To-may-to, To-mah-to; Act of War, Act of Terrorism: How Semantics in Insurance Contracts Affect the Public Insurance Adjuster

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I. Introduction

After the attacks on the World Trade Center in New York city on September 11, 2001, the insurance industry found itself between the proverbial rock and a hard place. Prior to September 11, 2001, commercial insurance providers' policies and homeowner's insurance policies essentially covered the risk of terrorism damages for policyholders at no additional charge; for neither all risk commercial policies nor homeowners policies included a specific "terrorism exclusion." Insurance providers did not assess the potential for a terrorist attack for two interrelated reasons: the probability of a terrorist attack seemed very slight because there had not been a significant history of terrorism on U.S. soil and, for this reason, no real data existed for insurance companies to measure in order to underwrite such a risk. Faced with estimated financial losses from the attacks reaching \$60 billion dollars, the insurance industry encountered a Hobson's choice: invoke their war exclusion policies to preclude coverage of the terrorist attacks and incur both public and Congressional wrath or pay out under the policies and bear the costs of the heretofore uncalculated risk of the terrorist attacks.

In the aftermath of September 11, 2001, the insurance industry was forced by the market and by the federal government to offer policyholders the opportunity to purchase terrorism coverage. The circumstances of the World Trade Center attacks thus gave rise to the birth of the

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¹ See Richard J. Hillman, U.S. Gen. Acct. Off., Terrorism Insurance: Rising Uninsured Exposure to Attacks Heightens Potential Economic Vulnerabilities 2 (2002) (noting that before September 11, insurers "considered the risk so low that they did not identify or price potential losses from terrorism activity separately from the general property and liability coverage provided to businesses").

² Jane Kendall, *The Incalculable Risk: How the World Trade Center Disaster Accelerated the Evolution of Insurance Terrorism Exclusions*, U. RICH. L. REV. 569, 572-73 (2002).

³ Letter from the House Committee on Financial Services to the National Association of Insurance Commissioners 1 (Sept. 17, 2001) ("Any attempt to evade coverage obligations by either primary insurers or reinsurers based on such legal maneuvering would not only be unsupportable and unpatriotic – it would tear at the faith of the American people in the insurance industry.").

United States terrorism insurance market. Terrorist activity has the potential to generate claims in aviation, property, liability, life, workers' compensation, business interruption, health, disability, automobile, and other lines of insurance. Therefore, because there exists the potential for so many types of claims, there are also multiple opportunities for the involvement of public insurance adjusters. In this respect, claims arising from terrorist activity may prove to be possible avenues of business for adjusters.

II. The Insurance Industry's Hobson's Choice

Immediately following the attacks on the World Trade Center, there was public speculation that insurers would invoke their war exclusion clauses to deny policyholders coverage. A war exclusion is "a provision in an insurance policy or rider thereto which relieves the insurance company of the full liability for the face value if the loss is caused by war;" war exclusions can typically be found in both commercial all risk insurance policies and in standard homeowners' insurance policies. War exclusions, then, are designed to protect the insurance company from having to provide coverage under its various policies to policyholders who suffer damages as a result of war.

A. War Exclusions: What Are They Good For (What Do They Exclude)?

To understand what, exactly, a war exclusion purports to exclude, one must consult the language of the exclusion. The standard Insurance Services Office (ISO)⁶ exclusion for commercial property is illustrative of the characteristic language found in a typical war exclusion clause:

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⁴ Gary Thompson, Insurance for Losses Resulting from the Terrorist Attacks of September 11, 2001, 12 MEALEY'S LITIG. REP.: REINSURANCE No. 11, at 21 (Oct. 4, 2001).

⁵ Daniel James Everett, Comment, *The "War" on Terrorism: Do War Exclusions Prevent Insurance Coverage for Losses Due to Acts of Terrorism?*, 54 ALA. L. REV. 175, 177 (2002-2003) (citing Robert B. Billings, *Of War Clauses*, 1952 INS. L.J. 793, 703-94).

⁶ The ISO is a highly regarded leading source of information about risk.

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 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.⁷

This typical exclusion contains a number of terms relating to war that are both broad and indefinite – terms such as "war" and "warlike action," to select only a few. In fact, the inherent vagueness in the insurers' use of these terms in the war exclusions to their policies has resulted in the judicial review of disputes centering on the meanings of these terms.⁸

As courts encountered the question of how to define "war," two different methods of constructing a definition evolved.⁹ The first method, termed the "technical meaning doctrine," defines war in light of its constitutional meaning; i.e., a war is that which is formally declared by Congress. The other method, the "common meaning doctrine," defines war with regard to "the reality of the situation" and "in light of the factual circumstances." It is the common meaning doctrine approach to defining war that remains the predominant approach utilized by modern

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⁷ ISO. Causes of Loss – Special Form CP 10 30, at 2.

