, at 56 (after September 11 attacks, AXA Colonia, lead insurer on consortium that had agreed to provide up to $852 million (944 Euros) in coverage for the
As to the September 11 losses, insurers have stated that the blow, although a hard one, can be borne by the industry. In fact, as the rubble has cleared, so have the prospects of insurers that appear to be able to profit in the long term from newfound customer willingness to pay higher premiums for coverage. Requests for government assistance have focused on protecting insurers from future terrorism losses beyond their capacity and thus encouraging insurers to continue to write this coverage for acceptable rates notwithstanding that September 11 has changed the industry's view of terrorism risks and the feasibility of underwriting them.

Insurers have argued that substantial government backing is necessary to save the industry from additional calamities or the scary prospect that terrorism could become more frequent. A number of proposals have surfaced, with considerable focus on one put forth by the U.S. Senate and another from the House of Representatives, with the White House

2002 World Cup soccer games, canceled its coverage). As the headline of the cited article implies, alternative coverage was found when National Indemnity Co., a unit of Berkshire Hathaway, agreed to provide coverage. The "program’s premium and limits were not disclosed," making it hard to evaluate the impact of terrorism on underwriting and pricing in this instance. The World Cup episode does, however, have implications for the ongoing debate regarding government support for insurers. Despite the underwriting challenges of the post-September 11 world, it appears that insurance coverage remains available, a trend that suggests caution and conservatism regarding the magnitude and type of government assistance to insurers.

180. Regulators have not uniformly accepted all of these insurer assurances at face value. See, e.g., Joseph B. Treaster, Lloyd’s Says It Can Pay, But Officials Seek Proof, N.Y. TIMES, Nov. 4, 2001, at B4, col. 1 ("Lloyd’s has been stung by heavy losses in the September 11 terrorist attacks. And now, insurance analysts, rating agencies and regulators are raising questions about Lloyd’s ability to pay its share of coverage for the attacks, the worst single disaster ever for the insurance industry."). If Lloyd’s is in a financial pinch because of the September 11 losses, it could of course have a significant ripple effect. For example, Lloyd’s has 22 percent of the risk on the WTC properties that are the subject of the coverage litigation described in Part III of this article that, depending on how one counts occurrences, is either $3.6 billion or $7.2 billion in coverage, making Lloyd’s syndicates responsible for $700 million or $1.5 billion in coverage. See also Treaster, at B4 (total Lloyd’s liability for September 11 claims estimated at $8 billion; group of insurance regulators retains Arthur Andersen to audit Lloyd’s finances for assurance).


183. The Senate bill was titled the “Terrorism Risk Insurance Act of 2001.” The bill as drafted provides for a two-year program of government subsidy of excess losses from terrorism with the option of renewal for one year by the government. The subsidy of 90 percent sharing of losses would become operative when industry losses exceed $10 billion. During the second year of the proposed program, the attachment point would be $20 billion. Should terrorism losses exceed $100 billion, Congress would act to determine an appropriate aid or cost-sharing arrangement. As of this writing, the bill had not been formally introduced despite press coverage of the proposal. See Steven Brostoff, Federal Terrorism Bill Stalls, NAT’L UNDERWRITER (Property & Casualty ed.), Nov. 19, 2001, at 5.

184. As of this writing, the House bill had been approved by the Financial Services Committee. See Steven Brostoff, Terrorism Insurance Loan Program Clears Committee, NAT’L UN-
offering a proposal more akin to the House bill. Describing and commenting upon the proposals, one leading newspaper noted:

In the Senate version, backed by the industry, insurance companies would commit their capital to a pool and if losses in any year exceed the pool, the government would be on the hook for the rest. The idea copies the British approach taken after the IRA destroyed $500 million of property in London in 1992. The problem is that this keeps government involved for all time and creates a new government entity (another Fannie Mae!) with great potential for mischief.

For its part, the Bush administration proposes that the government reinsure the market, but only for three years. For 2002, the feds would cover 80% of terrorist claims up to $20 billion and 90% above $20 billion. The government share of the risk would decline in later years and stop altogether in 2005.

The flaw in the Bush plan is that it offers first-dollar coverage, which would leave taxpayers on the hook for most of anything Osama bin Laden does in the next year. But we still prefer a plan with a sunset provision because the problem itself is short term. The insurance industry needs more capital than it has right now to cover terrorism, and only the government has deep enough pockets. But over time the market will unfreeze—premiums for terror coverage will be priced and capital will return.

185. This is perhaps not surprising because the primary sponsors of the House bill are Republicans generally allied with the president. Perhaps also unsurprisingly, the House bill not only addresses insurance assistance but provides for a ban on punitive damages in connection with any disputes over terrorism coverage with noneconomic damages exempted from any otherwise applicable rules of joint liability. See H.R. 3210 § 14 (b)(1), (2).

