

ALERT

## Terrorist Aftermath — Financial Institutions Must Examine Their Property Insurance Policies

By Richard Lewis

In the wake of that string of horrors perpetrated on September 11, it may seem inappropriate to focus on anything other than mourning the victims and lauding the bravery of the survivors. Unfortunately, almost all financial institutions suffered dislocation of their operations, with consequent losses, and insurance law often punishes even small delays in reporting losses with forfeiture of the right to collect. Further, coverage provided by property insurance policies is frequently difficult to understand, and there is little guidance from case law. Thus, financial institutions must parse confusing insurance language, decipher its meaning, and give notice, all in a short period of time. This short piece is designed to give some guidance in these tasks.

As an initial matter, "war risk" exclusions in property insurance policies should have no application to losses from the World Trade Center disaster, as terrorist attacks wrought by deranged individuals are not equivalent to the warlike actions of sovereign nations. As found by the Second Circuit in *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, in addressing whether various "war risk" exclusions precluded coverage for damages stemming from the hijacking and subsequent destruction of a Boeing 747, "war risk" exclusions are limited in effect to the use of force between governments or entities essentially like governments. This 1974 holding is generally accepted and should prevent application of "war risk" exclusions to insurance claims made for damage from the WTC tragedy.

Turning the focus to coverage, the principal promise of property insurance is to provide coverage for "direct physical loss of or damage to" the policyholder's property. Moreover, almost all property insurance policies promise to pay for losses of "business income" — essentially, profit and unavoidable expenses — sustained during the period in which "direct physical loss of or damage to property" causes a suspension of operations. The application of these coverage promises to those financial institutions whose premises suffered physical loss or damage should, thus, be straightforward.

What about those firms which suffered business losses unrelated to any physical damage to their property? For such institutions, the first coverage for which to look is contingent business income coverage, designed to cover a policyholder for loss of business income caused by damage to or destruction of property owned by others. An example of such coverage would be that purchased by a carmaker to protect it if its sole supplier of transmissions

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Anderson Kill & Olick, P.C. created the Financial Services Insurance Coverage Group to serve its various clients in the financial industry and to focus its coverage expertise on the insurance issues common to broker/dealers, commercial banks, investment banks, investment advisors, hedge funds and financial institutions including mutual funds.

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suffers destruction of its factory, and the carmaker suffers a business income loss from its inability to complete manufacture of cars.

Similarly, financial institutions can look to contingent extra expense coverage to pay for increased costs incurred after the disaster to minimize or avoid a contingent business income loss. Extra expense coverage can be thought of as the flip side of business income coverage. For instance, the New York Times simply cannot afford to be out of business for a single day; accordingly, it must have extra expense coverage to pay for the increased costs of acquiring immediate access to a different printing house if its usual one is destroyed. The extra expense promise also provides coverage for costs incurred in minimizing business income losses. Accordingly, if a financial institution incurred additional expenses in order to avoid or minimize a contingent business income loss — for instance, by purchasing cell phones for its employees — it may have coverage for those costs under contingent extra expense coverage.

Another coverage for which to look is that provided by the civil authority clause, often listed as an “additional coverage” in property insurance policies. This clause is designed to provide coverage for business income losses incurred as a result of an order by a civil authority preventing access to the policyholder’s place of business. Obviously, financial institutions in lower Manhattan may have coverage under such clauses — given that access to their premises was prohibited for a number of days after the attack and for some areas is still prohibited — but financial institutions located throughout the New York metropolitan area may be able to make claims for business income losses if they can demonstrate that these losses stemmed from the inability of clients to get to their premises because of the orders of civil authorities. Finally, affected firms should also look to service interruption coverage, designed to provide coverage for business income losses attributable to dislocation of utility or telecommunications service.

Note, however, that a financial institution’s coverage may be eliminated if it does not give notice as quickly as possible. Accordingly, financial institutions which suffered a business income loss as a result of the WTC disaster should pore over their insurance policies to discover how those losses may be covered, and give immediate notice of their claims. ■

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