⁸ Following World War II, the Korean War, and the conflict in Vietnam, courts were pressed to answer questions concerning the definition of war. Paul H. Rogers, *Modern Warfare and Its Effect on Policy Construction*, 1952 INS. L.J. 360, 360.

⁹ See Daniel James Everett, Comment, supra note 5, at 177 (citing James M. Crain, War Exclusion Clauses and Undeclared Wars, 39 Tenn. L. Rev. 328, 332-36 (1972)).

¹⁰ See, e.g., Dole v. Merchants Mutual Ins. Co., 51 Me. 465 (1863) (noting that war is an existing fact and not a legislative decree), see also Shneiderman v. Metropolitan Casualty, 14 A.D.2d 284, 287 (N.Y. 1961) (in which the court interpreted the word "war" as a common person would and not as a politician or lawyer would).

courts.¹¹ Using this approach, courts construe war in its "ordinary, popular sense." But what is the "ordinary, popular sense" of war?

Examining war in its "ordinary, popular" sense certainly suggests a level of fluidity in the definition of war and this fluidity has, arguably, become favorable to the insured party in a dispute, for "the average man...presumably is unfamiliar with the existence of a state of war from the strictly political, military, and/or legal standpoint." If the perception of the average man is the standard by which courts gauge whether a war exists, then, in the context of modern day events, many events could potentially fall within the category of war. Indeed, the "ordinary, popular sense" of war in the modern day might be such that it would encompass the attacks on the World Trade Center on September 11, 2001.

In an attempt to limit the context of the "ordinary, popular" definition of war, courts have developed various factors to consider when determining whether a broad scale act of violence is in fact an act of war such that it would fall under an exclusion. In the case of *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, ¹⁴ the court was asked to consider whether the hijacking of an American plane over London by members of the Popular Front for the Liberation of Palestine (PFLP) and the subsequent destruction of that plane in Egypt was an act of war such that it fell within the insurer's war exclusion policy. ¹⁵ The district court held, and the Second Circuit Court of Appeals affirmed, that a thorough, case-specific factual analysis was

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¹¹ John G. Marshall, *The War Clause in Life Insurance Contracts*, 4. UTAH L. REV. 120, 125 (1954).

¹² Sidney I. Simon, *The Dilemma of War and Military Exclusion Clauses in Insurance Contracts*, 19 Am. Bus. L.J. 31, 41 (1981).

¹³ Shneiderman v. Metropolitan Casualty, 14 A.D.2d 284, 287 (N.Y. 1961).

¹⁴ 505 F.2d 989 (2d. Cir. 1974).

¹⁵ Pan American World Airways, Inc. v. Aetna Casualty and Surety Co., 505 F.2d 989, 993 (2d. Cir. 1974).

necessary because "[w]hen we deal with such sudden, wanton, opportunist acts of improvised terrorism, at least for insurance purposes, we must surely stay close to what happened..." Therefore, the court was careful to explore the terminology utilized in the insurer's war exclusion in light of the specific facts of the hijacking.

As a preliminary part of its analysis, the court traced the history, actions, and membership base of the PFLP. It was important for the court to characterize the PFLP's mindset, motivations, and ties to other sovereigns, for this characterization impacted the court's classification of the PFLP as either a sovereign, quasi-sovereign, or non-sovereign entity. This distinction is significant because of the court's holding that "a 'war,' whether declared or undeclared, can exist only where sovereign or quasi-sovereign entities engage in hostilities." The classification of a group as sovereign, quasi-sovereign, or non-sovereign is thus the threshold determinant of whether the group's actions can be viewed as acts of war.

The court in *Pan Am* did not develop a single definition of sovereignty, but instead composed a list of factors that tend to be persuasive of sovereignty. Such factors include (1) whether other locales accorded PFLP with the rights typically associated with a government, ¹⁸ and (2) whether other Middle Eastern states negotiated with the PFLP as they would have with equals. ¹⁹ The court also noted that a mere financial contribution or tie between a sovereign and a terrorist group was not enough to convey sovereign or quasi-sovereign status to the group. ²⁰

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¹⁶ Pan American World Airways, Inc. v. Aetna Casualty and Surety Co., 368 F. Supp 1098, 1116 (S.D.N.Y. 1973), *aff* ⁷ *d*, 505 F.2d 989 (2d. Cir. 1974).

¹⁷ Pan American World Airways, Inc. v. Aetna Casualty and Surety Co., 505 F.2d 989, 1005 (2d. Cir. 1974).

¹⁸ *Id*.

¹⁹ *Id*.

²⁰ *Id*.