186. Editorial, Ensuring Insurance, WALL ST. J., Oct. 24, 2001, at A22, col. 2. The Senate Banking Committee version of the plan, as described in a subsequent news article, would require insurers to absorb the “first $10 billion in [terrorist] claims and the government would pay 90 percent of claims exceeding that [amount].” See also Oster, supra note 182, at A24, col. 2 (describing administration and other proposals in more detail); Mark A. Hoffman, White House suggests alternative to terror pool, BUS. INS., Oct. 22, 2001, at 4 (same); Stephen Labaton & Joseph B. Treaster, Bush Details Plan to Help Insurers on Future Terror Claims, N.Y. TIMES, Oct. 16, 2001, at C1, col. 2 (same).
Endorsing a government bailout/backup of private industry did not come easy to the newspaper’s editorial writers, but they, like insuror lobbyists, have made a colorable case for some form of government role in assuring a continued market for terrorism coverage. Certainly, it seems to be a better case than existed for the airline bailout act, which Congress rushed into law less than two weeks after the September 11 disaster. In that instance, Congress gave short shrift to the possibility that we would all be better off if the airline crisis was handled through the bankruptcy and market systems. Many think that this would have led, after some short-

187. Ensuring Insurance, supra note 186:

We would rather eat cabbage for the next 20 years than have to suggest that the insurance industry needs some government help.

But government does have the duty to provide for national defense, and in this case it clearly failed to deal with terrorist risk. On the other hand, any government aid must be constructed so that it doesn’t put taxpayers at permanent risk.

188. See Oster, supra note 182, at A24 (noting that reports by Weiss Ratings, Inc., Fitch Inc. and Standard & Poor’s stress need for federal involvement in maintaining insurer capacity to underwrite terrorism risks.

The reports from the ratings firms generally support the industry’s contention that legislation is needed quickly because most reinsurers that normally take on some of the risk underwritten by insurers have said they will quit offering terrorism coverage after Jan. 1. About 70 percent of insurance contracts renew Jan. 1.

189. See Stabilization Act, supra note 46, § 408(b)(3). The Act provides more than $5 billion in monetary aid to the airline industry and also limits airline liability to the amount of insurance in force through creating a federal cause of action for losses but making the federal action a claimant’s “exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights.” Id. § 408(b)(1). The Act also provides that all September 11 claims be venued in the Southern District of New York (§ 408(b)(3)), with applicable law to be that of the site where the crash occurred (§ 408(b)(2)).

190. See id. (providing for $5 billion in direct financial assistance, $10 billion in loan guarantees, and liability limitation).

Congress, of course, would regard the disappearance of airlines as a bad thing but appears to have misunderstood the consequences. Delta Airlines might, for example, fail, a prospect that Senator Orrin Hatch (R-Utah) candidly admitted was a large motivation for his vote because of the company’s many workers in his state (see Cong. Rec. S9594 (Sept. 21, 2001), which was a view voiced by all legislators from states with significant airline operations (see, e.g., Sen. Carl Levin, D-Mich.; Cong. Rec. S9595, Sept. 22, 2001). Airline failure does not, however, mean that the airplanes would disappear from the face of the earth or that other aspects of the operation would not be purchased and continue in some form or be reconstituted under a new entrepreneurial entity. Congress was concerned about airline health not only because of the role of air travel in the daily business economy but also because commercial airlines were likely to be needed in transporting soldiers and activated reservists to designated posts. See Cong. Rec. S9591 (Statement of Sen. Jon Corzine (D-N.J.) (Sept. 21, 2001) (Military officials “told us [Sen. Corzine and Sen. Robert Torricelli (D-N.J.)] that about 40 percent of the transportation that our military folks will need in a full war might be provided by our private aviation industry. The strength of that industry clearly is important for our national security.”).

191. The congressional debates on the Act suggest that legislators really did think, to pen a bad pun, that the sky was falling. Legislators appeared to believe that bankruptcy was
term discomfort, to a stronger system of consolidated, solvent carriers.\textsuperscript{192} Irrespective of the merits of the airline bailout, the case for assistance to the insurance industry appears stronger.\textsuperscript{193}

Before rushing to any insurance judgment along the lines of the airline bailout, insurers and policymakers need to step back and assess terrorist risks without panic even though the clock is ticking (and as of this writing may have expired in some cases) on policy renewal, reinsurance agreements, exclusionary language, and the like.\textsuperscript{194} In particular, to determine imminent for the major airlines if financial assistance was not forthcoming. The airlines, of course, had been grounded for several days in the wake of the attacks and resumed flights were underpatronized while fixed costs of the airlines remained high, resulting in millions of dollars of losses each day. See supra note 190; see generally Cong. Rec. S9590–9600 (Sept. 21, 2000).

Even though the Bankruptcy Code provides for Chapter 11 reorganization bankruptcies in which debtors can continue to operate their businesses while delaying and reducing payments to creditors, Congress must have unconsciously or implicitly believed that the airlines were in such dire straits that they could not give vendors adequate protection to continue to purchase fuel and the other necessities of operation. In addition, sufficiently dismal financial reports would require the Chapter 11 bankruptcy to be converted to a Chapter 7 liquidation bankruptcy. Under either of these scenarios, the airlines would be implicitly seen as heading for disappearance rather than as able to emerge from bankruptcy as a continuing industry.

\textsuperscript{192} See Ensuring Insurance, supra note 186, at A22:

We are especially sorry to have to consider government aid [for insurers] given the spending extravaganza in Washington at the moment. Any industry remotely affected by the events of September 11 has its hand out, and little of this special pleading makes any economic sense. The $15 billion bailout of the airline industry is a case in point. A few bankruptcies would not disturb the fact that airplanes would still be there to fly—albeit under new, and probably better, owners.

\textsuperscript{193} See Ensuring Insurance, supra note 186, at A22:

But property and casualty insurance is different. Unlike the airline industry, which involves hard assets, the insurance industry is a crucial part of the financial underpinnings of the real economy. Without insurance, the real estate, construction and shipping industries would be moribund (a[nd] small businesses that are located in malls or have big landlords—florists, bookstores and shoe stores—might soon follow). Moreover, the [insurance] aid packages now being considered by Congress do not constitute a bailout in the sense that the industry has promised to pay off all claims from September 11.

