
ATILA: Transatlantic Lectures in Insurance Law

Insurance in Times of War : War & Cyber Exclusions

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- ***Merck & Co. & Int'l Indem., Ltd. v. ACE Am. Ins. Co.***: New Jersey Trial Court
 - Loss:
 - 27 June 2017: 40,000 Merck computers infected with malware (“Not Petya” virus), leading to US \$1,400,000,000 loss.
 - Merck submitted claim for loss under its first-party property “all risk” insurance program with a limit of US \$1,750,000,000 limit. Program was led by Merck captive insurer, Int'l Indemnity.
 - After denial of coverage, Merck sued reinsurers of captive program in New Jersey state court in 2018.
 - Insurers took position that “war”/”hostile acts” applied to preclude coverage given suspicions that Not Petya was produced by Russian state actors and allegedly launched against Ukraine due to ongoing conflicts there.
 - Merck argued that the origins of Not Petya were not clear and that the insurers could not meet their burden under New Jersey law (and principles of policy interpretation generally accepted in the U.S.) to show that the exclusion, narrowly construed, applied to preclude coverage.

A. 1) Loss or damage caused by hostile or warlike action in time of peace or war, including action in hindering, combating, or defending against an actual, impending, or expected attack:

a) by any government or sovereign power (de jure or de facto) or by any authority maintaining or using military, naval or air forces;

b) or by military, naval, or air forces;

c) or by an agent of such government, power, authority or forces;

This policy does not insure against loss or damage caused by or resulting from Exclusions A., B., or C., regardless of any other cause or event contributing concurrently or in any other sequence to the loss.

- ***Merck & Co. & Int’l Indem., Ltd. v. ACE Am. Ins. Co.***, Order on Cross-Motions for Partial Summary Judgment (N.J. Super. Ct., Union Cty., (Dec. 6, 2021))
 - Held: traditional war exclusion does not bar coverage under “all-risks” property policy for damage from NotPetya malware. Court concluded, relying on dictionary definitions:
 - “Warlike” has only one reasonable meaning and requires actions between nation states.
 - “Hostile” means “characteristic of an enemy,” a point not clearly supported under these facts.
 - [Commentators](#) have focused on “silent cyber” coverage for physical loss caused by cyber peril:
 - “It is noteworthy that the policy at issue is an ‘all-risk’ property policy, not a cyber policy. ... The ruling makes clear that ‘silent cyber’ coverage may exist in traditional non-cyber policies.”
 - “The Merck ruling will further prompt carriers to revisit their policy wording to address and exclude today’s cyber risks.”
 - Expect new “cyberwarfare” exclusions expressly excluding similar future events?

- ***Mondelez Int'l, Inc. v. Zurich Am. Ins. Co.***, No. 2018-L011008 (Ill. Cir. Ct., Cook Cnty. filed 10 Oct. 2018)
 - Loss:
 - 22 and 27 June 2017: Mondelez servers were incapacitated by “Trojan Horse” Not Petya viruses, one that was activated on 22 June and shut down one set of servers, a second on 27 June that shut down another set of Mondelez servers, rendering both totally dysfunctional.
 - Overall loss exceeded US \$100,000,000.
 - Mondelez submitted claim under Zurich first-party property “all risk” insurance policy specifically agreeing to cover “physical loss or damage to electronic data, programs, or software, including physical loss or damage caused by the malicious introduction of a machine code or instruction”
 - After receiving prompt notice, Zurich initially agreed to advance payment of US \$10,000,000. Thereafter:
 - On 1 June 2018, Zurich denied coverage in reliance on a “war or hostile action” exclusion.
 - On 18 July, Zurich then “rescinded” 1 June denial, possibly due to March 2018 Zurich statements that Not Petya/WannaCry were “ransomware” attacks (§ 12, Complaint).
 - On 9 October 2018, Zurich “reasserted” denial with no new facts but adding defenses.

1. This Policy excludes loss or damage directly or indirectly caused by or resulting from any of the following regardless of any other cause or event, whether or not insured under this Policy, contributing concurrently or in any other sequence to the loss:

- a) hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack by any:
 - (i) government or sovereign power (de jure or de facto);
 - (ii) military, naval, or air force; or
 - (iii) agent or authority of any party specified in i or ii above.

- Scheduled for trial in Illinois state court beginning October 2022 based on complaint filed in October 2018
- Jury trial with two issues:
 - Application of “war/hostile acts” exclusion based on allegations that conflicts between Russia and Ukraine in 2017 brought claim under war exclusion.
 - Number of policy limits applicable given that there were two separate releases of Not Petya virus shutting two separate sets of servers. Policy defines “occurrence” as a “discrete event” (as reported by counsel).

[Policy excludes loss] Caused by or resulting from . . . hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack by any:

- (i) government or sovereign power (de jure or de facto);
- (ii) military, naval or air force; or
- (iii) agent or authority of any party specified in i or ii above.

War Exclusion at Issue in Landmark *Pan Am* Decision

Excludes coverage for loss/liability from:

1. capture, seizure, arrest, restraint or detention or the consequences thereof or of any attempt thereat, or any taking of the property insured or damage to or destruction thereof by any Government or governmental authority or agent . . . or by any military, naval or usurped power, whether any of the foregoing be done by way of requisition or otherwise and whether in time of peace or war and whether lawful or unlawful[;]
2. war, invasion, civil war, revolution, rebellion, insurrection or warlike operations, whether there be a declaration of war or not . . .;
3. strikes, riots, civil commotion.

Pan Am World Airways v. Aetna, 505 F.2d 989, 994 (2d Cir. 1974).

This insurance does not apply to . . .

‘Bodily injury’ or ‘property damage’ arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war; or
- (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; or
- (4) ‘Terrorism’, including any action taken in hindering or defending against an actual or expected incident of ‘terrorism’ regardless of any other cause or event that contributes concurrently or in any sequence to the injury or damage.”).

ISO, 2001, Form CG 21 69 01 02 (“War or Terrorism Exclusion”).

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