

## THE “WAR” ON TERRORISM: DO WAR EXCLUSIONS PREVENT INSURANCE COVERAGE FOR LOSSES DUE TO ACTS OF TERRORISM?

On September the 11th, enemies of freedom committed an act of war against our country. Americans have known wars—but for the past 136 years, they have been wars on foreign soil, except for one Sunday in 1941 . . . . Americans have known surprise attacks—but never before on thousands of civilians. All of this was brought upon us in a single day—and night fell on a different world, a world where freedom itself is under attack.<sup>1</sup>

—President George W. Bush

### I. INTRODUCTION

The world has changed since the tragic events of September 11, 2001. These events will never be forgotten, as the entire world was shocked and horrified at the aftermath of the attacks on America’s airlines, the World Trade Center, and the Pentagon. Arguably for the first time since Pearl Harbor, an act of war occurred on American soil. Congress reiterated the President’s sentiments, “condemn[ing] in the strongest possible terms the terrorists who planned and carried out the September 11, 2001, attacks against the United States, as well as their sponsors,” and declaring “that the United States is entitled to respond under international law.”<sup>2</sup>

What enemy carried out these deadly attacks that have been called “more than acts of terror[,] . . . acts of war[?]”<sup>3</sup> This enemy is a breed of soldier willing to sacrifice his life to strike at the heart of democracy. These soldiers are organized as networks of radical terrorist cells, many of which are funded by Osama bin Laden.<sup>4</sup> The roots of this movement have been traced to the mountains of Afghanistan,<sup>5</sup> and consequently, the first reprisals by the United States began there. The terrorists’ goal is “to kill and punish

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1. President George W. Bush, Address to a Joint Session of Congress & the American People (Sept. 20, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html>.

2. S.J. Res. 22, 107th Cong., 115 Stat. 222 (2001).

3. President George W. Bush, Remarks by the President in Photo Opportunity with the National Security Team (Sept. 12, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/print/20010912-4.html>.

4. SIMON REEVE, THE NEW JACKALS: RAMZI YOUSEF, OSAMA BIN LADEN AND THE FUTURE OF TERRORISM I (1999).

5. *Id.* at 2.

for what they believe is Western imperialism and the global oppression of Muslims.”<sup>6</sup> Bin Laden has targeted the United States because, in his words:

If the Israelis are killing the small children in Palestine and the Americans are killing the innocent people in Iraq, and if the majority of the American people support their dissolute president, this means the American people are fighting us and we have the right to target them . . . . [All taxpayers are targets because they are] helping the American war machine against the Muslim nation.<sup>7</sup>

In bin Laden’s view, America committed a “declaration of war on God, his messenger, and Muslims.”<sup>8</sup> As a result, bin Laden has formed an impenetrable hierarchy of terrorists, organized into cells.<sup>9</sup> These cells are given information when needed to perform precisely timed attacks against valuable United States interests.<sup>10</sup> Products of his organization include the devastating attacks on New York City and the Pentagon.

Not only did those attacks affect thousands of lives, the massive losses in terms of both life and property could result in the largest catastrophe the insurance industry has ever seen. The issue now is whether the insurance industry is equipped to handle losses on this scale, losses that were clearly not calculated risks within the industry’s rate structure. The main vehicle advanced as a possible protection for the industry has been the war exclusion clauses contained in most life, property, and casualty insurance contracts.<sup>11</sup> In light of recent events, the controversy over whether war exclusion clauses are applicable highlights the need to analyze these exclusions within the context of international terrorist attacks upon American soil.<sup>12</sup> Additionally, the massive losses ensuing from the collapse of the World Trade Center require the insurance industry to evaluate what course is necessary to protect business from failure due to similar catastrophic losses in the future.<sup>13</sup>

With that in mind, the purpose of this Comment is to analyze significant cases dealing with war exclusion clauses within the context of international

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6. *Id.* at 4.

7. *Id.*

8. *Id.* at 269 (quoting the text of Osama bin Laden’s *fatwa* urging a jihad against Americans).

9. REEVE, *supra* note 4, at 263.

10. *Id.* at 263.

11. See, e.g., Sidney I. Simon, *The Dilemma of War and Military Exclusion Clauses in Insurance Contracts*, 19 AM. BUS. L.J. 31, 31 (1981).

12. See *infra* note 14 (restricting the scope of this Comment to terrorist attacks upon American soil in an attempt to limit the arguments for other enumerated exclusions within a typical war exclusion clause such as civil war and insurrection).

13. Initial estimates include: \$30-70 billion in property damage, \$2 billion in liability damage (mainly aviation liability assessments), and \$3-6 billion in workers’ compensation losses. This does not include life insurance and other losses. The estimates show the impact this catastrophe will have on the insurance industry, considering the worst insurance catastrophe on record is Hurricane Andrew, which cost \$18 billion. INDEP. INS. AGENTS OF AM., INC., *THE INSURANCE IMPLICATIONS OF TERRORIST ATTACKS 3-4* (2001), available at IIAA Virtual University, <http://vu.iaa.net/WTC/> [hereinafter IIAA] (on file with the *Alabama Law Review*).

terrorism. Therefore, this Comment will examine some essential aspects of insurance law that are necessary for a thorough understanding of war exclusion jurisprudence. Further, this Comment will attempt to do the following: identify what constitutes a "war" for purposes of the exclusion; evaluate likely war risks, including "acts of war," "warlike operation," and "hostilities;" determine if international terrorist strikes on the United States are included within the language of the war exclusion;<sup>14</sup> and evaluate the possible impact of war exclusion clauses in the wake of current world events.

## II. THE WAR EXCLUSION

A war exclusion clause 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."<sup>15</sup> War exclusion clauses are recognized as both fair and consistent with public policy.<sup>16</sup> A thorough understanding of war exclusion jurisprudence begins with the text of a typical exclusion. The standard Insurance Services Office (ISO) exclusion for commercial property provides an excellent example of the representative language found in a war exclusion clause. The ISO exclusion states:

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

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14. While most war exclusion clauses contain enumerated exclusions for civil war, insurrection, unrest, and military or usurped power, these specific clauses are beyond the scope of this Comment because international terrorism on American soil is the factual focus of this Comment. They could be pertinent in an argument concerning terrorism overseas and should be researched under those specific facts. For an introduction into how these enumerated risks are defined, see *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 368 F. Supp. 1098 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 989 (2d Cir. 1974). Additionally, this Comment will not include analysis of the issue of whether an intentional act of terrorism is an accidental occurrence under an insurance policy.

