

Three Things That Every In-House Counsel Should Know About Terrorism Risk Insurance

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PRACTICES Insurance Recovery

With a series of high-profile terror attacks this summer both at home and abroad, terrorism risk is again a focal point of planning for corporate risk managers and in-house counsel. Fifteen years after the attacks of September 11, 2001, the market for terrorism risk insurance is continuing to expand and mature with support from the federal government. As we remember the events of September 11, 2001 and the more recent tragedies in Brussels, Orlando, Dallas, Nice and countless other locations worldwide, here are three things that every in-house counsel should know about terrorism risk insurance.

1. What is TRIPRA? TRIPRA refers to the “Terrorism Risk Insurance Program Reauthorization Act of 2015.” In the aftermath of the terrorist attacks on September 11, 2001 and in order to stabilize the pricing and availability of insurance for terrorism risk, the Terrorism Risk Insurance Act of 2002 (“TRIA”) created a temporary program whereby the federal government agreed to reinsure certain losses resulting from “certified” acts of terrorism. In 2015, the program was reauthorized through TRIPRA. As renewed, federal reimbursement for insurers is subject to conditions including (but not limited to) the following:

- Insurers must offer terrorism coverage in all property and casualty policies on terms materially equivalent to those offered for risks other than terrorism.
- Market-wide losses must exceed \$27.5 billion before federal assistance will be provided. The amount of this “insurance marketplace aggregate” retention will increase by \$2 billion each year after 2015 up to \$37.5 billion.
- After the aggregate retention is satisfied, federal reimbursement will be limited to 84 percent of insured losses in 2016, with insurer participation increasing 1 percent annually up to 20 percent by 2020.
- Federal reimbursement will be available only for “certified” foreign or domestic acts of terrorism, as determined by the Secretary of Treasury, Secretary of State and Attorney General of the United States, in consultation with the Secretary of Homeland Security. The terrorism event must involve losses of at least \$120 million in 2016, with the threshold for federal participation increasing by \$20 million each year through 2020, when the reauthorization expires.
- Federal assistance is capped at \$100 billion per year.

2. Do contractual insurance requirements mandate coverage for terrorism risk? While many contracts specifically identify the type and amount of insurance coverage required of a counterparty, other contracts refer generally to “all risk” coverage or contain catchall provisions authorizing a party to compel the procurement of other usual and customary

insurance coverage. Parties and courts have struggled, with varying results, to determine whether such general insurance requirements include terrorism risk insurance. *Compare TAG 380, LLC v. ComMet 380, Inc.*, 890 N.E. 2d 195 (N.Y. 2008) (“TAG was required to maintain insurance for the building against fire and loss or damage by other risks under the Standard Fire Insurance Policy and Extended Coverage Endorsement, covering windstorm, hail, smoke, explosion and physical contact with the building by an aircraft or vehicle, irrespective of whether the mechanism of loss was the result of a terrorist attack.”); *ECF North Ridge Assocs., L.P. v. ORIX Capital Markets, LLC*, 336 S.W. 3d 400, 407-410 (Tex. App.—Dallas 2011, pet. denied) (affirming decision finding that a failure to procure terrorism insurance breached loan agreements, which enabled the servicer to obtain certain insurance coverage, including certified terrorism insurance, if such perils are commonly insured against for similar properties, similarly situated) with *Omni Berkshire Corp. v. Wells Fargo Bank, NA*, 307 F. Supp. 2d 534 (S.D.N.Y. 2004) (holding that a loan agreement requiring “comprehensive all risk insurance” coverage for five collateralized hotels did not require the purchase of terrorism coverage after insurance companies started excluding acts of terrorism from “all risk” policies after 9/11, but also finding that an “other insurance” clause required the purchase of \$60 million in stand-alone terrorism coverage); *Four Times Square Assocs., LLC v. CIGNA Investments, Inc.*, 306 A.D. 2d 4, 5-6 (N.Y. App. Div. 2003) (finding that a leaseholder/mortgagee had demonstrated grounds for injunctive relief to prohibit any action to hold the mortgagee in default or to invade a lockbox account for failure to procure terrorism insurance coverage not expressly required under the terms of the mortgage). To avoid similar disputes and uncertainty, parties are well advised to spell out specifically whether and how much terrorism risk insurance is required under a given contract.

3. What key terms and limitations on stand-alone terrorism insurance coverage should corporate counsel and risk managers anticipate and address? As a preliminary matter, stand-alone terrorism insurance policies may address first-party property and business interruption coverage, as well as third-party liability coverage. Whether insuring first-party risks or liability, stand-alone terrorism policies are typically triggered by a specific defined “certified act of terrorism.” Risk managers and in-house counsel should review these provisions carefully. Some stand-alone policies define the coverage trigger narrowly to require certification by government authorities, a specific threshold of insured losses, and/or evidence of intent by terrorists to influence political actors or policies. Other policies may define the requisite act of terror more broadly to include sabotage or conduct motivated by religious or other non-political ideology. However “certified acts of terrorism” is defined in a stand-alone terrorism policy, the definition should ideally dovetail with terrorism exclusions in liability, property and other traditional policies to avoid a potentially significant gap in coverage.

Terrorism insurance typically does not insure political risks, including loss resulting from strikes, riots, civil commotion, rebellion, revolution, war and insurrection. Cyber-related loss and liability are also usually excluded under a stand-alone terrorism policy as are nuclear, biological, chemical and radiological hazards.

Other provisions, which may appear standard under a traditional policy, can require adjustment when included in a terrorism insurance policy. Valuation provisions, for example, requiring repair or replacement to access the full value of the insured’s loss, undiscounted by depreciation, may need to be relaxed in the aftermath of a certified terror attack. Likewise, insuring terms requiring direct physical loss or damage to insured property as a prerequisite to business interruption recovery may not fully account for collateral losses to businesses

affected but undamaged by a terror attack. Nevertheless, to the extent that stand-alone terrorism policies are manuscript forms, some modifications can be made to address the needs of individual corporate policyholders.

If you have questions about stand-alone terrorism policies or insurance coverage for terrorism risks in general, please contact one of Haynes Boone's insurance recovery partners listed below.