\textsuperscript{194} January 1, 2002, has been advanced as something of an absolute deadline by the insurance industry because it is the date on which many reinsurance agreements are up for renewal. If reinsurance is not renewed, the argument goes, primary and excess insurers will be unwilling or unable to write coverage for terrorism losses. Even if this insurance doomsday scenario is correct, the consequences appear manageable. Even without reinsurance, large primary or excess carriers would appear to have the capacity to write limited coverage for terrorism at higher premiums. For example, a business may not be able to get all of the terrorism coverage that it wants but can perhaps buy lower-limits terrorism coverage that will protect it from most risks. In the meantime, insurers and Congress could continue to work rationally toward a solution without undue haste.

If a second unthinkable terrorist act takes place (e.g., the Sears Tower destroyed by suicide bombers) before a considered resolution is enacted, there would be a large uninsured loss, requiring the government to step in with emergency assistance, just as the Federal Emergency Management Agency now does for society's less prominent victims of uninsured flood and tornado damage. This could be expensive, of course, but probably does not result in the federal
the appropriateness and nature of any government assistance, the terror
risk should be analogized to that presented by other tough risks such as
flood, earthquake, or hurricane. To the extent that terrorism parallels these
risks, the industry and government response should probably parallel the
traditional treatment of those risks. To the extent that terrorism presents
a truly more difficult risk, government aid is warranted, but only to the
extent of that greater difficulty in the risk. Anything more gives insurers a
bailout rather than measured assistance that can be justified by its utility
to society.

Under that logic, one might initially think of the terrorist risk as some-
thing that should be addressed with a risk pool in which insurers are forced
to participate as a condition of doing business, something like the hurricane
and windstorm pools found in Florida or other hurricane-prone states.195
Seven states have some form of government-sponsored windstorm plan.196
These plans function in a manner similar to residual plans for high-risk
homeowner and automobile insurance. If an individual insurer will not
accept the risk, the pool takes the risk, usually at a high premium. The
pool is backed by insurers on a prorated basis according to market share
with the state standing in reserve should the losses in a given year threaten
the pool.197

Another model is flood insurance. Under the National Flood Insurance
Act of 1968,198 the federal government offers flood insurance at subsidized
government paying any more money than is planned under the various proposed means of
assisting the insurance industry. Although insurance is an important underpinning of coverage,
even a total unavailability of terrorism insurance is hardly likely to grind business to a
halt. Will the tenants of the Sears Tower really stop coming to work without terrorism in-
surance?

195. See SCOTT E. HARRINGTON & GREGORY R. NIEHAUS, RISK MANAGEMENT AND INSUR-
ANCE 584, 585–87 (1999) (describing beach and windstorm insurance coverage programs in
Gulf Coast and Atlantic Coast states, with detailed description of Florida programs respond-
ing to hard market created by Hurricane Andrew); SEAN F. MOONEY, ARE TERRORISM RISKS
REALLY UNINSURABLE, NAT'L UNDERWRITER (PROPERTY & CASUALTY ED.), OCT. 22, 2001, at 49
(“terrorism coverage for single-family homes would at this point appear to not involve abnormally high
catastrophic exposures, beyond that already covered for natural perils like hurricanes”).

196. See HARRINGTON & NIEHAUS, supra note 195, at 584 (beach and windstorm insurance
coverage programs operate in Alabama, Florida, Louisiana, Mississippi, North Carolina, South
Carolina, and Texas).

197. See HARRINGTON & NIEHAUS, supra note 195, at 584 (also presenting graph of amounts
of exposure for state plans) and at 585–87 (describing Florida situation, in which there is
long-standing residual market mechanism of Florida Windstorm Underwriting Association/
Residential Property and Casualty Joint Underwriting Association created in 1993 in the
aftermath of Hurricane Andrew as the insurer of last resort and the Hurricane Catastrophe
Fund that operates as reinsurer for property insurers). See also MOONEY, supra note 195, at 49
(describing Hawaii Hurricane Relief Fund, which was established in the aftermath of Hur-
cricane Iniki in 1992 but which was discontinued and implicitly deemed no longer necessary
by 2000; “[t]he fund was structured to encourage its eventual replacement by the private
sector”).

rates on property in flood-risk zones, but only up to a relatively low limit.\textsuperscript{199} Since 1983, the government has offered a “write-your-own” program that appears to have successfully encouraged insurers to offer flood coverage, with more than three-fourths of the nation’s flood insurance being written on this basis.\textsuperscript{200}

Under the write-your-own program, private insurers sell flood insurance under their own names, collect the premiums, retain a specified percentage for commissions and expenses, and invest the remaining premiums. The companies service the flood insurance contracts, adjust losses, and pay their own claims. If the insurers’ losses are not covered by premiums and investment income, they are reimbursed for the difference. However, any profits go to the U.S. Treasury.\textsuperscript{201}

Earthquake coverage is similar to flood coverage except that the insurance industry appears to have succeeded in making earthquake coverage available without direct government aid. Normally, earth movement, like flood, is excluded from the standard property policy. Specific coverage can usually be purchased at an additional premium except in certain high-risk areas.\textsuperscript{202} After the 1994 Northridge earthquake, California established the California Earthquake Authority, a state-run but privately financed plan to insure against earthquakes.\textsuperscript{203}

