THE CHANGING FACE OF GLOBAL TERRORISM AND A NEW LOOK OF WAR: AN ANALYSIS OF THE WAR-RISK EXCLUSION IN THE WAKE OF THE ANNIVERSARY OF SEPTEMBER 11, AND BEYOND

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I. INTRODUCTION

On the morning of September 11, 2001, the nation was horrified to learn that four hijacked passenger jets had crashed in the United States, destroying the World Trade Center in New York and damaging the Pentagon in Washington, D.C. The nation learned that thousands of American citizens were feared killed.

At 8:45 a.m. EDT, American Airlines Flight 11, a Boeing 767 traveling from Boston to Los Angeles, crashed into the North Tower of the World Trade Center in New York, killing all eighty-one passengers, nine flight attendants, and both pilots.1 “Captain John Ogonowski or one of his crew members managed to push a button in the cockpit that allowed air traffic controllers to hear segments of the cockpit conversation.”2 At 8:28 a.m. EDT, a hijacker was heard to say, “Don’t do anything foolish. You are not going to get hurt.”3

Minutes later, at 9:03 a.m. EDT, United Airlines Flight 175, leaving Boston’s Logan Airport en route to Los Angeles, was hijacked and crashed into the South Tower of the World Trade Center, killing the sixty-five people on board.4 One of the passengers, Peter Hanson, called his parents and explained to them that the hijackers had taken over the plane, armed only with knives, and had stabbed one member of the flight crew.5 An unknown flight attendant called an emergency number from a phone located in the rear of the aircraft. During this call, the flight attendant also explained how her colleagues had been stabbed by the hijackers.6

At 9:40 a.m. EDT, American Airlines Flight 77 crashed into the Pentagon in Washington, D.C.7 Flight 77, a Boeing 757, took off from Dulles Airport in Washington, D.C., and was en route to Los Angeles with fifty-eight passengers, four flight attendants, and two pilots on board when it was hijacked.8 All those on board the aircraft were killed, along with an estimated 190 people who worked at the Pentagon.9 Aboard Flight 77 was lawyer and TV commentator Barbara Olson, wife of United States Solicitor General Ted Olson.10

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2. Id.
3. Id.
5. Id.
6. Id. The FBI named the suspected hijackers on the United Airlines Flight 175 as Marwan Al-Shehhi, Fayez Ahmed, Mohald Alshehri, Hamza Alghamdi, and Ahmed Alghamdi. Id.
8. Id.
9. Id.
10. Id.
She had an opportunity to call her husband twice and ask him, “What should I tell the pilot to do?” During the second telephone call, her husband told her that a plane had crashed into the World Trade Center.

The fourth hijacked plane, United Airlines Flight 93, crashed in the Pennsylvania countryside southeast of Pittsburgh, near the town of Shanksville, Pennsylvania, at 10:00 a.m. EDT. Flight 93, a Boeing 757, had taken off from Newark, New Jersey, and was bound for San Francisco. All thirty-eight passengers, the two pilots, and the five flight attendants were killed in the crash. The hijackers aboard Flight 93 were believed to have been armed with knives and a box that they claimed contained a bomb. The hijackers’ target was unknown. The hijackers “may have been over-powered by passengers who had already heard about the World Trade Center crashes.” It is believed that the hijackers told the passengers they were going to die and told them to phone their loved ones. One of the passengers, Jeremy Glick, a sales manager, talked to his wife for thirty minutes. During this conversation, he explained to his wife that as a result of a secret vote, he and other passengers had decided to act. One of these other passengers, Thomas Burnett, told his wife: “I know we’re all going to die. . . . There’s three of us who are going to do something about it.”

Each of the World Trade Center Towers was 110 stories tall. Immediately after the crash into the North Tower, a five-alarm fire was reported calling for 200 firefighters to respond. They did as they were trained. All 200 of the firefighters who responded to the first alarm were killed.

