

The Combative War Exclusion: Past, Present, Future; Theory and Practice

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Insurance in Times of War: War and Cyber Exclusions

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War and Risk

- Insurance operates on a few basic axioms, *e.g.*:
- Accepted Risk Needs to be Pooled;
- The Pooled Risk Should Be (Mostly) Uncorrelated
- Regularity is the Insurer's Friend;
- Investment Income is an Important Element of Profit – even if company underwriting is good -- and becomes essential if there are underwriting losses;
- Paying out claims gradually is better than paying rapidly or in large “clumps”;

War Disrupts Assumptions Because It:

- Can be Widespread – and Correlates Risk;
- Deviates From the (ordinarily peaceful) Norm;
- Can be Acute – inflicts “mass” destruction (on correlated risk) in a short time;
- Creates a groundswell of demand for immediate payment;
- Undermines Investment Operations;
- Impedes careful, deliberate claims adjustment;

War as Part of a Constellation of “Mega-Risks”

- Because of its disruptive impact, War is considered a sufficiently dangerous Mega-Risk that it must be excluded, sub-limited, or subject to substantially increase premium. Other Examples:
- Flood;
- Earthquake;
- Nuclear Disaster;
- Pandemics;
- Government Edicts



War Not a Total Bar to Coverage

- The famous *Carter v. Boehm* case was one arguably resulting in coverage for war-related loss: French privateers take over East India Company factory at Fort Marlborough, Bencoolen, Sumatra.
- Perhaps not “total” war but part of a “forever” war as great powers struggle for supremacy. Claimant Roger Carter actually taken prisoner.
- *Carter v. Boehm* remembered for doctrine (*uberimae fidei*) more than its facts -- Lord Mansfield actually found coverage and rejected a non-disclosure rescission defense but did so giving insurers a strong disclosure doctrine requiring utmost good faith

Insurance and War's Ancient Days

- Concerns about Privateering; Piracy part of the mix
- Sometimes fought on other doctrinal grounds (*e.g.*, insurable interest in *Lucena v. Crawford*)
- Express War Exclusions somewhat slow in coming to land-based insurance risks
- And not really part of the Lloyd's culture – in the what might be termed the “Coffeehouse Days,” War Risks were a part of marine transport and an “ordinary” risk of shipping
- **Sea Risk** and **War Risk** not really separated at the time
- *See, e.g.*, “Colbert’s Ordinance” in France (1681) and its “rule” that maritime policies would include losses from hostilities. Continued in 1807 law

War Exclusion History (con't)

- Lloyd's introduces specific war risk coverage (not exclusion) in 1779 (implies increased use of exclusions in ordinary policies): 15 enumerated perils; 11 specifically touching on war, piracy, violence
- Some form of War Exclusion appears more frequently in policies from 1840 onward
- Ironically perhaps a consequence of less of a “forever war” world. Reduced warring changes the equation on regularity, predictability, law of large numbers
- Also, increase in value of ships and cargo made risk without a War Exclusion less attractive
- Legislatures shift in views

The First Wave of the Exclusion

- The Exclusion becomes rather firmly established for land-based property insurance by the late 19th Century or early 20th Century (in time for World War I and its mass casualties and destruction – magnified in World War II).
- Use hastened by Spanish Civil War that featured substantial injury to civilian populations and property.
- But courts construe war and war exclusions narrowly – reflected in U.S. Civil War cases: *Ionides v. Universal Marine Ins. Co.*, 143 Eng. Rep. 445 (C.P. 1863)(exclusion not applicable for loss where ship runs aground because Confederate forces extinguished Cape Hatteras, North Carolina lighthouse); *The Brig Amy Warwick*, 67 U.S. 635, 666 (1862)(war is “That state in which a **nation** prosecutes its right **by force**”).
- *Welt v. Conn. Mut. Life Ins. Co.*, 48 N.Y. 34 (1871)(death during railway robbery by uniformed perpetrators not excluded as perpetrators could not be sufficiently identified as soldiers).
- Similar restraint in applying expanded exclusions that apply to “civil commotion” “insurrection” and the like



“Modern” Case Law Continues Trend of Narrow View of Exclusion

- *Queen Ins. Co. v. Globe & Rutgers Fire In. Co.*, 263 U.S. 487 (1924)(U.S. Supreme Court rejects exclusion when two ships collide even though both ships were part of convoys of military supplies) – but no military ships involved.
- *Stinson v. N.Y. Life Ins.*, 167 F.2d 233 (D.C. Cir. 1948)(soldier’s death in fall after end of hostilities not barred from coverage).