15. Robert B. Billings, *Of War Clauses*, 1952 INS. L.J. 793, 793-94. In the case of life insurance, the loss occurs in one of two ways. First, if the war clause applies, there is no coverage and the insured's beneficiary usually receives only his premiums back as compensation. *E.g.*, *Rosenau v. Idaho Mut. Ben. Ass'n*, 145 P.2d 227 (Idaho 1944). Second, the insured tries to assert the double indemnity provision for an accidental death benefit, which contains a war exclusion clause. Here, the insured's beneficiary will be compensated for the face value of the policy, but will not receive double indemnity if the war clause applies. *E.g.*, *Stankus v. N.Y. Life Ins. Co.*, 44 N.E.2d 687 (Mass. 1942). When property insurance is litigated in this area, it typically occurs within the context of a fight between insurance companies. Here, the insured usually has "all risk" coverage that excludes "war risks" and a separate policy to indemnify him for loss due to "war risks." In these cases, the two insurance companies litigate the issue to determine who will pay the loss, but typically the insured will be fully indemnified. *E.g.*, *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 368 F. Supp. 1098 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 989 (2d Cir. 1974). Additionally, although most of these cases concern the issue of whether the war or warlike act was the proximate cause of the loss, that issue is not really a problem in the area of international terrorism, because typically it is easy to determine that the intentional terrorist act caused the loss. While proximate causation issues could be encountered if an insurer tries to argue that the Arab-Israeli conflict or a war/civil war in one of the Arab countries is the cause of the terrorist event, that issue is clearly beyond the scope of this Comment. See *supra* note 14.

16. Simon, *supra* note 11, at 34 ("[T]he insurance company has the right to limit its liability in such instances, since the 'purpose of such a [war or military exclusion] clause is not insidious or difficult to understand.") (alteration in original) (quoting *Stanbery v. Aetna Life Ins. Co.*, 98 A.2d 134, 139 (N.J. Super. Ct. Law Div. 1953)) (citation omitted). See *infra* note 27.

of any other cause or event that contributes concurrently or in any sequence to the loss.

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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.<sup>17</sup>

This sample exclusion provides a context for this Comment. However, while many standard form insurance contracts contain similar war exclusions—as with any insurance policy—it is crucial to analyze the specific clause at issue. Often, a few additional words modifying the applicable language could lead to significantly different results when interpreted by a court.

### III. INSURANCE LAW CONSIDERATIONS

To grasp court decisions in the area of war exclusion clauses, four areas of insurance law must be fully understood. Those areas are (1) judicial notice, (2) the burden of proof, (3) risk, and (4) insurance contract interpretation and construction. Each of these elements is essential because they provide fundamental guidance for courts in an attempt to render equitable outcomes. However, the conflicting nature of these policies will become evident later in the Comment as war exclusion jurisprudence is analyzed.

For a court to take judicial notice of a fact it must be “one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”<sup>18</sup> Although it is not as crucial to an analysis of the meaning of “war” today, judicial notice was the impetus for many earlier courts taking a very strict interpretation of “war,” defining it to mean only declared war.<sup>19</sup> Thus, in many cases the facts regarding both the terrorist act and any groups involved must be presented to meet the insurer’s burden of proof that the terrorist action falls within the exclusion.

Generally, the insured has the burden of presenting the policy and showing that the loss is one covered under the policy.<sup>20</sup> Once the insured

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17. IIAA, *supra* note 13, at 5 (emphasis omitted).

18. FED. R. EVID. 201(b).

19. See sources cited *infra* note 59.

20. *E.g.*, *Holiday Inns, Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460, 1463 (S.D.N.Y. 1983). Generally

establishes a prima facie case, the insurer has the burden of proving that the loss falls within one of the exclusions contained within the policy.<sup>21</sup> Courts allocate the burden in this manner because "the basic intent of an insurer [*sic*] is to avoid liability in all possible situations, and . . . the basic intent of an insured is to recover the maximum amount possible in all situations."<sup>22</sup> Therefore, all things being equal, if the insurer cannot present enough evidence to prove that the loss is excluded, the insured is covered under the applicable policy.

To put the rules of construction into context, it is important to understand the risk involved and the purposes for the inclusion of war exclusion clauses within insurance contracts. An insurer may choose the level of risk it plans to assume in its policies in advance.<sup>23</sup> Insurance premiums are based upon past experience statistics,<sup>24</sup> which include all of the factors that allow actuarial tables to be produced. The factors used in computing the premiums identify the risk(s) that the company plans to assume upon issuance of the policy.<sup>25</sup> Policy considerations play into the insurer's decision to exclude certain risks. First, the massive liability, both in terms of actual casualties and damage to property, is tremendous in time of war<sup>26</sup> and is excluded from most policies because the risk cannot be accurately determined in order to charge an appropriate premium.<sup>27</sup> Additionally, the exclusions are added to insurance contracts to protect the companies from financial disaster in the event of a catastrophic loss.<sup>28</sup> Therefore, "[r]ather than penalize the entire nation by causing the bankruptcy of such corporations, the courts have penalized the individual insured."<sup>29</sup> These purposes are similar to the reasons for insurance exclusions for "acts of God." Thus, in determining what is properly deemed a "war," a court should not consider those factors that have no affect upon the risk.

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speaking, this showing is met by simply introducing the policy and evidence of the actual loss, and should cause the insured no problems in the context of catastrophic loss in the case of an international terrorist attack.

21. *E.g.*, *Holiday Inns*, 571 F. Supp. at 1463.

22. James M. Crain, Comment, *War Exclusion Clauses and Undeclared Wars*, 39 TENN. L. REV. 328, 337 (1972).

23. Billings, *supra* note 15, at 796 ("[T]he insurance company has the right to select in advance those particular risks it is willing to assume.").