In essence, each participating insurer can write CEA earthquake policies, keep a portion of the premium for administrative expenses, and have the risk borne by the CEA. . . . [T]he CEA can obtain up to $10.5 billion from various sources to pay claims (in addition to the premium revenue from CEA earthquake policies). Given its capital sources, the CEA can be viewed as a pooling arrangement among participating insurers.\textsuperscript{204}

For thirty years, the federal government has helped to facilitate the acceptance and pooling of hurricane, flood, and earthquake risks. This approach appears to have succeeded in prompting private insurers to

\textsuperscript{199} See George E. Rejda, Principles of Risk Management and Insurance 192 (4th ed. 1992). Until 1978, the subsidized insurance program was operated jointly by the federal government and private insurers. In 1978, the federal government “took over the program.” The limits of coverage under the emergency program for national flood insurance (as of 1992) were $35,000 for single-family homes and $10,000 for contents, with a residential structure maximum of $100,000. Under the “regular” program, the limits are $185,000 on the dwelling and $60,000 on contents. Id. See also Harrington & Niehaus, supra note 195, at 581–83 (describing program); James S. Trieschnigg & Sandra G. Gustavson, Risk Management & Insurance 244 (9th ed. 1995) (also describing program).

\textsuperscript{200} See Rejda, supra note 199, at 192.

\textsuperscript{201} Rejda, supra note 199, at 192, citing Nat’l. Underwriter (Property & Casualty ed.), Nov. 11, 1983, at 2, and providing further explanation of the program at 192–93. See also Trieschnigg & Gustavson, supra note 199, at 244 (also describing program).

\textsuperscript{202} See Harrington & Niehaus, supra note 195, at 581.

\textsuperscript{203} See Harrington & Niehaus, supra note 195, at 587–88 (describing California program).

\textsuperscript{204} See Harrington & Niehaus, supra note 195, at 587–88.
write coverage, even where the risk involved is equivalent to the awful losses of September 11.205 The subsidy approach is, of course, subject to criticism in that it arguably encourages unwise activity such as building in hurricane-, flood-, or earthquake-prone areas. Any subsidy program poses this danger: it involves the government assisting in activities that make so little economic sense that the private market would discourage or even prohibit them.

Government backing of “terrorism insurance” presents no real analogy to this problem except perhaps in rare circumstances. Terrorism coverage seems not to encourage the type of moral hazard or adverse selection posed by government efforts to facilitate hurricane, flood, or earthquake insurance. If these programs are defensible, some government role in fostering a market for terrorism coverage seems defensible. But the seeming comparability of these risks suggests that government programs aimed at terrorism coverage need not be more grand or generous than those existing for hurricane, flood, or earthquake risks.206

Some have argued that terrorism presents a bigger problem than other

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205. See Harrington & Niehaus, supra note 195, at 587, n.8 (if an earthquake with the intensity of the 1906 San Francisco earthquake were to hit populated areas of California today, potential losses "[would be] higher than $50 billion," a figure in accord with loss estimates for the September 11 tragedy). See text and accompanying notes 3–4, supra (discussing estimates of September 11 losses). Similarly, one can argue that because the government did not act to bail insurers out of the problems created by asbestos liability that exceeded the September 11 liability, then the government should be similarly reluctant to engage in terror insurance intervention. See Towers Perrin Reinsurance, September 11, 2001: Implications for the Insurance Industry, Sept. 26, 2001, at 5 (total insurer losses from asbestos liability of approximately $120 billion, $35 to $65 billion of which fell upon U.S. insurers). Asbestos liability, however, accumulated over time, giving insurers opportunities for gradual or phased response, while future terrorism losses could be rapid and unanticipated, as were the September 11 losses.

206. Arguably, the better case can be made for doing less in the arena of terrorism coverage and letting the proverbial chips fall where they may upon private insurers. See Morgan Stanley Equity Research North America, Insurance-Property-Casualty Bulletin, Sept. 17, 2001, at 12:

There is a history of unsuccessful outcomes to ponder when Congress has interfered, with the best of intentions, to prop up insolvent financial institutions that got themselves in trouble through poor risk management. The savings and loan crisis comes to mind.

Anytime managements are allowed to make bad risk management decisions and escape the consequences, a precedent is set and lessons are learned. In the case of insurance, two unfortunate consequences result: 1) customers learn not to discriminate—that is, pay for—the value of good risk management and strong ratings, driving down margins so that returns support only the lowest common denominator; 2) some managements learn there are no bad consequences for bad behavior, and take more risk, threatening the system and ultimately increasing costs to everyone.

The insurance business already suffers greatly from the fact that buyers do not discriminate adequately between companies with good and bad claims-paying ratings, and good and bad balance sheets. Now, a time has finally arrived in which the sheep and goats of the industry will be separated. It would be unfortunate if the sheep acquiesced with or even encouraged an effort by Congress to dress up the goats to look like sheep.
tough risks, at least right now because capacity is already strained by the September 11 attack. In addition, weaker reinsurers will be strained, perhaps unable to pay claims, and subject to failure from the shock of these losses. At least in the short term, and perhaps over the longer term as well, it has been argued that terrorism is simply too hard to underwrite because of its unpredictability and the lack of a historical actuarial record upon which to cost out the risk of exposure to terrorism. One arguable analogy is the United Kingdom, which established a terrorism reinsurance program (Pool Re) in response to IRA attacks. Of course, weather is unpredictable, too. But while we do not know when and where the next tornado will hit, insurers can average out the risk over time and collect a premium sufficient to protect themselves provided the risk is pooled and distributed.