In addition to the threshold sovereignty or quasi-sovereignty requirement, the Pan Am court made several other important holdings regarding the definitions of other terms contained within the all-risk insurers' war exclusion clauses. One important clarification that the court made was the definition of "warlike operations." The court acknowledged that the term "warlike operations" is broader than "war," and developed a list of factors that tend to support the finding of a "warlike operation." These factors include: (a) whether the group members wore insignia. 21 (b) whether the group members openly carried arms, ²² (c) whether the acts had military rather than criminal overtones, ²³ and (d) whether the group members were agents of a sovereign government rather than merely a radical political group.²⁴

In weighing the merits of the insured's claim that the loss was covered by its all-risk insurance policy, the Pan Am court was also cognizant of the applicable burden of proof as well as the doctrine of *contra proferentem*, which is a canon of construction that courts have frequently applied to insurance contracts. As to the burden of proof, the court found that the insured has the initial burden of establishing the existence of the all-risk policy and the loss of the covered property.²⁵ If the insured is able to meet these two requirements, then the burden shifts to the insurer to demonstrate that "an interpretation favoring them is the only reasonable reading of at least one of the relevant terms of exclusion."²⁶ A further hurdle for insurers to overcome is the doctrine of contra proferentem, which calls for the construction of contractual

²¹ *Id*.

²² *Id*.

²³ *Id*.

²⁴ *Id*.

²⁵ *Id.* at 1000.

²⁶ Id. (quoting Sincoff v. Liberty Mutual Fire Insurance Co., 183 N.E.2d 899, 901 (N.Y. 1962)).

ambiguities in favor of the insured.²⁷ While courts understand "the logic of insurers' objectives in excluding war risks," the rationale behind the doctrine of *contra proferentem* is to "encourage insurers to draft precise contract terms in order to prevent unfair claim denials." Thus, courts have held that ambiguities in contract language be "construed strictly against the drafter and liberally in favor of the policyholder." In reaching its decision, the *Pan Am* court thus analyzed the applicability of the insurers' war exclusions by comparing the specific facts of the hijacking to judicially created definitions of "war" under the rubric of the doctrine of *contra proferentem*. In completing this analysis, the court held that the war exclusions contained within the all-risk policies did not extend to cover the actions of the PFLP.

B. War Exclusions In the Wake of September 11, 2001

"The deliberate and deadly attacks, which were carried out yesterday against our country, were more than acts of terror. They were acts of war." – President George W. Bush³⁰

Although *Pan Am* did not extend the definition of "war" or "warlike operation" to include a terrorist act such that it fell under an insurer's war exclusion clause, neither did the court disbar the possibility that a terrorist attack could sufficiently meet the definitional requirements of "war." In fact, the *Pan Am* court acknowledged that the inquiry of whether any act of terrorist violence falls under the definition of "war" or "warlike operation" is necessarily a fact-driven inquiry.³¹ The "ordinary, popular sense" of war and its relation to terrorism has likely evolved

²⁷ *Id*.

²⁸ Jane Kendall, supra note 2, at 574.

²⁹ Jane Kendall, supra note 2, at 574-75; *see*, *e.g.*, Schmutz v. Employees' Fire Ins. Co., 76 F.2d 116, 122 (2d Cir. 1935); Raska v. Farm Bureau Mut. Ins. Co., 314 N.W.2d 440, 441 (Mich. 1982); Buckeye Union Ins. Co. v. Price, 313 N.E.2d 844, 846 (Ohio 1974).

³⁰ President George W. Bush, Remarks at End of Cabinet Room Meeting with National Security Team (Sept. 12, 2001), in *Text of Bush Statement*, WASH. POST, Sept.12, 2001, at A3.

³¹ Pan American World Airways, Inc. v. Aetna Casualty and Surety Co., 368 F. Supp 1098, 1116 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 989 (2d. Cir. 1974).

since the judiciary defined it in 1974's *Pan Am* case. However, *Pan Am* still remains the current state of the law in Second Circuit Court of Appeals.³² Therefore, to determine whether the insurance industry may have successfully invoked its war exclusion clauses in response to the attacks of September 11, 2001 in this forum, an application of the factors established by *Pan Am* is necessary.