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

25. *See id.*

26. *Int'l Dairy Eng'g Co. v. Am. Home Assurance Co.*, 352 F. Supp. 827, 828 (N.D. Cal. 1970), *aff'd*, 474 F.2d 1242 (9th Cir. 1973); *Langlas v. Iowa Life Ins. Co.*, 63 N.W.2d 885, 888 (Iowa 1954).

27. *Schneiderman v. Metro. Cas. Co.*, 220 N.Y.S.2d 947, 951 (N.Y. App. Div. 1961); Billings, *supra* note 15, at 797 ("The clear weight of authority, both among the judiciary and the actuaries, is to the effect that the hazard of war is indeterminable and cannot be calculated for premium-paying purposes."); Marshall, *supra* note 24, at 120 ("But since it is impossible for an insurance company to compute with any accuracy the unpredictable hazards of warfare, it is widely recognized that clauses in insurance contracts excluding protection in case of death by war are not against public policy."). *See also* *Beley v. Pa. Mut. Life Ins. Co.*, 95 A.2d 202, 206 (Pa. 1953) (Chidsey, J., dissenting).

28. Simon, *supra* note 11, at 31. *See also* Crain, *supra* note 22, at 338.

29. Simon, *supra* note 11, at 31.

A thorough understanding of the purpose of war exclusion clauses is necessary in order to construe these provisions because the "interpretation of any particular contract is usually aimed at determining the intentions and the expectations of the parties."<sup>30</sup> Consequently, a court should look first to the plain meaning of the policy to determine what its terms mean.<sup>31</sup> Generally, a phrase or word in a contract will not be given a strict legal meaning, but will be taken as used in the common vernacular.<sup>32</sup> "[R]equiring that words be given a meaning different from that of common usage will inevitably tend to benefit that party which is aware of the special meaning—in this case, the insurer."<sup>33</sup> This is primarily because laypeople will not understand the import of the term in the policy and may believe they are covered when they are not, or may fail to claim compensation when they are covered.<sup>34</sup>

Complementing the plain meaning doctrine are the "rule of adhesion"<sup>35</sup> and the related doctrine of *contra proferentem*.<sup>36</sup> If a court finds ambiguity in the words contained in a contract, then the court will follow the general rule of construction that words should be construed against the insurer and in favor of the insured.<sup>37</sup> Ultimately, the key constraint on this rule of construction is that ambiguity is a condition precedent to its use.<sup>38</sup>

In sum, to construe properly a war exclusion clause, it is the court's "function and duty to ascertain and effectuate [the parties'] lawful inten-

30. Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 865 (1964).

31. Stankus v. N.Y. Life Ins. Co., 44 N.E.2d 687, 688-89 (Mass. 1942); Thomas E. Galyean, *Acts of Terrorism and Combat by Irregular Forces—An Insurance "War Risk"?*, 21 COMP. JURID. REV. 57, 64 (1984); Marshall, *supra* note 24, at 124.

32. Goodrich v. John Hancock Mut. Life Ins. Co., 234 N.Y.S.2d 587, 589-90 (N.Y. App. Div. 1962); J.W. Wheeler, *The War Clause*, 1953 INS. L.J. 727, 731.

33. Crain, *supra* note 22, at 338.

34. *See id.*

35. Simon, *supra* note 11, at 34.

36. Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 999-1000 (2d Cir. 1974); Holiday Inns, Inc. v. Aetna Ins. Co., 571 F. Supp. 1460, 1464 (S.D.N.Y. 1983). *Contra proferentem* is a rule of construction properly called *omina praesumuntur contra proferentem*, which states "that interpretation will be preferred which is less favorable to the one by whom the contract was drafted." Patterson, *supra* note 30, at 854. This maxim is intended to favor the party of lesser bargaining power because, in contracting, the weaker party must accept the terms of the stronger party. This is always true in adhesion contracts, but may apply to nondrafting parties in normal contracts as well. *Id.* at 855-60.

37. Simon, *supra* note 11, at 34 ("Application of the 'rule of adhesion' in insurance law, however, may affect the operation of the policy. This rule applies when a provision in the contract is ambiguous, so that the intent of the parties is not clear. Because of the unequal bargaining power exercised by the insurer when it alone draws up the provisions of the policy, the courts construe such ambiguous provisions against the insurer."); Billings, *supra* note 15, at 795; Crain, *supra* note 22, at 328; Galyean, *supra* note 31, at 64; Wheeler, *supra* note 32, at 727. Some courts have mutated this rule and strictly construe any insurance contract provision against the insurer, whether ambiguity exists or not. *See, e.g.,* Int'l Dairy Eng'g Co. v. Am. Home Assurance Co., 352 F. Supp. 827, 828 (N.D. Cal. 1970), *aff'd*, 474 F.2d 1242 (9th Cir. 1973); Rosenau v. Idaho Mut. Ben. Ass'n, 145 P.2d 227, 229 (Idaho 1944).

38. *See* N.Y. Life Ins. Co. v. Bennion, 158 F.2d 260, 265-66 (10th Cir. 1946); Simon, *supra* note 11, at 34 ("[A] contract of insurance is to be construed like any other contract according to the sense and meaning of the terms used by the parties. If these words are clear and unambiguous, it does not lie within the province of the court to rewrite or distort the contract in any effort to aid the insured or beneficiaries of the policy."); Billings, *supra* note 15, at 795; Wheeler, *supra* note 32, at 727.

tion[s]. In so doing, [the court] should place [itself] in the position of the parties when the contract was made, [and] consider the purposes, the subject matter, and the circumstances under which their minds met.”<sup>39</sup> Only if the words are ambiguous should a court construe them against the insurer. This analytical framework of construction, coupled with the burden of proof, makes the showing of exclusion a hard-fought battle for the insurer.