In addition, the insurance industry has shown itself capable of underwriting other difficult risks without government assistance, although often not to the extent desired by policyholders or at prices deemed attractive by policyholders. There have also been occasionally severe shortages or unavailability of coverage. For example, during the mid-1970s, there was the medical malpractice “crisis.” During the 1980s, there was a generally hard market noted for “crises” in product liability insurance, pollution, and D & O liability coverage.

Without minimizing the seriousness of these problems, it appears that insurance markets have largely surmounted them. Various state governments actively assisted the formation of new carriers and the continuation

207. See Ensuring Insurance, supra note 186, at A22:

The costs of another terrorist attack would be beyond the capacity of industry to bear. Right now, without paying any claims, the industry has about $300 billion in capital, but the capital of the firms that are most exposed comes to between $80 billion and $100 billion. If the total claims arising from September 11 amount to anything near the high end of the estimate—$100 billion—then bid goodbye to almost one-third of the industry.

208. See Insurance-Property-Casualty Bulletin, supra note 206, at 6 (because of September 11 attacks, “capacity of the reinsurance market worldwide to take risk, currently around $120 billion annually of premium, will shrink significantly,—perhaps by one-third or more”). See also id. at 7 (Lloyd’s syndicates may be particularly vulnerable because of “habit of reinsuring internally”).

209. See Ensuring Insurance, supra note 186, at A22:

The risk of more terrorist acts cannot be quantified at the moment, thus premiums for terror coverage can’t be priced. The abominable events of September 11 were the largest human-made disaster the industry has ever seen. Until that date, the probability of terrorism was considered so low that coverage was included as a “give-away”—it was neither priced in premiums nor charged for—and no capital was set aside to pay for it. By now, although the probability of another terrorist attack is high, actuaries cannot quantify the risk.


of existing underwriting to provide medical malpractice coverage during the 1970s. But today, this coverage is largely provided by the private sector with some state government involvement through risk pools and physicians’ catastrophe funds. A federal program of subsidized medical malpractice insurance has not been implemented, notwithstanding the difficulty and expense of medical malpractice insurance during the past thirty years.

Similarly, the perceived product liability insurance crises prompted unsuccessful efforts to federalize product liability law and some talk of federal aid on the insurance front. Instead, insurers and brokers worked to establish new carriers (e.g., Ace Ltd. and XL)\textsuperscript{212} and policies (claims-made policies in lieu of the traditional occurrence policy) as well as to revise standard policies. Product liability insurance again became widely available, although at generally higher prices even during the largely soft market of the 1990s.

The hard 1980s market for D & O insurance was a less extreme parallel of the product liability situation. The law of corporate director liability was seen as expanding too rapidly by many,\textsuperscript{213} prompting D & O insurers to hike premiums or refuse to write coverage\textsuperscript{214} (and also prompting reluctance to take director posts).\textsuperscript{215} State governments responded with remedial

\textsuperscript{212} See Christopher Oster, supra note 181, at A1, col. 1, and A17, col. 5 ("In the mid-1980s, [Marsh & McLennan] launched Ace Ltd. and Exel Capital, now known as XL. Those moves came in response to some established insurers ceasing to write liability coverage in the wake of huge jury awards for asbestos-related illnesses and big judgments against corporate directors and officers. Both Ace and XL went on to become publicly traded. Marsh retains small stakes in them."). Legislation enacted largely during the 1980s also facilitated the formation of risk retention groups and captive insurers.

\textsuperscript{213} See, e.g., Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (holding directors liable for insufficient vetting of proposed merger arranged by CEO); Robert W. Hamilton, CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES; CASES AND MATERIALS 789 (7th ed. 2001) ("[R]esponse of the corporate bar to Van Gorkom was one of shocked incredulity," with many commentators suggesting that the decision had gutted protections directors previously enjoyed under the business judgment rule. Id. at 780–81.").

\textsuperscript{214} The hard market in D & O insurance was not solely the result of any one case or doctrinal development, even when the case was one of Delaware law, a key jurisdiction for corporate governance matters. See Hamilton, supra note 213, at 781, n.22:

The decision in Van Gorkom was handed down during a "liability insurance crisis" in the United States. During this period insurance companies writing liability insurance in a variety of areas were reducing their exposure by reducing coverage limits, increasing premiums, and declining entirely to insure specific risks. Directors' and officers' liability insurance was involved in this process, and some of the activities described in the text may have been the consequence of the difficulties some companies were experiencing in obtaining or maintaining acceptable levels of liability insurance for their directors.

See also Tamar Lewin, Director Insurance Drying Up, N.Y. TIMES, Mar. 7, 1986, at D1, col. 3; William Glaberson, Liability Rates Flattening Out at Crisis Easer, N.Y. TIMES, Feb. 9, 1987, at A1, col. 5 (both cited by Hamilton).

protective legislation.\textsuperscript{216} Courts responded (although perhaps not consciously) by not aggressively expanding the potential new frontiers of liability.\textsuperscript{217} Insurers responded with more careful underwriting practices and higher premiums.\textsuperscript{218} D & O insurance is today not cheap but it is widely available, without significant government assistance.