Applying the factors established by *Pan Am* to the facts incident to the attack on the World Trade Center begins with a threshold determination of whether those responsible for the attack had at least some incidents of sovereignty. The al Qaeda terrorist organization probably could not constitute a "sovereign" for the purposes of the definition of war as that term applies in war exclusion clauses. However, an insurer may have success in postulating that al Qaeda constitutes a "quasi-sovereign." One case subsequent to *Pan Am* examined the proposition made in *Pan Am* that "war can exist between quasi-sovereign entities" defining a de facto government.³³ The court in this case, *Holiday Inns, Inc. v. Aetna Ins. Co.*, ³⁴ held that a group's occupancy of a territory within the boundaries of a sovereign state, even with the sovereign's consent, was not enough to achieve a de facto government or a "quasi-sovereign entity" status. ³⁵ But factors such as al Qaeda's extensive, international network, its close relationship with the Taliban government of Afghanistan and its purported occupancy of that sovereign throughout various times in history, its methodical and precise training of its members that is closely

³² The relation of a terrorist attack to an act of war was explored in one other subsequent case, Holiday Inns, Inc. v. Aetna Insurance Co., 571 F. Supp. 1460 (S.D.N.Y 1983) and the court's holding in this case will be addressed in the following paragraph.

³³ See Pan American World Airways, Inc. v. Aetna Casualty and Surety Co., 505 F.2d 989, 1013 (2d. Cir. 1974).

³⁴ 571 F. Supp. 1460, (S.D.N.Y. 1983).

³⁵ Holiday Inns, Inc. v. Aetna Ins. Co., 571 F. Supp. 1460, 1503 (S.D.N.Y. 1983).

reminiscent of military training, the United States' subsequent declaration of a "war on terror" in response to the World Trade Center attack, and the deployment of the United States military to nations aligned on the so-termed "axis of evil" - - -all of these factors, when considered together, may be persuasive enough such that a court would find that al Qaeda possessed attributes of quasi-sovereignty, and thus, that al Qaeda and the United States became, as of September 11, 2001, engaged in "war" as the term is defined in relation to war exclusions. ³⁶

Approved by individual states and by the judiciary, war exclusions were prevalent and almost certainly existed in every standard commercial all risk insurance policy and homeowners' insurance policy prior to September 11, 2001. The facts surrounding the terrorist attack were such that insurance companies, arguably, may have prevailed if they had chosen to invoke their war exclusion clauses. However, the insurance companies did not even attempt to invoke their policies' war exclusions.³⁷ Although some have argued that the insurers did not invoke exclusions because they did not apply to bar coverage,³⁸ a more persuasive argument is that insurers did not seek to invoke to their war exclusion clauses for political reasons:

In the wake of the recent attacks, it was obvious that any denial of claims based on the war risk exclusion would come with a hefty public relations price tag. Plus, there existed the possibility that governmental mandates would override such a decision in any case. At best, such a claim denial would be viewed as un-American.³⁹

Invoking the war clauses in the wake of September 11, 2001, a time during which most of the nation was in a state of shock, grief, and experiencing a resurgence of patriotism, would likely

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³⁶ See Jane Kendall, supra note 2, at 582 n.62.

³⁷ James G. Rizzo, *Tragedy's Aftermath: The Impact of 9/11 on the Insurance Industry*, 46 FEB. B. B.J. 10 (2002) (stating that primary insurers "assured their policy holders that they would not invoke the 'war' exclusion to deny coverage").

³⁸ See Andrew S. Neuwelt, Comment, The Impact of September 11 on Terrorism Insurance: Comparing Senate Bill 2600, House of Representatives Bill 3210, and the United Kingdon's Pool Re, 9 ILSA J. INT'L & COMP. L. 473, 478 (2002-2003).

³⁹ Jack P. Gibson et al, International Risk Management Institute, Attack on America: The Insurance Coverage Issues, Part 1: War Risk Exclusions (2001) *at* http://www.irmi.com/Expert/Articles/2001/Gibson09.aspx.

have been akin to political suicide for many large insurance companies. Thus, insurers had no real choice in any sense of the word – they *had* to honor policies or else face the very real risk that the insurance industry as they knew it would cease to exist. It is important to note, then, that because insurance companies did not attempt to invoke their policies' war exclusions, there exist no cases that examine acts of terrorism in relation to the twenty-first century "ordinary, popular" sense of war.

III. The Terrorism Risk Insurance Act of 2002 and the Terrorism Risk Insurance Extension Act of 2005

As quickly as the insurance industry decided to honor claims for losses due to the September 11 terrorist attacks, it just as quickly began drafting terrorism exclusions to incorporate into new policies and into existing policies as they came up for renewal. In fact, by early February 2002, 45 states had approved terrorism exclusion clauses. A detailed discussion of terrorism exclusions will follow in Part IV of this paper.

A. The Terrorism Risk Insurance Act (TRIA)

With the ink drying on the newly approved terrorism exclusion, Congress realized that should another terrorist attack occur, a majority of the nation's businesses would be without coverage. With this realization as motivation,⁴¹ the federal government enacted the Terrorism Risk Insurance Act (TRIA)⁴² in late November 2002 as a temporary means of providing additional support to the insurance industry.⁴³

To accomplish its goal of ensuring that the nation's businesses be able to resume functioning in the event of another major terrorist attack, the TRIA expressly nullifies the use of

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⁴⁰ *Id*.