When the second crash occurred at the South Tower, New York City Mayor Giuliani ordered Lower Manhattan south of 14th Street evacuated; he closed all bridges and tunnels into Manhattan, closed all public and private schools, and canceled mayoral primary elections. At 9:50 a.m. EDT, the North Tower of the World Trade Center collapsed. At 10:13 a.m. EDT, the United Nations Building was evacuated; at 10:20 a.m. EDT, the Securities and Exchange Commission closed all United States financial markets, and at 10:22 a.m. EDT, the World Bank closed. At 10:29 a.m. EDT, the South Tower of the World Trade Center collapsed.

11. Id.
12. Id. The suspected hijackers on American Airlines Flight 77 were named by the FBI as Khalid Al-Midhar, Majed Moqed, Nawaq Alhamzi, Salem Alhamzi, and Hani Hanjour. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id.
23. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id.
Following the Pentagon crash, the United States military declared “threat con delta”—the highest state of alert. The Capitol Building and the White House were evacuated. The Federal Aviation Administration grounded all United States flights. International flights bound for the United States were diverted to Canada, stranding 17,000 people.33

Shortly thereafter, the Los Angeles and San Francisco International Airports were evacuated. The Immigration and Naturalization Service declared high alert at United States borders. The President of the United States was transported from Barksdale Air Force Base in Louisiana to an undisclosed location. Washington, D.C., declared a state of national emergency. The United States Navy dispatched battleships and aircraft carriers to New York and Washington, D.C. At 4:10 p.m. EDT, Building 7 of the World Trade Center (forty-seven stories) was burning, and at 5:20 p.m. EDT, it collapsed. At 5:30 p.m. EDT, the bottom ten floors of the South Tower of the World Trade Center collapsed. On September 12, 2001, Mayor Giuliani requested that the federal government ship 6,000 body bags to New York City. On that same day, 1 Liberty Plaza in New York City (a fifty-four-story building, already evacuated) collapsed due to the terrorist attack.

On September 14, 2001, the United States Congress passed Senate Joint Resolution 23, a Joint Congressional Resolution “to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.” On September 20, 2001, President George W. Bush, the forty-third President of the United States, during a televised address to a joint session of Congress, issued demands to the Taliban: “These demands are not open to negotiation or discussion. . . . From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime”, and with those words, with a nation galvanized, with the world horrified, nothing would ever be the same.

The insurance industry suffered its largest loss in history on September 11, 2001. The loss is estimated to exceed $30 billion, with recent projections indicating that the loss may be as high as $75 billion. Prior to September 11, the largest single insurance loss suffered

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30. Id.
31. Id.
32. Id.
33. Id.
34. Id.
35. Id.
36. Id.
37. Id.
38. Id.
39. Id.
40. Id.
41. Id.
42. Id.
43. Id.
within the United States resulted from Hurricane Andrew in 1992.\footnote{47} As a result of the damages wrought by Hurricane Andrew, the insurance industry paid approximately $15 billion ($19 billion in current value).\footnote{48}

The systemic catastrophic-type losses resulting directly and indirectly from September 11 are coincidentally referred to by the insurance industry as a “clash event.”\footnote{49} “A ‘clash event’ is a large loss that has a substantial impact upon disparate lines of insurance coverage.”\footnote{50} The losses caused by the September 11 terrorist attacks are systemic, primarily involving life policies,\footnote{51} health policies, automobile policies,\footnote{52} liability policies,\footnote{53} and property policies.\footnote{54} The majority of the losses experienced will be in the property insurance arena. War is the quintessential clash event.