A Preference for Policyholders

- “Courts will relegate the war exclusion to a nonperforming role if it can be shown that damage to covered Property can otherwise be attributed to some specified cause of loss.”
- Susan Massmann, *War Risk Exclusion Legal History Outline*, FC&S On Lines Column, NAT’L UNDERWRITER (Property & Casualty ed.) p. 40 (Sept. 24, 2001) at p. 45

But the Exclusion is Not Always Inapplicable – Sometimes War is War

- *Magoun v. New England Marine Ins. Co.*, 16 F. Cas. 483 (C.C. Mass. 1840)(seizure of ship by foreign government excluded); *Standard Oil Co. v. U.S.*, 267 U.S. 76 (1925) (seizure by foreign government excluded)
- *Vanderbilt v. Travelers' Ins. Co.*, 184 N.Y.S. 54 (N.Y. 1920)(exclusion in life insurance policy enforced in death of soldier in war); *Stankus v. N.Y. Life Ins. Co.*, 44 N.E. 2d 687 (Mass. 1942)(same); *N.Y. Life Ins. Co. v. Bennion*, 158 F.2d 260 (10th Cir. 1946)(battleship captain's death at Pearl Harbor excluded from life insurance policy); *Caruso v. John Hancock Mutl. Life Ins. Co.*, 53 A.2d 222 (N.J. 1947)(similar result). *But see Pang v. Sun Life Assur. Co.*, 37 Haw. 208 (1945)(death of off-base, non-military fireman due to Pearl Harbor bombing not subject to War Exclusion).

Results Mixed If Victim in Military but Death Not Result of Soldiering

- Death of soldiers from the 1918 Influenza Pandemic (a/k/a the “Spanish Flu”)(American diversion-speak) produced different case results. *See Coit v. Jefferson Standard Life Ins. Co.*, 168 P.2d 163, 164 (Cal. 1946)(collecting cases).
- The Exclusion becomes rather firmly established for land-based property insurance by the late 18th or 19th Century

A Functional Approach

- *Carson v. Equitable Life Asur. Soc.*, 317 A.2d 474 (Conn. Super. Ct. 1973)(no coverage for soldier's death on reconnaissance patrol in Vietnam (a war zone) during the time cease fire was supposed to be in effect)
- *Goodrich v. John Hancock Mut. Life Ins.*, 234 N.Y.S. 587 (N.Y. App. Div. 1962)(Korean conflict clearly "war" within meaning of exclusion – soldier's death came from accidental discharge of weapon rather than enemy combat but still was sufficiently incident to military service)(but case remanded on issue of whether exclusion sufficiently prominent in life insurance policy).
- *See also* Jason B. Libby, *War Risk Aviation Exclusions*, 60 J. AIR L. & COMM. 609 (1994).

Footnote re Insurrection, Riot Cases

- *Home Ins. Co. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954)(Puerto Rican unrest essentially excluded civil “war”)
- *Hamdi & Ibrahim Mango Co. v. Reliance Ins. Co.*, 291 F.2d 437 (2d Cir. 1961)(Conflict of Arabian and Jewish militias for control sufficient “war” to exclude cargo loss claims stemming from mortar fire in Haifa)
- *Wilder Bros. v. Lumberman’s Mut. Cas. Co.*, 529 F. Supp. 133, 116 (S.D.N.Y. 1981)(Nicaraguan Sandinista-Somoza conflict sufficiently “civil war” for losses to be excluded).
- *North Bay School v. Indus. Indem. Co.*, 10 Cal. Rptr. 2d 88 (Cal. Ct. App. 1992) (vandalism of school by juvenile delinquents not “riot” loss subject to exclusion).



And Don't Forget Evel Knievel (We Know of No EU Equivalent)

- a/k/a Robert C. Knievel, America daredevil with mixed successes – including failed 1974 attempt a 400-meter motorcycle/rocket jump over the Snake River Canyon in Idaho.
- Promoter purchased liability insurance
- Restless crowd impatient with delay (and hungry/thirsty) looted the concession stands. Vendors sue Knievel & promoters for inadequate security
- Insurer successfully avoided coverage on basis of riot or “civil commotion” exclusion. *See Foremost Ins. Co. v. Putzier*, 606 P.2d 987 (Idaho 1980).
- *But see Foremost Ins. Co. v. Guanche*, 627 P.2d 317 (1981)(one vendor able to sustain a property insurance claim by contending agent statements created reasonable expectation of coverage) (a high water mark of U.S. Court sympathy for policyholder)