⁴¹ Terrorism Risk Insurance Act of 2002 § 101 (a)(1-3), 15 U.S.C. § 6701 note (2002), *amended by* 15 U.S.C. § 6701 note (2005).

⁴² Terrorism Risk Insurance Act of 2002, 15 U.S.C. §6701 note (2002), amended by 15 U.S.C. §6701 note (2005).

⁴³ Terrorism Risk Insurance Act of 2002 § 101 (b).

terrorism exclusion clauses in contracts for property and casualty insurance⁴⁴ and preempts state approval of the use of terrorism exclusions in such contracts.⁴⁵ The TRIA mandates that commercial insurance providers offer their policyholders the opportunity to purchase terrorism coverage.⁴⁶ Specifically, the TRIA directs that:

During each Program Year...an insurer (1) shall make available, in all of its property and casualty insurance policies, coverage for insured losses; and (2) shall make available property and casualty insurance coverage for insured losses that does not differ materially from the terms, amounts, and other coverage limitations applicable to losses arising from events other than acts of terrorism.⁴⁷

This mandatory coverage provision of the TRIA is targeted specifically to commercial and casualty insurers; thus the TRIA does not extend to homeowners insurance providers and other types of insurers. Though the TRIA requires that commercial insurers make terrorism coverage available to policyholders, if policyholders choose not to purchase terrorism coverage, then insurers may incorporate a terrorism exclusion into that policy.

While the TRIA necessitates the availability of terrorism insurance, it also recognizes that the insurance industry cannot by itself bear the full brunt of a catastrophic loss. Therefore, the second major component of the TRIA is the establishment of a federal backstop program that allows insurance companies to share the costs of loss with the federal government, according to a specific formula.⁴⁸ However, before TRIA's compensation provision can be activated, the Secretary of Treasury must certify that the act is an act of terrorism.

⁴⁴ Terrorism Risk Insurance Act of 2002 § 105 (a).

⁴⁵ Terrorism Risk Insurance Act of 2002 § 105 (b).

 $^{^{46}}$ See Terrorism Risk Insurance Act of 2002 §§ 101-103.

⁴⁷ Terrorism Risk Insurance Act of 2002 § 103 (c)(1-2).

⁴⁸ Terrorism Risk Insurance Act of 2002 § 103 (e).

The TRIA's definition of terrorism can be summarized as comprising five components, each of which must be met in order for an act to be act of terrorism. First, the act must be certified by the Secretary to be an act of terrorism.⁴⁹ Second, the act must be "a violent act or an act that is dangerous to (1) human life; (2) property; or (3) infrastructure."50 Third, the act must have "resulted in damage within the United States, or outside of the United States in case of either an air carrier vessel or the premises of a United States mission."51 Fourth, the act must have been "committed by an individual or individuals acting on behalf of any foreign person or foreign interest, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion."52 Fifth, to be certified as an act of terrorism, the property and casualty losses resulting from the act must exceed \$5,000,000.00.⁵³ Further, the definition is constrained by the important limitation that an act cannot become certified if the act is committed "as part of the course of a war declared by Congress."54 If all of these criteria can be met, then the Secretary may certify that an act of terrorism has occurred.⁵⁵ Once the Secretary has certified an act as one of terrorism, then government assistance may apply.

Although the TRIA was intended to be a temporary means of providing additional support to the insurance industry, at the end of 2005, the insurance industry was adamant in its

⁴⁹ Terrorism Risk Insurance Act of 2002 § 102 (1)(A).

⁵⁰ Terrorism Risk Insurance Act of 2002 § 102 (1)(A)(ii)(I-III).

⁵¹ Terrorism Risk Insurance Act of 2002 § 102 (1)(A)(iii)(I-II).

 $^{^{52}}$ Terrorism Risk Insurance Act of 2002 $\$ 102 (1)(A)(iv).

⁵³ Terrorism Risk Insurance Act of 2002 § 102 (1)(B)(i).

⁵⁴ Terrorism Risk Insurance Act of 2002 § 102 (1)(B)(i).

⁵⁵ Terrorism Risk Insurance Act of 2002 § 102 (1)(C).

stance that the private market for terrorism insurance could not withstand the withdrawal of the promise of a federal backstop in the event of another major terrorist attack. A more reluctant federal government agreed that the program should be extended, but with several modifications tending to support the development of a more independent private market.⁵⁶ Therefore, TRIA was extended and modified by an extension act, known as TRIEA, for an additional two years. TRIEA is scheduled to potentially sunset at the end of December 2007.