The tragic events of September 11 have given rise to many significant questions that will dominate the upcoming debate over historic and prospective coverage. Central to many of these questions is the seldom-litigated war-risk exclusion. Typically, these policies contained war-risk exclusions.\footnote{55} At the heart of the insurance coverage debate are most property insurance policies that provide coverage on an all-risk basis. However, all-risk policies do not cover all losses.\footnote{56} Most policies contain four potentially relevant exclusions. The first exclusion, the war exclusion, focuses on the nature of the act and the actors. The

\footnote{47} Finnerty & Connuck, \textit{supra} note 46, at 1.  
\footnote{48} Id.  
\footnote{49} Id.  
\footnote{50} Id.  
\footnote{51} The actual death toll is likely to be slightly less than 3,000. Stempel, \textit{supra} note 46, at 822 n.16 (citing Teresa Agovino, \textit{Life Insurers, Regulators Move to Quickly Pay Claims: War, Terrorism Exclusions Not Invoked}, \textit{LAS VEGAS SUN}, Sept. 24, 2001, at 4C). A financial consultant has estimated that life insurance claims will not exceed $3 billion. \textit{Id}.  
\footnote{52} Absent an exclusion, vehicle owners can make claims under their comprehensive auto coverage. See Stempel, \textit{supra} note 46, at 827.  
\footnote{53} Tort claims against American Airlines and United Airlines may have the benefit of limited liability through Congress’s enactment of the Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 408, 115 Stat. 230 (2001) (LIability of airlines “arising from the terrorist-related aircraft crashes shall . . . not be in an amount greater than the limits of the liability coverage maintained by the air carrier.”). The Air Transportation Safety Act established a fund for victims who waive available court actions, see id. §§ 401-409, and prohibited awards of punitive damages against the Victims Compensation Fund. See id. § 405(b)(5). American Airlines estimates that it expects the claims paid by its insurance carriers to total $2.3 billion. See Stempel, supra note 46, at 830 n.49 (citing \textit{American Airlines to Claim $2.3 Billion}, \textit{BUS. INS.}, Oct. 29, 2001, at 1). For an extensive analysis of Aviation Insurance issues arising from war risks, see generally Jason B. Libby, \textit{War Risk Aviation Exclusions}, 60 J. AIR L. & COM. 609 (Dec.-Jan. 1994-95).  
\footnote{54} Property coverage for the physical loss of the World Trade Center towers and their contents, together with physical damage to surrounding property caused by the airplane collisions will likely be covered. However, significant coverage questions will need to be addressed regarding business interruption coverage. In order to qualify for business interruption coverage, courts have held that there must be a complete suspension of operation as a result of a covered damage or loss. See, e.g., \textit{Am. States Ins. Co. v. Creative Walking, Inc.}, 16 F. Supp. 2d 1062, 1065 (E.D. Mo. 1998), aff’d, 175 F.3d 1023 (8th Cir. 1996) (slowedown of operations is not business interruption); Home Indem. Co. v. Hylplains Beef, L.C., 893 F. Supp. 987, 991-92 (D. Kan. 1995), aff’d, 89 F.3d 850 (10th Cir. 1996) (mere slowdown is insufficient to give rise to covered business interruption absent a complete suspension of operations). A minority of courts have sustained business interruption coverage in the absence of physical damage and/or when acts of civil authority have prohibited access to the insured’s premises. See \textit{Am. Med. Imaging Corp. v. St. Paul Fire & Marine Ins. Co.}, 949 F.2d 690, 693 (3d Cir. 1991) (slowedown sufficient); Nat’l Children’s Expositions Corp. v. Anchor Ins. Co., 279 F.2d 428, 430 (2d Cir. 1960) (maintaining that there could be liability in the absence of actual physical damage); Allen Park Theater Co. v. Michigan Miller’s Mut. Ins. Co., 210 N.W.2d 402, 403 (Mich. Ct. App. 1973); Sloan v. Phoenix of Hartford Ins. Co., 207 N.W.2d 434, 436 (Mich. Ct. App. 1973); Andrew M. Reidy & Robert L. Carter, \textit{Insurance Law: Business Interruption}, NAT’L L.J., Oct. 1, 2001, at A23. The law is unsettled as to whether business interruption coverage exists when a suspension of the insured’s operation is the result of governmental order. See generally William H. Danne, Annotation, \textit{Business Interruption Insurance}, 37 A.L.R. 5th 41 (1996) (collecting cases that reach differing results of business interruption claims arising from alleged closures by order of civil authority).  
\footnote{55} See Stempel, \textit{supra} note 46, at 823 n.21, 827 n.39, 829-30, 830 n.46 (property, automobile, airline liability, and standard commercial general liability insurance respectively).  
remaining potentially relevant exclusions may become involved depending on the weapon or mechanism used to commit the terrorist act. For example, use of a nuclear device or a “dirty bomb” could cause radioactive contamination, which would fall within the nuclear exclusion. The electrical damage exclusion may apply to damage caused by electromagnetic pulses resulting from nuclear detonation. Finally, the pollution exclusion may apply to biochemical and biotoxnic weapons such as anthrax.