#### IV. WAR

##### A. *The Movement to Common Meaning*

War is thus an act of force to compel our enemy to do our will . . . .  
[W]ar is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means.<sup>40</sup>

—*Carl von Clausewitz*

For insurance purposes, courts have developed two very distinct doctrines to determine whether a “war” exists and, consequently, whether policies exclude losses related to the instant conflicts. Although most policies have changed contract terms so that the issue will not arise, a little history concerning the construction of the term “war” is necessary for a thorough understanding of war exclusion jurisprudence.<sup>41</sup> Furthermore, the other enumerated war exclusions only exist in the context of a condition of “war.”<sup>42</sup>

Except for marine insurance,<sup>43</sup> most policies prior to World War I did not contain war exclusion clauses.<sup>44</sup> However, the losses sustained in this country’s first large-scale military conflict caused insurance companies to add war exclusions in many policies.<sup>45</sup> The sheer manpower and possibility of devastating loss prompted the insurance industry to add many of these

39. *Bennion*, 158 F.2d at 264-65.

40. CARL VON CLAUSEWITZ, ON WAR 75, 87 (Michael Howard & Peter Paret eds., trans., Princeton Univ. Press 1984) (1832). Policy was one part of Clausewitz’s war trinity:

War is more than a true chameleon that slightly adapts its characteristics to the given case. As a total phenomenon its dominant tendencies always make war a paradoxical trinity—composed of primordial violence, hatred, and enmity, which are to be regarded as a blind natural force; of the play of chance and probability within which the creative spirit is free to roam; and of its element of subordination, as an instrument of policy, which makes it subject to reason alone.

*Id.* at 89.

41. Although all the current insurance cases and policies reviewed by the author have seen this clarification by the industry through the addition of the modifying word “undeclared” either before or after “war,” there is still the possibility that some insurance contracts do not have this modification, in which case an understanding of the doctrines controlling the construction of “war” is essential. See Galyean, *supra* note 31, at 64-65.

42. *Id.* at 65.

43. Current war exclusion clauses are based on similar clauses in marine insurance policies. *Id.* at 61.

44. Paul H. Rogers, *Modern Warfare and Its Effect on Policy Construction*, 1952 INS. L.J. 360, 360.

45. See Rogers, *supra* note 44, at 360.

exclusions to life insurance contracts.<sup>46</sup> These clauses were simple and straightforward, and it was not until after the attack on Pearl Harbor that the construction of war exclusion clauses became an issue.<sup>47</sup> From this point, problems only increased as courts were asked similar questions concerning the definition of "war" following World War II, the Korean War, and the conflict in Vietnam.<sup>48</sup>

The result of this progression was the development of two distinct and contradictory doctrines used to construe the term "war," the technical and common meaning doctrines.<sup>49</sup> The technical meaning doctrine defines "war" in its constitutional sense of formally declared war.<sup>50</sup> In contrast, the common meaning doctrine looks to the reality of the situation and defines the term "war" based on the specific facts in any given situation.<sup>51</sup> For a declared war, like either of the World Wars, both doctrines arrive at the same result—exclusion from coverage under the policy.<sup>52</sup> However, the two doctrines reach opposite answers in four important situations: (1) losses prior to a formal declaration of war; (2) losses after the cessation of all hostilities in a formally declared war, but prior to formal peace; (3) losses in conflicts where there is no formal declaration of war; and (4) losses in conflicts after the cessation of hostilities where no formal declaration of war was made.<sup>53</sup>

Under the technical meaning doctrine, courts are reluctant to find war unless there is a formal declaration of war by Congress as required under the Constitution.<sup>54</sup> This doctrine, resulting in decisions favoring the insured, is applied in four of the five Pearl Harbor cases,<sup>55</sup> as well as in *Beley v. Pennsylvania Mutual Life Insurance Co.*,<sup>56</sup> a case concerning the Korean War.<sup>57</sup> There are three reasons typically advanced to support this doctrine: (1) constitutional requirements, (2) uncertainties about what constitutes a war, and (3) inherent ambiguity in policy language.<sup>58</sup>

First, some courts felt that a political determination as to whether a state of war exists was necessary for the court to take judicial notice of a "war."<sup>59</sup> Consequently, courts required an actual declaration before they would judi-

46. See *id.* Life insurance contracts are where a majority of the cases interpreting war exclusion clauses occur. See *id.* at 360-61.

47. See *id.*

48. See *id.*

49. Crain, *supra* note 22, at 332-36. Crain lists a third category, which he calls the inherently ambiguous doctrine. The courts adopting that approach are merely using the maxims of contract construction to arrive at the technical meaning doctrine result. *Id.* at 336-37.

50. *Id.* at 332-33.

51. *Id.* at 334.

52. *Id.* at 331.

53. *Christensen v. Sterling Ins. Co.*, 284 P.2d 287, 288 (Wash. 1955); Crain, *supra* note 22, at 331.

54. See U.S. CONST. art. I, § 8, cl. 11; Crain, *supra* note 22, at 332.

55. Crain, *supra* note 22, at 332.

56. 95 A.2d 202 (Pa. 1953).

57. *Beley*, 95 A.2d at 205.

58. Crain, *supra* note 22, at 332-34.

59. *West v. Palmetto State Life Ins. Co.*, 25 S.E.2d 475, 477 (S.C. 1943); Galyean, *supra* note 31, at 62-63; Simon, *supra* note 11, at 41.

cially notice a "war."<sup>60</sup> This view contains several flaws.<sup>61</sup> First, the technical meaning doctrine does not account for the purpose of the war exclusion clauses themselves—to protect insurers from catastrophic risks, not merely to avoid losses for declared wars.<sup>62</sup> The increased liability for insurers is the same regardless of whether the President commits troops or Congress formally declares war.<sup>63</sup> Additionally, many courts view the dispute in contractual rather than constitutional terms stating, "in matters which are purely private, courts may take judicial notice that a war exists [even if it does not conform to constitutional requirements]."<sup>64</sup> This argument recognizes that plain meaning should govern contract interpretation.<sup>65</sup> Also, courts "take judicial notice of whatever is unquestioningly accepted by informed society as fact."<sup>66</sup> This approach would include an armed conflict that is not a declared war.<sup>67</sup> Equally important is that the courts adopting the technical meaning approach fail to realize that, because the declaration of war is a political determination, political motivations may prevent Congress from declaring a war, even though it believes a state of war exists and recognizes the fact in debates.<sup>68</sup>

Second, courts often seem reluctant to adopt a plain meaning view of war because of the uncertainty of determining when a war actually exists.<sup>69</sup> Although uncertainty may indeed exist, courts routinely deal with factual uncertainties. In the same vein, these courts concede that they can determine when a war exists, because they all view Pearl Harbor as an "act of war."<sup>70</sup> If they can distinguish between an "act of war" and a "state of war," they are capable of determining when wars actually exist. The motive behind asserting this justification seems to be a *de facto* application of the doctrine that ambiguities in insurance contracts are construed to favor the insured.