Pollution coverage is a similar story. The standard CGL was revised to eliminate coverage for any pollution liability, without even the prior exception for sudden and accidental pollution. Although pollution coverage is not cheap or always easy to obtain, policyholders can buy back such coverage or purchase environmental impairment coverage, usually on a claims-made basis to avoid the problems of underwriting this risk on an occurrence basis. Although the government has not offered to be the pollution insurer of last resort (for the seemingly obvious reason that it does not want to encourage pollution), it arguably has done this indirectly through the Superfund program.

Distilled to its essence, the crucial question regarding government aid to insurers is whether terrorism is really all that distinct from these other tough risks. Determining which risk terrorism most resembles suggests the appropriate role—or nonrole—of government backing. The implicit view of the Bush administration and some commentators is that in the long term, terrorism can be underwritten, perhaps without the seemingly permanent government-backed protection seen with hurricane, flood, and earthquake insurance or with only state-by-state government intervention.\textsuperscript{219} The necessary assumptions here are that government and society will obtain a better grasp of the terrorism problem and that insurers will acquire expertise sufficient to underwrite the risk.\textsuperscript{220} This view assumes

\textsuperscript{216} See, e.g., Del. Gen. Corp. Law § 102(b)(7) (2000) (providing that corporation may by specific provision in certificate of incorporation eliminate or limit personal liability of director for breach of fiduciary duty, provided that director may still remain liable where there is breach of duty of loyalty, bad faith, violation of statutory provisions on dividends, or director improperly derives personal benefit). See also Model Business Corporation Act § 2.02(b)(4) (1990 revision to Act) (similar provision reacting to Van Gorkom). As of 1999, "43 states have adopted statutes similar either to this section or to Del. C.G.L. § 102(b)(7)." See Hamilton, supra note 213, at 782.

\textsuperscript{217} See, e.g., Cede & Co., Cinerama, Inc. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993) (finding no basis for plaintiff recovery merely because of director negligence or breach of duty; plaintiff must also show causality and damages).

\textsuperscript{218} See William Glaberson, Liability Rates Flattening Out as Crisis Eases, N.Y. Times, Feb. 9, 1987, at A1, col. 5. The insurance industry also responded with the formation of new carriers better equipped to take on the D & O risk. See Oster, supra note 181, at A17, col. 5 (broker Marsh & McLennan formed Ace and XL insurers for this purpose as well as to provide high excess products coverage).

\textsuperscript{219} See Ensuring Insurance, supra note 186, at A22. For example, perhaps New York, Illinois, and California will need to be more interventionist than Kansas, Missouri, and the Dakotas in view of the high concentration of potential terrorism targets in those skyscraper-laden states with substantial urban commercial concentrations.

\textsuperscript{220} Other respected commentators have argued that perhaps no government aid is needed
that the next several years will see a disabling of foreign powers that support terrorism, curtailment of terrorist funding, better intelligence, increasingly effective antiterror technology, and generally better homeland security (e.g., airport screeners who are competent and not engaged in illegal activities). This may be a necessary condition if effective insurer underwriting is to occur. If terrorism is contained, a track record will develop for which actuaries can make calculations based on a world of episodic but not overwhelming terrorist threat.221

If the campaign against terrorism is not particularly successful, the underwriting job is harder but perhaps not impossible. Even in a world where September 11 horrors take place with some frequency, insurers can control their exposure through policy limits, site-specific underwriting (e.g., willingness to insure the Bugtussle Mall but not the John Hancock building), large deductibles or self-insured retentions, very high premiums (for those unwilling to go bare or self-insure), and tailored exclusions. For example, a reasonable property insurer may be willing to cover the John Hancock building for everything but attacks by hijacked aircraft if the policyholder can demonstrate adequate protection against car bombers, ninja-like ground attackers, and demolition terrorists. In that case, the building may be “uninsurable” for hijacking attacks without a government program but there would still exist a de facto government program for airport security (regardless of who provides the security worker with a W-2 form) and military interdiction where commercial planes violate no-fly zones around major cities with skyscrapers that may be terrorist targets.

Before making any long-term decisions about the government role in relation to terrorism coverage, policymakers should remember the rationale for assisting insurers in the first place. The goal is not to help insurers because they face financial difficulty but to assist insurers so that insurance will be available to permit business and society to continue to operate productively. If terrorism coverage can indeed continue to be offered at even


The insurance industry has a somewhat stronger case. It’s not seeking compensation for terrorist-induced losses, nor protection against future losses that it could otherwise cover. It wants protection against possible future claims so large and unpredictable as to be difficult to assess in advance—in effect, a new capacity it can’t provide. Still, some skepticism may be in order. After all, insurers are in the business of assessing risk and setting premiums accordingly; it’s hard to imagine why no insurer or reinsurer is capable of doing this for future terrorist attacks.

221. See Mooney, supra note 195, at 49 (Mooney suggests caution before labeling terrorism an uninsurable risk. “Terrorism as such is now ‘perceived’ to be uninsurable. Prior to September 11 the perception was radically different—the coverage was practically given away. Even after September 11, it can be argued that not all terrorism acts need be viewed as uninsurable.”).
high prices, it may be wiser to simply treat this as a cost of doing business. Notwithstanding the difficulties posed by September 11, one source estimates that during 2002 the cost of risk to corporations per $1,000 of revenue will be $9.42 as compared to a range of $5.20 to $8.30 during the last decade.\textsuperscript{222} Although every dollar counts to the cost-conscious corporation, these figures can be read as suggesting that insurance rates will rise by something less than one-half of one percent even without government subsidies. This is hardly a compelling case for much of a bailout. Although there will be particularly hard segments of the insurance market, something modest and temporary seems more in order.