B. The Terrorism Risk Insurance Extension Act (TRIEA)

The Terrorism Risk Insurance Extension Act of 2005⁵⁷ both extends and also modifies some of the provisions of TRIA. First, it is important to note that TRIEA places a larger potential risk responsibility on the private insurance market than did its predecessor;⁵⁸ arguably, this can be seen as evidence of Congress' intent to wean the private market from its dependence on the promise of federal government assistance. Other pertinent modifications include increasing the threshold amount of damages needed in order to trigger the federal backstop program from \$5 million dollars under TRIA to \$50 million dollars under TRIEA in 2006 and then to \$100 million dollars in 2007;⁵⁹ increasing deductible amounts that insurers must pay before the federal backstop program will begin to assist to cover losses;⁶⁰ and increasing the total

⁵⁶ The Secretary of the Treasury, John W. Snow, stated that "It is our view that continuation of the program in its current form is likely to hinder the further development of the insurance market by crowding out innovation and capacity building. Consistent with its original purpose as a temporary program scheduled to end on December 31, 2005, and the need to encourage further development of the private market, the Administration opposes extension of TRIA in its current form." Letter from John W. Snow to the Senate Banking Committee Chairman Richard Shelby and Ranking Member Paul Sarbanes and House Fin. Services Comm. Chairman Michael Oxley and Ranking Member Barney Frank (June 30, 2005) *at* http://www.ustreas.gov/press/releases/js2618.htm.

⁵⁷ Terrorism Risk Insurance Extension Act of 2005, 15 U.S.C. §6701 note (2005).

⁵⁸ See Terrorism Risk Insurance Extension Act of 2005, 15 U.S.C. §§ 3-6.

⁵⁹ Terrorism Risk Insurance Extension Act of 2005 § 6(B).

⁶⁰ Terrorism Risk Insurance Extension Act of 2005 § 3(c).

amount that the insurance industry must pay as a whole through deductibles and co-payments from \$15 billion in 2005 to \$25 billion in 2006 to \$27.5 billion in 2007.⁶¹

C. An Uncertain Future: Will 2008 See the Rise of a TRIE(E)A?

In assessing the overall effectiveness and impact of both the TRIA and TRIEA programs, two distinct factions have emerged. In reviewing the successes of both TRIA and TRIEA, insurers have claimed that without TRIA and TRIEA, a private market for terrorism insurance would not exist, for insurers are still hesitant to underwrite such potentially catastrophic risks. ⁶² Insurers, therefore, would like to see TRIA extended yet again as both the private and public sector continue to work on a long-term, permanent solution to the problem of securing a terrorism insurance market. ⁶³ The President's Working Group on Financial Markets, the group charged by statute with performing an analysis regarding the "long-term availability and affordability of insurance for terrorism risk" ⁶⁴ and submitting a report on its findings to Congress by September 30, 2006, on the other hand, concludes in its report that TRIA has negatively affected the development of a market for terrorism insurance and that it should not be extended in 2007. ⁶⁵

In his statement submitted to the National Association of Insurance Commissioners

(NAIC) at a public hearing on insurance matters, William P. Bowden, Jr., the General Counsel to
Willis Group Holdings Ltd., identified that part of the developing contention between some

⁶⁴ Terrorism Risk Insurance Extension Act of 2005 § 8(e)(1)-(2).

⁶¹ Terrorism Risk Insurance Extension Act of 2005 § 5(a)-(b).

⁶² Terrorism Threats and the Insurance Market: Hearing Before the House Comm. on Fin. Services, the House Subcomm. on Oversights and Investigation, and the House Homeland Sec. Subcomm. on Intelligence, Info. Sharing, and Terrorism Risk Assessment, 109th Cong. (2006) (testimony of Terry Fleming, Risk Insurance Management Society, Inc.).

⁶³ *Id*.

⁶⁵ See President's Working Group on Financial Markets, Report on Terrorism Risk Insurance (2006) http://www.ustreas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/pdf/report.pdf.

members of the government and the insurance industry stems from the problem of determining which group should ultimately be more "responsible" for the business of insuring terrorism coverage:

[S]ome question whether the government should have a role in this issue at all. They contend, "This is what insurance companies are in business to do. Practice smart underwriting, assume the risk, collect the premiums and payout claims as losses are incurred." But this neglects one critical factor. A terrorist attack is an act of war waged against our country, rather than an action taken merely against the directly impacted companies or locations. Certainly, we all agree, when the issue is stated this way, there is no doubt that the federal government must assume a central role in protecting America. 66

This statement is interesting for several reasons; the first of which is that the general counsel of a major company equates an act of terrorism to an act of war (perhaps illustrating that the "ordinary, popular" sense of war can encompass a terrorist act?). Additionally, this statement is also illustrative of the unique "partnership" that the insurance industry and the federal government have assumed in sharing responsibility for sustainability of the nation's businesses in the event of a major terrorist attack.