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60. West, 25 S.E.2d at 477; Simon, *supra* note 11, at 41.

61. Wheeler, *supra* note 32, at 728.

62. *Id.* ("It is felt that [the Pearl Harbor decisions] fail to give proper recognition to the obvious intent of the exclusionary clauses and that the decisions are based primarily on the reluctance of the courts to allow the exclusionary clauses to defeat recovery, not on any lack of understanding of the war risk."); Crain, *supra* note 22, at 338.

63. Langlas v. Iowa Life Ins. Co., 63 N.W.2d 885, 888 (Iowa 1954); Christensen v. Sterling Ins. Co., 284 P.2d 287, 289-90 (Wash. 1955).

64. Christensen, 284 P.2d at 289.

65. *Id.*

66. Beley v. Pa. Mut. Life Ins. Co., 95 A.2d 202, 213 (Pa. 1953) (Musmanno, J., concurring).

67. Beley, 95 A.2d at 213 (Musmanno, J., concurring).

68. One such motive here may be congressional concern that the insurance industry would invoke their war exclusion clauses, preventing recovery for the huge losses that occurred during the September 11th attack. See, e.g., *id.* at 209 (Bell, J., dissenting) ("Although for political or international reasons, or to save the 'position' of their leader, the majority in Congress have not formally declared war against the North Koreans or Red China, the Congress (as well as every person in the civilized world) knows that the United States [*sic*] is at war in Korea.")

69. See West v. Palmetto State Life Ins. Co., 25 S.E.2d 475, 477 (S.C. 1943).

70. N.Y. Life Ins. Co. v. Bennion, 158 F.2d 260, 262 (10th Cir. 1946); Savage v. Sun Life Assurance Co., 57 F. Supp. 620, 620-21 (W.D. La. 1944); Pang v. Sun Life Assurance Co., 1945 WL 5596, at \*6 (Haw. Terr. 1945); Beley, 95 A.2d at 216 (Musmanno, J., concurring).

Third, two dissenting opinions apply maxims of construction to reach the same conclusion.<sup>71</sup> Under their approach, because there are many definitions of the term "war," the term is ambiguous and should be construed against the insurer.<sup>72</sup> Following this logic, the definition most favorable to the insured within the Pearl Harbor context is a restrictive definition of "war," meaning declared war.<sup>73</sup> The problem with this approach is that neither party to the contract will be sure of the definition. For instance, if the term "war" is inherently ambiguous and the issue is whether a war has ended, then the court must adopt a plain, rather than a technical, meaning of "war"<sup>74</sup> (meaning the cessation of actual hostilities), because this definition most likely will not bar an insured's recovery. Therefore, the court would have inconsistent definitions of "war," because the beginning of the war would be technically determined while its ending would not be technically determined.<sup>75</sup> Although the doctrine of construing ambiguous terms in favor of the insured is qualified by the fact that the construction must be reasonable, the court must still decide which definition it will use. Nevertheless, the reasoning in these cases led the insurance industry to adopt modifying words such as "undeclared" in war exclusion provisions to force the courts to apply the common meaning approach.<sup>76</sup>

Conversely, the common meaning doctrine, while requiring a more difficult determination of when a war begins or ends, provides a much more realistic, risk-based approach as to how "war" should be defined. This approach began in post-World War II cases and remains the predominant approach accepted by contemporary courts.<sup>77</sup> Under this approach, the courts construe "war" in its "ordinary, popular sense."<sup>78</sup> By approaching a war exclusion clause under this doctrine, a court adheres to the generally accepted plain meaning rule of contract interpretation.<sup>79</sup> Additionally, this view likely supports the intent of the parties, favorable to the insured, because "the average man . . . presumably is unfamiliar with the existence of a state of war from the strictly political, military and/or legal standpoint."<sup>80</sup> Modern courts generally adopt this approach, and the insurance industry has

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71. *Bennion*, 158 F.2d at 267 (Huxman, J., dissenting); *Thomas v. Metro. Life Ins. Co.*, 131 A.2d 600, 612 (Pa. 1957) (Musmanno, J., dissenting).

72. *Bennion*, 158 F.2d at 267 (Huxman, J., dissenting); *Thomas*, 131 A.2d at 612 (Musmanno, J., dissenting); Crain, *supra* note 22, at 336-37.

73. Crain, *supra* note 22, at 336-37.

74. Otherwise, the court would be construing the language against the insured not against the insurer.

75. An additional justification for this approach might be that declaration of war is all that is formally required, and therefore the logic is still consistent, but it seems counterintuitive to adopt inconsistent methods of determining the beginning and end of a war. *Beley*, 95 A.2d at 206.