One potentially positive aspect of the September 11 horror for the future of insurance underwriting is that property and liability insurers may assume the role that boiler and machinery insurers have long held—using the underwriting process to increase the safety of the policyholder’s operations. With boiler and machinery insurance, the policyholder not only gets coverage but also gets the expert safety inspection of the boiler or other equipment. In the early twentieth century and to a continued extent, Underwriters Laboratories, a company begun by insurers to assist in reducing risk, improved the safety of electrical appliances by testing as a condition of insurability. Today’s insurers might take a similar approach and require that policyholders demonstrate reasonable counterterrorism measures as a condition of obtaining insurance or price premiums aggressively according to the policyholder’s self-protection against terrorism.

Under this scenario, it seems plausible that insurers can indeed still write some sort of terror coverage and make money, provided that they dodge the bullet of another WTC disaster before policies are renewed and increased premiums collected. If government backing is necessary, it may be required for as little as a year or two. Despite the depressing litany of terrorist incidents noted in Part VI of this article, including the 1993 bombing of the same WTC destroyed on September 11, insurers continued to write terrorism coverage at no cost (assuming that one accepts that the standard war risk exclusion is not a terrorism exclusion, even for the mega-terrorism of September 11). One can therefore argue with some force that, notwithstanding the cries for aid, insurers will provide some risk distribution and management options for terrorism.\textsuperscript{223}


\textsuperscript{223} One can argue that despite the September 11 loss, the event was a financially positive one for the insurance industry as a whole. See Oster, supra note 181, at A1, col. 1 (brokers and investment bankers forming insurance companies to take advantage of business opportunities provided by September 11 disaster), and at A17, col. 2 (Marsh & McLennan CEO Jeffrey W. Greenberg, then at insurer AIG, was criticized for opportunism when in 1992 he described Hurricane Andrew destruction as presenting business prospects for insurers (“an opportunity to get price increases now”) but history proved him correct notwithstanding
permanent legislative approach to the problem, the United States would do well to study insurance activity in Israel, Britain, and Northern Ireland, all of which have faced substantial terrorist activity and continued to persevere with a modern economy.224

But on the proverbial other hand, insurers can also argue that twenty-first century terrorism is different.225 It includes not only the elements of past terrorism (hate, ignorance, weapons, willingness to die for a cause no matter how bizarre, theological if warped commitment to the cause, aid and sanctuary from nations that wish to use the terrorist for political purposes) but also a new level of organization. Now the suicidal fanatic has learned to fly and through the support of a far-flung and well-heeled network is better able to infiltrate the target society and move undetected. Josef Stalin once grimly but accurately observed that a single death is a tragedy but a million deaths is a statistic. Paradoxically, terrorism has moved from an ability to inflict tragic but relatively contained losses to the threat of massive and mind- and emotion-numbing losses.

Florida regulators' temporary moratorium on rate increases when Greenberg's memo was leaked; Henny Sender & Christopher Oster, Insurers Have Easy Time Raising Money, Wall St. J., Oct. 24, 2001, at C1, col. 3; Thomas K. Meakin, Insurers Still Standing After WTC Attack, Nat'l Underwriter (Property & Casualty ed.), Oct. 22, 2001, at 28 (demonstrating that despite fall in stock prices in the wake of September 11, many insurers remain quite solvent); Andrew Ross Sorkin & Joseph B. Treaster, 2 Private Firms Taking Stake in Casualty Insurer, N.Y. Times, Oct. 24, 2001, at C1, col. 2. See also Morgan Stanley, World Trade Center Special Issue, Equity Research N.A., Sept. 17, 2001 (suggesting that weaker insurers and reinsurers may be brought down by September 11 losses but that stronger carriers will benefit from the shakeout due to a predicted "flight to quality" by buyers in coming policy placements).

224. See Mooney, supra note 195, at 49:

Pool Re in the United Kingdom, designed to provide terrorism coverage in that country, allowed for the growth of a competitive private sector, and, prior to September 11, Pool Re had contracted substantially.

In summary, the potential risk of terrorism appears to be too much for the existing insurance system to handle. Hence, there is a clear role for the federal government to act to avoid a financial calamity.

However, this role should be carefully circumscribed and include strong incentives for the early reentry of private sector mechanisms for risk transfer.

See also Mazier, supra note 64, at 46, 48 (New York insurance coverage attorney notes that U.K. terrorism had damage of far lower magnitude than September 11 attack).

225. See Calmetta Coleman, Buffett Says Insurers Made Mistake on Terror as Berkshire Posts Loss, Wall St. J., Nov. 12, 2001, at B3, col. 4 (billionaire investor Warren Buffett, head of Berkshire Hathaway, states in letter to shareholders that Berkshire's insurance operations made "huge mistake" by not anticipating the need to collect extra premium for terrorist acts, and he outlined plans to revamp underwriting practices"). Although noting the seriousness of terrorism, Buffett's letter implicitly suggests that insurers can cover terrorism if they underwrite it correctly at an adequate premium. In effect, an arguable financial genius suggests no need for an extensive government role in assisting insurers in order to maintain terrorism coverage. Buffett's assessment also implicitly accepts the view that the standard war risk exclusions (that were undoubtedly contained in the Berkshire and General Re policies) do not preclude coverage for terrorism losses.
In the sense of now having potentially great magnitude, twenty-first century terrorism looks like a hurricane, flood, or earthquake. But these natural disasters, because of their very dispersion, seldom hit the wealthiest pockets of society. Many floods are in rural areas, as are earthquakes. Hurricanes often wreak the greatest havoc on areas of light development and population. When this is not the case, of course, the quantum of loss becomes industry threatening. Hurricane Andrew was the worst hurricane not because of its strength but because it hit Miami. Similarly, the Northridge earthquake was not the strongest earthquake but did the most damage because it took place in populated, developed, wealthy southern California. By their nature, terrorist attacks in the United States are likely to be aimed at population centers, particularly at landmarks, which tend to involve higher property damage and business losses.