Whether the Congress will be swayed by the insurance industry's arguments in support of extending TRIEA in the face of direct opposition by the group charged with the task of analyzing TRIEA's effectiveness in establishing a more secure private market for terrorism insurance remains to be seen. Only time will tell which side will prevail or what compromise will be struck.

IV. The Terrorism Exclusion Clause

"Fool me once, shame on you; fool me twice, shame on me." - Darrell Huckaby

Prior to September 11, 2001, the insurance industry as whole had not anticipated that it would be faced with the costs of a major terrorist attack. However, immediately after honoring

⁶⁶ William P. Bowden, Jr., Statement Submitted to NAIC at a Public Hearing on Terrorism Insurance Matters, (March 29, 2006) http://www.naic.org/documents/topics_tria_testimony0603_bowden.pdf.

their policies to provide coverage for the losses arising out of the destruction of the World Trade Center, the insurance industry began drafting terrorism exclusion clauses. When TRIA was passed in 2002, the exclusions previously drafted and approved by the Insurance Services Offices (ISO) were, in large part,⁶⁷ effectively tabled. At the end of 2005, when the industry was still uncertain whether Congress would extend TRIA, it once again geared up to implement its terrorism exclusion clauses. In fact, in 2005, 47 states and the District of Columbia once again approved specific optional exclusions for terrorism coverage.⁶⁸

These exclusions approved by 47 states and the District of Columbia are not blanket exclusions; instead, they become effective when \$25 million dollars in total insured property losses are incurred within a 72 hour timeframe.⁶⁹ If the attack results in more than \$25 million dollars of claims of loss, then the exclusion provides that the insurance company need not cover *any* amount of loss.⁷⁰ Additionally, in the special case of commercial liability insurance policies, even if the \$25 million dollar threshold requirement is not met, if the attack results in the deaths or serious bodily injuries of 50 or more people, then a terrorism exclusion will spring into action to deny coverage.⁷¹

⁶⁷ Except in the instance where a commercial or casualty insurance policyholder did not accept terrorism coverage, in which case, the insurance company's use of a terrorism exclusions was permissible.

⁶⁸ Insurance Information Institute, Terrorism Risk and Insurance (2007) *at* http://iii.org/media/hottopics/insurance/terrorism/

⁶⁹ This threshold is measured in the aggregate and is not specific to the individual policyholder's loss; thus, all insurance claims made against all insurers that, combined, reach the \$25 million dollar threshold may trigger the exclusion.

⁷⁰ Jorge Gomez, Commissioner of Insurance of Wisconsin, *Bulletin to All Property and Casualty Insurers on Terrorism Risk Insurance Act of 2002 and Exclusions Related to Acts of Terrorism* (August 2004) http://oci.wi.gov/bulletin/0804terror.htm.

⁷¹ Gomez, supra note 71.

V. Impact on Public Insurance Adjusters

A. Public Insurance Adjusters Negotiating on Behalf of Commercial Policyholders 1. If TRIEA sunsets at the end of 2007:

If the Terrorism Risk Insurance Extension Act sunsets at the end of 2007, then commercial insurance providers will no longer be compelled to offer terrorism insurance to their policyholders. According to arguments put forth by the insurance industry in support of extending TRIA and TRIEA, the industry is of the opinion that the private terrorism insurance market has not reached a level of sufficiency such that it would be able to sustain itself. Therefore, it follows that at least some insurance providers would withdraw their terrorism coverage from the market and instead integrate terrorism exclusions into their policies.

Public insurance adjusters in the wake of TRIEA's sunset should therefore be prepared to encounter commercial policies that contain explicit terrorism exclusions. If a policy contains a terrorism exclusion, the public insurance adjuster should be first become familiar with the circumstances that trigger the exclusion. Public insurance adjusters should also be cognizant that terrorism exclusions have never been subject to judicial review. The terms contained within these exclusions may need to be judicially interpreted in order to clarify their meaning -much in the same way that terms contained within war exclusion policies needed to be clarified to be given their proper meaning. Precedent war exclusion cases held that definitions centering on "war" should reflect that " [the] average man...presumably is unfamiliar with the existence of a state of war from the strictly political, military, and/or legal standpoint;" similarly, the various terms used in a terrorism exclusion clause need to reflect the average man's understanding of an act of terrorism. If these terms prove to not coincide with the average man's understanding, then they may be ambiguous. In this instance, the doctrine of *contra proferentem* will work to favor

⁷² Shneiderman v. Metropolitan Casualty, 14 A.D.2d 284, 287 (N.Y. 1961).

the policyholder because it requires that ambiguities be construed in favor of the policyholder. Thus, in a coverage dispute, the prudent public insurance adjuster should work to find an ambiguous term contained within the policy, and present that ambiguity to the insurance company as evidence that the loss should be covered. Perhaps the insurance company will cede to the public insurance adjuster's argument out of fear of unfavorable judicial construction of terms contained within its terrorism exclusion.