76. See Crain, *supra* note 22, at 333; Galyean, *supra* note 31, at 64; Marshall, *supra* note 24, at 125.

77. See Marshall, *supra* note 24, at 125.

78. Simon, *supra* note 11, at 41.

79. Galyean, *supra* note 31, at 64.

80. Simon, *supra* note 11, at 42.

compelled it by the addition of the adjective "undeclared" in most war exclusions to clear up any ambiguity existing in the term "war."<sup>81</sup>

Under the common meaning doctrine, courts focus on the context of the facts existing at the time of the loss.<sup>82</sup> The courts view war as a decision for the executive branch of the government to protect the country's national interests.<sup>83</sup> The courts consider factors other than action by the President in determining if a "war" in fact existed. These factors include whether the combatants wore uniforms,<sup>84</sup> the nature and type of weaponry used,<sup>85</sup> the actual organization of the operation,<sup>86</sup> the act causing the loss,<sup>87</sup> whether congressional appropriations were made,<sup>88</sup> whether combat zone tax exclusions were provided,<sup>89</sup> and declarations by the Judge Advocate General initiating court-martial jurisdiction in cases arising from the conflict.<sup>90</sup> Another factor may include whether heroism medals were awarded,<sup>91</sup> an occasion that occurs only during periods of actual hostilities.<sup>92</sup> These factors suggest that, while Congress may choose not to declare war formally, it can do so informally by ratifying existing operations. This judicial approach recognizes and resolves the issue of politically-motivated congressional resistance to making a formal declaration of war. Thus, "[t]he existence of such military hostilities at the time of a loss should be the key to determining whether a condition of war exists."<sup>93</sup>

### *B. Determination of a Modern "State of War"*

Having reached the conclusion that the courts will look to factual contexts to determine whether a "state of war" exists, what facts support such a finding? At a minimum, "war" should be understood as "operations intended to gain a military advantage."<sup>94</sup> In *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*,<sup>95</sup> the court noted that "[w]ar has been

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81. *Id.* at 43; Galyean, *supra* note 31, at 64; Marshall, *supra* note 24, at 125.

82. Galyean, *supra* note 31, at 62.

83. *Id.* at 63. Additionally, although the Constitution does not give the President the right to declare war, he is given the power to repel any invasion of the United States. Therefore, his powers as Commander in Chief give him the *de facto* ability, even consistent with the War Powers Resolution, to respond and engage the United States in war. *The Prize Cases*, 67 U.S. (2 Black) 635, 669-70 (1862).

84. *See Welts v. Conn. Mut. Life Ins. Co.*, 48 N.Y. 34, 40 (N.Y. 1871).

85. *See Galyean, supra* note 28, at 62. *Cf. Welts*, 48 N.Y. at 40 (discussing whether the deceased was engaged in "military service" at the time of his death).

86. *Cf. Welts*, 48 N.Y. at 40.

87. *Id.*

88. *See Hamilton v. McLaughry*, 136 F. 445, 451 (C.C.D. Kan. 1905).

89. *See Beley v. Pa. Mut. Life Ins. Co.*, 95 A.2d 202, 209 (Pa. 1953) (Bell, J., dissenting) (stating that the Revenue Act of 1950 provides tax exemptions for Armed Forces members who serve in combat zones).

90. *See Arce v. State*, 202 S.W. 951, 952 (Tex. Crim. App. 1918).

91. *Thomas v. Metro. Life Ins. Co.*, 131 A.2d 600, 610 (Pa. 1957).

92. *See, e.g., Thomas*, 131 A.2d at 610 (stating that the Navy Cross is only awarded in connection with military operations).

93. Galyean, *supra* note 31, at 67.

94. Crain, *supra* note 22, at 339.

95. 368 F. Supp. 1098 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 989 (2d Cir. 1974).

defined almost always as the employment of force between governments or entities essentially like governments, at least *de facto*.”<sup>96</sup> *Pan Am* is important because it was the first case in which war exclusion clauses were construed in the context of actions of a terrorist group, the Popular Front for the Liberation of Palestine (PFLP).<sup>97</sup> In *Pan Am*, the court held a small terrorist group blowing up a Pan American jet for propaganda purposes did not fall within the war risk exclusions.<sup>98</sup> The court thought that a thorough case-by-case factual examination was necessary in these circumstances, 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 rather than to what might have happened. The terrorists themselves did so.”<sup>99</sup> Consequently, the court’s characterization of the PFLP was vital. The court stated:

As to the PFLP itself, this was a relatively small organization led by dedicated revolutionists whose major commitments were to the “class struggle” and the “war” against “imperialism.” The PFLP went largely its own way, following its own doctrines and tactics, competing for the allegiance of the Palestinian masses, opposing other fedayeen groups and the Arab governments much of the time.<sup>100</sup>

The Second Circuit affirmed the decision and adopted the district court’s definition of war, yet added “war is a course of hostility engaged in by entities that have at least significant attributes of sovereignty.”<sup>101</sup> The court then addressed “war” in relation to terrorist groups, stating “a guerrilla group must have at least some incidents of sovereignty before its activity can properly be styled ‘war.’”<sup>102</sup>

Because most courts recognize the necessity of incidents of sovereignty, a definition of this concept is necessary. First, the courts have expressly stated that mere financial support from a sovereign to a terrorist organization is not enough to constitute sovereign or quasi-sovereign status.<sup>103</sup> A later court defined sovereignty in this context as follows:

It is not sufficient to achieve such status that the group or entity in question occupy territory within the boundary of the sovereign state upon the consent of that state’s *de jure* government. That is so, even

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96. *Pan Am. World Airways*, 368 F. Supp. at 1130.

97. *Id.*

98. *Id.* at 1132.

99. *Id.* at 1116.

100. *Id.* at 1115.

101. *Pan Am. World Airways, Inc. v. Aetna Ins. & Cas. Co.*, 505 F.2d 989, 1012 (2d Cir. 1974). *Couch on Insurance* also adopts this definition. LEE R. RUSS & THOMAS F. SEGALLA, 10 COUCH ON INSURANCE § 152:5 (3d ed. 1998).

102. *Pan Am. World Airways*, 505 F.2d at 1013.

103. *Id.* at 1015.

if that government's consent extends to permitting its guests to exercise considerable control and autonomy within the camps or other facilities in which they dwell. "De facto governments" manifest "attributes of sovereignty" when they stake out and maintain adverse claims to territory, accompanying those claims with declarations of independence and sovereignty.<sup>104</sup>

In the case of international terrorist groups, none currently operating, including al Qaeda, will be able to satisfy this definition of sovereignty. Typically, these terrorist organizations exist either covertly or with the express consent of a government hostile to United States interests, such as Afghanistan.