Insurers can thus argue that terrorism has moved to a sufficiently higher-order magnitude with greater dispersion because of this potential intensity. In effect, a severe act of terrorism becomes a vertical hurricane, earthquake, or flood and therefore becomes the type of correlated risk that the private sector cannot underwrite alone. Although not “war” in the classic sense or within the meaning of the standard war risk exclusion, it is warlike in its correlation and severity as well as in its unpredictability. If one accepts this view, a long-term or permanent government commitment to helping spur terrorism coverage that functions similarly to windstorm, flood, and earthquake programs may be justified.

What seems unjustified, except in only the shorted immediate term, is first-dollar or unlimited government coverage of terrorism losses. The September 11 losses are different largely because they are so big. Prior to September 11, the insurance industry showed that it could absorb “little” terrorism losses and did so without apparent increase in premium. If the government starts picking up the terrorism tab from dollar one and does so to the full extent of the loss, it essentially bails out insurers with little in return. Even if this government underwriting is not at the 100 percent level, it would remain an unwarranted gift to the insurance industry. Government coverage at 90 percent or 80 percent levels is essentially the same thing, even at a level in excess of $10 billion of industry losses.

One searches the trade literature in vain for any notion of how the industry or its congressional supporters derived these high percentages of

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227. See Mooney, supra note 195, at 49 (suggesting that after initial emergency role for government, insurers should be able to underwrite terrorism risks. “Can risk of $40 billion be transferred in the private sector of the U.S. economy? Yes, if the correct mechanisms are in place. For perspective, the stock market transfers the financial risks of corporations every day.”).
required government subsidy. One could as easily argue for 50–50 cost sharing of high excess losses, although even this more reasonable figure has a pulled-from-thin-air quality. Perhaps a more studied analysis of insurance industry finances would show that far less government assistance is required or that the attachment point for such aid should be considerably higher (e.g., $25 billion). The burden in calculating and defending this figure, however, should be placed upon insurers. Until the amount of needed assistance is clearly demonstrated, government aid should be only what is necessary to keep the market functioning in some form. Because of looming reinsurance treaty renewal dates, some action is inevitable, but policymakers should not be stampeded into doing more than what is necessary.

A rush to judgment toward excessive government generosity, as occurred in the airline bailout, would be a particularly unwise move by Congress. Insurers and risk managers have made a strong case regarding the seriousness of the problem and a reasonably compelling case for having at least an emergency program in place in time for the next round of reinsurance renewals. However, the short-term triage required for generally healthy

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228. As of this writing, Congress has yet to enact either a temporary or a permanent program for backing terrorism insurance. See Hoffman, supra note 184, at 1 (House-Senate disagreements prevent passage of legislation during 2001); Mark A. Hoffman, Insurers still await action by Congress, BUS. INS., Nov. 26, 2001, at 3. See also Steven Brostoff, Timing, Suspicion Hurts Insurers in D.C., NAT'L UNDERWRITER (Property & Casualty ed.), Dec. 3, 2001, at 41 (offering explanation for difference between swift congressional aid for airlines and other industries as contrasted with greater reluctance to aid insurers; explaining part of the difference as congressional regret from acting hastily and too generously on behalf of airlines); text and accompanying notes 40–45, supra (describing airline assistance legislation).

229. See Editorial, Industry must lobby Congress now on terrorism coverage, BUS. INS., Nov. 12, 2001, at 8 (noting industry preference for Senate bill and arguing that situation is urgent):

All in the insurance industry are holding their breath, waiting to see what federal lawmakers will do next.

The question of whether and how the U.S. government will alleviate the burden of insuring future terrorism risks is central to nearly all impending discussions of renewals among buyers and sellers of commercial insurance and reinsurance. Renewal negotiations must begin soon for 2002 programs to be completed by Jan. 1, but without knowing how the government might step in, it is impossible to discuss pricing and capacity for terrorism insurance. This looming question also creates uncertainty for all other coverage discussions.

The Senate approach is preferable because it would provide only catastrophic protection. It also would call for the government to provide true coverage of losses rather than simply loans with potentially onerous repayment terms, as under the House measure.

See also Jane Merriman, Insurers pressured as WTC bill heads toward $70bn, REUTERS ENGLISH NEWS SERV., Oct. 16, 2001, available at Westlaw ALLNEWSPLUS database; Dave Lenckus, Airports lose terror cover, BUS. INS., Oct. 1, 2001, at 1. There were many individual insurer acts of retrenchment. For example, in the immediate aftermath of the attacks, the St. Paul Companies sent a notice to its agents and brokers imposing a moratorium on writing any new business in the New York metropolitan area. The Lloyd's Underwriting Association on Sep-
insurers whose future looks brighter than their past hardly calls for the immediate establishment of a long-term government program of high loss subsidy. Quick action may be needed to preserve some semblance of coverage in the short term. There is no need to lock the United States into a massive program of insurance subsidies until the situation is better studied, understood, and steadied.