57. Nonfissile weapons involve conventional explosions that do not achieve a nuclear reaction. Id. at 374. “Because they are built with a component of radioactive isotopes, these elements spread out to poison the land and people with whom they come in contact.” Id. “Fissile nuclear weapons deliver five primary damage effects upon detonation: blast, heat, electromagnetic pulse, and direct and residual radiation.” Id. Typically insurance companies have been concerned with the effects of radiation with regard to the nuclear exclusion. “Fissile weapons create two types of radiation.” Id. at 375. “The first form of radiation is immediate radiation in the form of deadly gamma and x-rays . . . . Residual radiation comprises the second form of radiation. This is known as fallout. When a nuclear fireball touches the ground, it throws radioactive particles into the air . . . . This effect encounters a potential exclusion.” Id. at 375-76.

The International Standard Organization (ISO) Causes of Loss—Special Form excludes coverage for “nuclear hazard.” ISO FORM CP 10 30 10 91 (B)(1)(d) (1990). Under this form, the insurance carrier will not pay for loss or damage caused directly or indirectly by “nuclear radiation, or radioactive contamination, however caused.” Id. However, the carrier will cover loss or damage caused by fire. Id.

Some policies contain an “absolute nuclear exclusion,” which applies to “any injury or damage to or arising out of any nuclear device, radioactive material, isotope, . . . or any other chemical element having an atomic number above eighty-three (83) or any other material having similar properties of radioactivity.” Constitution State Ins. Co v. ISO-TEX, Inc., 61 F.3d 405, 408 (5th Cir. 1995). The language suggested that the exclusion would be broad enough in application to include nuclear events caused by terrorist acts. Id. However, most nuclear exclusions are limited to circumstances involving nuclear materials located at a particular nuclear facility or site. See generally Sunny Ridge Enter., Inc v. Fireman’s Fund Ins. Co., 132 F. Supp. 2d 525, 526 (E.D. Ky. 2001); Chemetron Inv., Inc. v. Fid. & Cas. Co. of N.Y., 886 F. Supp. 1194, 1196-97 (W.D. Pa. 1994).

58. Most property insurance policies contain an electrical damage exclusion. Rappe, supra note 56, at 363-64. A number of cases address the validity and application of the exclusions for electrical currents or disturbances. See generally Cont’l Ins. Co. v. Arkwright Mut. Ins. Co., 102 F.3d 30, 31 (5th Cir. 1996); Aetna Ins. Co. v. Getchell Steel Treating Co., 395 F.2d 12, 14-15 (8th Cir. 1968); Nat’l Union Fire Ins. Co. v. Travelers Indem. Co., 210 F. Supp. 2d 479, 486-87 (S.D.N.Y. 2002); Davidson Hotel Co. v. St. Paul Fire & Marine Ins. Co., 136 F. Supp. 2d 901, 904 (W.D. Tenn. 2001); Assoc. Elec. Coop. v. Mutual Boiler & Mach. Ins. Co., 492 F. Supp. 410, 411 (W.D. Mo. 1980); Sachs v. Am. Cent. Ins. Co., 227 N.Y.S.2d 873, 904 (N.Y. Sup. Supp. 1962), aff’d, 18 A.D.2d 851 (N.Y.A.D. 2 Rept. 1963). While these exclusions have generally been upheld, they have also been limited in the scope of their application to “artificially generated electrical currents.” ISO FORM CP 10 30 10 91 (B)(2) (1990). Accordingly, these cases suggest that the exclusion would apply to damage caused by an electrical current that was precipitated by the electromagnetic pulse (EMP) of a weapon of mass destruction. The electromagnetic pulse arises when charged particles . . . moving away from ground zero . . . travel along wires, pipes, and conduits . . . through the air to find antennas. From the [antenna] conductor the particles jump to attached electronic equipment and destroy it. Even if a building escapes the tremendous blast and thermal radiation, it may sustain damage to its wiring and electronic components from the effect of EMP.