However, the *Pan Am* decision leaves open the possibility that a terrorist organization may gain attributes of sovereignty, or at minimum quasi-sovereignty, through an agency relationship with a sovereign that consents to its presence. In *Pan Am*, the court stated that although financial support may not give a terrorist organization sovereign nation status, the "PFLP has never acted on behalf of a recognized government."<sup>105</sup> The clear implication of this language is that had the PFLP acted on behalf of a recognized government, it might have attained sovereign status. Additionally, the court calls the group's actions criminal rather than military<sup>106</sup> and speaks of the group's members as "agents of a radical political group, rather than a sovereign government."<sup>107</sup>

Many of these observations come from the court's characterization of the PFLP as a small group with no significant support from sovereign nations whose main purpose was propaganda.<sup>108</sup> This should be contrasted with internationally organized groups, such as al Qaeda, whose leader had a close relationship with the Taliban government of Afghanistan. Additionally, the size of the group, the fact that it declared war against the United States—not the entire Western world—and the group's organization, training, and use of precisely-timed destructive attacks, suggest that it is factually more like a military organization than a loosely bound group of criminals. Also, the group's policy and its members' political differences are important for a determination of the existence of a war.<sup>109</sup> There must also be a determination of whether agents of the Afghan government,<sup>110</sup> arguably such as al Qaeda, retain the sovereignty necessary to establish a "state of war."

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104. *Holiday Inns, Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460, 1500 (S.D.N.Y. 1983) (specifically discussing the P.L.O.).

105. *Pan Am. World Airways*, 505 F.2d at 1014.

106. *Id.* at 1015.

107. *Id.*

108. *Id.*

109. *Rogers*, *supra* note 44, at 361. *Cf.* VON CLAUSEWITZ, *supra* note 40.

110. It is not difficult to argue that those terrorists were the agents of the Taliban because the United States government attacked that regime in retaliation for the September 11th attacks.

Moreover, the executive branch's proclamation of a war on terrorism, al Qaeda's declaration of war against the United States, and the United States' deployment of a heavy military contingent in retaliation for the September 11th attacks, suggest that the initial attacks resulted in a "state of war." These factors are especially important given the modern trend of courts taking judicial notice of the actions of the executive branch as a *prima facie* showing that a "state of war" exists.<sup>111</sup> Because this approach is a factual determination, the insurance industry would likely favor it, because it limits the court's use of the "rule of adhesion."

#### V. ACTS OF WAR, WARLIKE OPERATIONS, AND HOSTILITIES

Convincing a court to find an agency relationship between al Qaeda and Afghanistan will be difficult. Furthermore, many courts will be reluctant to find any type of quasi-sovereign status for an international terrorist organization. Therefore, the other enumerated war exclusions must be analyzed. These include "acts of war," "warlike operations," and "hostilities."

In general, an "act of war" occurs when one sovereign uses force against another.<sup>112</sup> One court explained "acts of war" as:

"Hostile attacks and armed invasions of the territory or jurisdiction of a nation accompanied by the destruction of life and property by officers acting under the sanction and authority of their government however great and flagrant provocation to war are often atoned for and adjusted without it ensuing."

Hostile attacks of this kind from time immemorial have been referred to as "acts of war". They are acts, which, under International Law, would justify the nation, whose citizens or armed forces were attacked, or whose territory was invaded, in declaring war on the aggressor nation.<sup>113</sup>

While a "state of war" need not arise, an "act of war," which does not lead to a corresponding "state of war," usually occurs only in the context of a strong nation asserting force against a weaker nation that does not resist.<sup>114</sup> An example could be the conquering of Kuwait by Iraq, where arguably no "state of war" occurred until the United States became involved. Even acts of individuals may be considered "acts of war," if conducted "under orders of a commanding officer and sanctioned by a recognized government."<sup>115</sup>

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111. Galyean, *supra* note 31, at 66; Wheeler, *supra* note 32, at 730.

112. *Thomas v. Metro. Life Ins. Co.*, 131 A.2d 600, 606 (Pa. 1957).

113. *Thomas*, 131 A.2d at 606 (quoting *Bishop v. Jones & Petty*, 28 Tex. 294, 319 (Tex. 1866)).

114. *Id.* at 608.

115. *Thomas*, 131 A.2d at 609.

With the abandonment of the technical meaning doctrine, the distinction between an "act of war" and a "state of war" is of little consequence. This distinction was critical in the Pearl Harbor cases, because it allowed the courts to justify their positions by finding that the attack was an "act of war," which resulted in a "state of war"—in contrast to an incident where the Japanese attacked the *Panay*, an American ship, which was deemed an "act of war" that produced no "state of war."<sup>116</sup> This distinction allowed the courts to find that no "state of war" existed when the attacks occurred because there was no declaration and granted coverage for the insured.<sup>117</sup>

Even if a policy includes an "act of war" in its war exclusion clause, the tests used to determine whether a "war" exists should apply. Therefore, as implied above, a terrorist group could engage in an "act of war," if it enjoyed some incidents of sovereignty such as "sanction[] by a recognized government."<sup>118</sup> Without the minimum level of quasi-sovereign characteristics, a terrorist organization is incapable of an "act of war."<sup>119</sup>

The term "warlike operation" is viewed more broadly than the term "war."<sup>120</sup> The first American cases to construe the term held "warlike operations" to be any military operation in time of war,<sup>121</sup> or operations that were similar to these (some type of hostile action) that occurred even where no "state of war" existed.<sup>122</sup> The purpose of this construction was to exclude coverage for losses, within the marine insurance context, which resulted from some type of hostile action, rather than a mere negligent act that might be blamed on an existing state of war.<sup>123</sup> Accordingly, courts look to the nature of the operation, not the cargo or commander of a ship, to determine if a "warlike operation" caused the loss.<sup>124</sup> Similarly, "hostilities" are judicially defined as "actual operations of war, either offensive, defensive or protective . . . [and] the hostile act need not involve the overt use of a weapon which is in itself, capable of inflicting harm."<sup>125</sup>

The problem in asserting these enumerated exclusions arises when a terrorist group attacks civilians.<sup>126</sup> The courts generally are reluctant to apply one of these exclusions where the attack occurs far from the location of the

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116. *E.g.*, *West v. Palmetto State Life Ins. Co.*, 25 S.E.2d 475, 478 (S.C. 1943).