On the other hand, if the insurance policy is silent as to the matter of terrorism, then the public insurance adjuster will likely be successful in arguing that the loss should be covered. This is particularly the case given that all commercial insurance providers have experienced the requirements of TRIA, and thus are all aware that terrorism insurance is a potentially contentious subject. To that effect, the public insurance adjuster should point out to the insurance company that it had the opportunity to incorporate a terrorism exclusion clause in its policy, and its failure to do so indicates that it did not intend to exclude terrorism from coverage.

The insurance company that fails to incorporate a terrorism exclusion clause or that fears that its existing clause is ambiguous may attempt to invoke its war exclusion clause in order to deny coverage of the loss. Although no case has explicitly extended a war exclusion clause to cover an act of terrorism, the *Pan Am* case noted that a strict application of a war exclusion clause's terminology in conjunction with the specific facts of the incident should be applied on a case-by-case basis to determine whether the act falls within the exclusion. It is conceivable that an incident falling under the definitional requirements of an act of terrorism may simultaneously meet those associated with "war" or "warlike operations." For example, if a violent act caused by an international group bearing insignia, openly carrying arms, and perhaps possessing attributes of quasi-sovereignty, causes an insurance loss totaling under \$25 million dollars in the

aggregate during a 72 hour time period, then the policy's terrorism exclusion clause will not trigger, and the insurance company may be liable for up to 24.9 million dollars. However, if the insurance company draws tight purse-strings, it may argue that even though this act has all the dressings of an act of terrorism, it is, in fact, an act of war. Concededly, this may prove to be a more difficult argument than an insurance company may choose to undertake, but it raises the interesting possibility of the intermingling of the definitions of terrorism and war.

2. If TRIEA is extended at the end of 2007:

If TRIEA does not sunset at the end of 2007, then it is likely that the federal government will still require commercial insurers to offer policyholders the opportunity to purchase terrorism coverage via another extension act. Although the exact provisions of such an act are unknown at this time, it is helpful to review TRIA and TRIEA's definition of terrorism, for it is likely, based upon the past experience of TRIEA, that this definition will not undergo extensive change. Arguably one of the most important provisions of TRIEA's definition of terrorism, for our purposes, is that the Secretary must certify that an act is an act of terrorism. Therefore, if an act resembling an act of terrorism causes a policyholder to suffer a loss, it does not officially become an act of terrorism until certified. If the act is not certified, the insurance company is not obligated to provide coverage under its terrorism insurance. However, a public insurance adjuster should attempt to gain coverage for the policyholder under alternative arguments. For example, he or she might argue that the damage to the policyholder's business or commercial property was caused by fire or smoke – which may often be the real causes of damage in a terrorist (or, in this case, a non-certified terrorist) attack.

B. Public Insurance Adjusters Negotiating on Behalf of Individual Homeowners' Insurance Policyholders

Although the typical homeowner's insurance policy contains a war exclusion, it does not contain a terrorism exclusion. Thus, in the event that a policyholder's home is damaged due to an act of terrorism, the public adjuster should be able to secure coverage for the policyholder. However, because the definitions of terrorism and war are potentially very interrelated, a clever insurance company might attempt to deny coverage for a terrorist act by invoking its war exclusion. In this case, a public insurance adjuster will want to examine the factors giving rise to a finding of "war" or "warlike operation" that the *Pan Am* court developed. If the public insurance adjuster can demonstrate, for example, that the group does not possess attributes of sovereignty, or that the act has more criminal than militaristic overtones, then the act more closely resembles one of terrorism than war, and the insurer cannot deny coverage.

Conversely, a particularly cunning public insurance adjuster might attempt to secure coverage for a loss caused by an act of "war" by positing that the loss was caused by an act of terrorism. This may not prove to be too difficult for the adjuster, for there are not, as of yet, any cases that define "terrorism" in the context of insurance contracts. Because the definition of "terrorism" is still so broad, a public insurance adjuster might succeed in arguing that an act bearing the trappings of "war" is really an act of "terrorism" such that it cannot be precluded from coverage by the insurer's war exclusion clause.

VI. Conclusion

The definitions of "war" and "terrorism," as those terms are construed respectively by courts, by federal statutes, and by the average person, may come to play an increasingly important role in insurance contracts and in coverage disputes. An understanding of these terms (and their potential flexibility) will therefore become important tools for the public insurance adjuster to master.