Rappe, supra note 56, at 374.

59. Utilization of a pollution exclusion to preclude coverage for biochemical or biotoxnic weapons is problematic. Courts have noted: “[t]he terms used in the pollution exclusion, such as ‘discharge,’ ‘dispersal,’ ‘release,’ and ‘escape,’ are terms of art in environmental law which generally are used with reference to damage or injury caused by improper disposal or containment of hazardous waste.” Sullen v. Allstate Ins. Co., 667 A.2d 617, 620-21 (Md. 1995) (quoting Atl. Mut. Ins. v. McFadden, 595 N.E.2d 762, 764 (Mass. 1992)); see also Nautilus Ins. Co. v. Jabar, 188 F.3d 27, 30 (1st Cir. 1999).

The courts have noted that the exclusionary clause appears to describe events, places, and activities normally associated with traditional environmental pollution claims. Keggi v. Northbrook Prop. & Cas. Ins., 13 P.3d 785, 790 (Ariz. Ct. App. 2000). In Keggi, a professional golfer occasionally lived and trained at her parents’ home. Id. at 790. Bacteria was discovered in the water system. Id. at 786-87. Keggi had ingested some of the water from her parents’ tap. Id. at 787. Keggi subsequently became seriously ill. Id. She sued the developer of the residential property for her injuries. Id. The developer tendered the defense of the lawsuit to Northbrook. Id. Northbrook refused to defend or indemnify based on its policy pollution exclusion. Id.

The court found that the waterborne bacteria did not precisely fall into any one of the categories listed as pollutants under the policy. Id. at 789-90. Specifically, “irritants” and “contaminants” are supposed to be either “solid, liquid, gaseous or thermal” whereas bacteria was none of these. Id. at 789. Further, those irritants and contaminants that were listed by the policy, such as “smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste,” were all inorganic while bacteria was organic, making it dissimilar to those enumerated. Id. at 790. Finally, the court found that bacteria could not be classified as “waste” because the definition of waste seemed to refer to industrial byproducts and not organic matter such as bacteria. Id. The court held that the pollution exclusion did not apply to living, organic “irritants” or “contaminants.” Id. at 789-90.
In Part II of this Article, the traditional war-risk exclusion and its historic interpretation is examined through a discussion of the constituent elements of the exclusion and the requirement of causation. Although there is a modicum of case law in this area, two principal cases have discussed the application of war-risk exclusions in the context of global and regional terrorism.

The geo-political framework of the Al-Qaida network and its ties with the Taliban in Afghanistan are discussed in Part III. The question of whether the war-risk exclusion applies to the terrorist attacks on September 11 is explored by analyzing the known facts in relation to the constituent elements of the exclusion.

Finally, insurance industry and government reaction to the September 11 attacks is explored in Part IV. The insurance industry is lobbying with the National Association of Insurance Commissioners for the adoption of terrorism exclusions within the commercial insurance marketplace. Congress is considering an alternative that would require domestic insurers to provide coverage for terrorism through a federally managed insurance program. The United States government has been involved in the insurance markets during times of war in order to stabilize the price and availability of coverage. Debate is underway in Congress regarding the Terrorism Risk Insurance Act of 2002 and the scope of federal intervention to stabilize the pricing and availability of terrorism coverage in the commercial insurance marketplace following September 11.

The court’s decision in Keggi exemplifies the difficulty insurance companies will have in utilizing policy pollution exclusions in situations where anthrax and other biotoxic and biochemical agents or compounds are used to cause loss.