117. *West*, 25 S.E.2d at 478.

118. *Thomas*, 131 A.2d at 609.

119. Galyean, *supra* note 31, at 68-71. This analysis is the same sovereignty analysis discussed *supra* notes 104-111; hence no substantive difference exists between the legal analysis of whether a loss caused by a terrorist group was an "act of war" or created a "state of war."

120. *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 368 F. Supp. 1098, 1130 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 989 (2d Cir. 1974); Galyean, *supra* note 31, at 68.

121. *E.g.*, *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.*, 282 F. 976, 979 (2d Cir. 1922) (summarizing British courts' holdings).

122. *E.g.*, *Pan Am.*, 368 F. Supp. at 1130 (referring to *British S.S. Co., Ltd. v. The King*, 1 A.C. 99, 114 (1921)).

123. *See Queen Ins.*, 282 F. at 979.

124. *Id.* at 981 (referring to *Owners of S.S. Marchtrove v. The King*, 36 Times L.R. 108 (1919)).

125. *Int'l Dairy Eng'g Co. v. Am. Home Assurance Co.*, 352 F. Supp. 827, 829 (N.D. Cal. 1970), *aff'd*, 474 F.2d 1242 (9th Cir. 1973).

126. *See Galyean, supra* note 31, at 69.

warfare.<sup>127</sup> The import of the location argument stems from a general idea that these types of losses are not foreseeable by either party and, therefore, are not within the intent of the parties with regard to the exclusion provision.<sup>128</sup> In *Pan Am*, the court held that “there is no warrant in the general understanding of English, in history, or in precedent for reading the phrase ‘warlike operations’ to encompass the infliction of intentional violence by political groups.”<sup>129</sup> Part of the court’s underlying logic for this assessment is the intent of the PFLP. According to the court, the PFLP’s “destructive action is not coercion or conquest in any sense, but the striking of spectacular blows for propaganda effects.”<sup>130</sup> While all terrorist activity has propagandist elements, in the case of the September 11th attacks, the devastation and brutality caused align more with actual combat than mere show. Thus, the intent of al Qaeda shown by their militaristic, precise planning suggests the act was “tied to some condition of war.”<sup>131</sup>

In sum, “acts of war,” “warlike operations,” and “hostilities” require many of the incidents of “war.” The purpose of these enumerated exclusions is to tie the causation of the loss to some hostile action. However, they do not necessarily broaden the actual risks that can be encompassed within the war exclusion clause itself. Therefore, the beginning and ending analysis will be a determination of whether “war” exists in fact.

## VI. CONCLUSION

It is clear that there are viable arguments for including losses occasioned by terrorist attacks within war exclusion clauses. The analysis is complex, and it is important to look closely at the terrorist organization and the acts performed before making an assessment that a war exclusion clause is applicable. Application of the war exclusion clause requires that the terrorist group have at least some incidents of sovereignty, including possible assistance from, or sanctioning of, its acts by a sovereign state. Additional factors that may lead to the conclusion that these losses are not recoverable under war exclusion clauses include the reaction of the sovereign being attacked, the scale of the attack, and the intent, organization, planning and equipment used by the organization itself.<sup>132</sup> In cases of questionable sovereignty, these extrinsic factors may lead to the factual conclusion that a “war” does exist between the United States and a group such as al Qaeda. These factors are important because the landscape of war is changing, and courts must continually determine what constitutes “war.”

While this Comment has shown the possibility of arguing that the losses suffered on September 11th resulted in “war,” companies are unlikely to

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127. See, e.g., *Pan Am*, 368 F. Supp. at 1130.

128. See Galyean, *supra* note 31, at 71.

129. *Pan Am*, 368 F. Supp. at 1130.

130. *Id.*

131. Galyean, *supra* note 31, at 73.

132. *Id.* at 76-77.

win here because of positions taken within the insurance industry. Part of the court's reasoning in *Pan Am* was that the war exclusion clause was ambiguous.<sup>133</sup> This ambiguity allowed the court to construe the clause strictly against the insurer. The court based its conclusion on three reasons tied to the insurance industry.<sup>134</sup> Those reasons resonate with the losses on September 11th. One of those reasons was that losses from terrorist activity were known risks and could have been excluded (based on the industry's use of specific terrorist exclusions in other policies) by the insurers in drafting their policies.<sup>135</sup> While no one imagined the scope of the devastation that occurred on September 11th, the 1993 World Trade Center bombing and other terrorist acts gave insurance companies notice of potential attacks on American soil.<sup>136</sup> Further, the insurance industry has posited that war exclusion clauses do not apply to September 11th losses because no government was behind the attack.<sup>137</sup> This stance will likely be accepted as conclusive as to the intent of the contracting parties and will result in an inapplicability of war exclusion clauses.

Regardless of whether companies assert war exclusions in the aftermath of September 11th, it is important to realize that terrorism is the new form of guerilla warfare. While many companies graciously refuse to assert war exclusions in the aftermath of September 11th, they must realize this is a waiver of their policy provision. Insureds may rely on a pattern of waiver throughout the industry, arguing that insurers are estopped from asserting these war exclusions for future losses resulting from terrorist activity. Additionally, the insurers' actions demonstrate that their intent in drafting was not to exclude the September 11th losses. Because of this possibility, and because of the long-term losses likely to occur as the war on terrorism continues, it is essential for the insurance industry to include some type of terrorism exclusion<sup>138</sup> or charge an increased premium to cover terrorism losses in order to prevent a complete industry failure in the future.

*Daniel James Everett*

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133. See *Pan Am*, 368 F. Supp. at 1118.

134. *Id.*

135. *Id.*

136. See generally REEVE, *supra* note 4 (depicting the 1993 bombing of the World Trade Center).

137. IIAA, *supra* note 13, at 5-7.

138. Ind. Ins. Agents of Am., Inc., *Marketplace News: Terrorist Exclusions Filed* (Dec. 12, 2001), available at IIAA Virtual University, <http://vu.iaaa.net/WTC/MarketplaceNews01.htm> (on file with author).