Renewed Battles

- *Pan American World Airways v. Aetna Cas. & Sur. Co.*, 505 F.2d 989 (2d Cir. 1974)(applying New York law)(hijacking by militant Palestinians not subject to general War Exclusion).
- *Holiday Inns, Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460 (S.D.N.Y. 1983)(War Exclusion does not thwart hotel coverage even though hotel was battleground in Lebanese civil war).
- *TRT/FTC Comm. v. ISCOP*, 847 F. Supp. 28 (Del. 1993)(armed robbery during U.S. military action against Panamanian strongman Manuel Noriega sufficiently war-related loss to be excluded because of disruption by military action). *But see* *Sherwin-Williams Co. v. ISCOP*, 863 F. Supp. 542 (N.D. Ohio 1994)(Looting losses in Panama not subject to exclusion).
- *Int'l Rescue Comm. v. Reliance Ins.*, 646 N.Y.S.2d 112 (N.Y. App. Div. 1996)(question of fact whether Somalia “at war” during *Black Hawk Down* unrest)

Turn of the Century Quiescence

- Not really an issue with 9/11 Attack(s): facing a public relations concern combined with generally unfavorable case law, insurers declined to deny coverage using War Exclusion
- *See generally Stempel, The Insurance Aftermath of September 11: Myriad Claims, Multiple Lines, Arguments Over Occurrence Counting, War Risk Exclusions, the Future of Terrorism Coverage, and New Issues of Government Role, 37 TORT & INS. L. J. 817 (2002).*
- Recognition that excluding terrorism, vandalism, crime (even if geo-politically motivated) requires more specificity than in general War Exclusion

Terrorism Exclusions Get Attention

- Widespread use after the 9/11 Attacks
- But some limited coverage via TRIA (Terrorism Risk Insurance Act)
- Originally enacted in 2002; Renewed in 2005, 2007, 2015 and 2019 (expiring at end of 2027 unless renewed)
- Requires offering of terrorism coverage as separate cover with national government reinsurance backing available
- But does not limit price – Purchase Sporadic
- But that's in large part because Terrorism differs from War (at least traditional War and traditional Terrorism) in terms of risk exposure
- See Helen M. Benzie, *War and Terrorism Risk Insurance*, 18 ST. JOHN'S J. LEG. COMMENTARY 427 (2004)

Still Issues of Line-Drawing for Traditional Use of War Exclusion

- *Universal Cable Products, LLC v. Atlantic Specialty Ins. Co.*, 929 P.3d 1143 (9th Cir. 2019)(applying California law)
- Interruptions of television mini-series *Dig* due to local Jerusalem violence not “war”
notwithstanding political/territorial tensions between Israel and Palestine
- But remands on the question of whether the unrest constituted “insurrection, rebellion, or revolution”



The “Dig” Exclusion Typical (Even if Policy Was Not)

- For the period from January 1, 2014, to June 30, 2015, Atlantic issued a television production insurance policy to Universal. The Policy covered losses that are "a direct result of an unexpected, sudden or accidental occurrence entirely beyond your control to include . . . [i]mminent peril, defined as certain, immediate and impending danger of such probability and severity to persons or property that it would be unreasonable or unconscionable to ignore." The Policy, which was negotiated before December 2013, covered loss caused by terrorism if that loss was not otherwise excluded.
- The relevant exclusions for analysis are four war-related exclusions:
 - 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 the governmental authority in hindering or defending against any of these. Such loss or damage is excluded regardless of any other cause or event contributed concurrently or in any sequence to the loss.
 - 4. *Any weapon of war* including atomic fission or radioactive force, whether in time of peace or war

Cyberwar and Change (Maybe)

- *Merck & Co. v. Ace American Ins. Co.*, (N.J. Superior Court Case No. L-002682-18)(decided Jan. 13, 2022) finds cyber attack not to be excludable loss pursuant to standard war risk exclusion. Review pending before N.J. Supreme Court.
- Even though the NotPetya hackers appear associated with the Russian government. See Andy Greenberg, SANDWORM: A NEW ERA OF CYBERWAR AND THE HUNT FOR THE KREMLIN'S MOST DANGEROUS HACKERS (2019)
- See generally Josephine Wolff, “Cyberwar by Almost Any Definition”: *NotPetya, the Evolution of Insurance War Exclusions, and Their Application to Cyberattacks*, 28 CONN. INS. L.J. 85 (2021)
- *Merck v. Ace* generally viewed as rightly decided but some controversy
- Surely not the last of the issue. See Lorelie S. Masters & Yaniel Abreu, *The War Exclusion Will Be a Leading Issue in the Months and Years Ahead*, HUNTON INSURANCE RECOVERY BLOG (March 16, 2022) – and upcoming Masters presentation in this ATILA Lecture



A Move to More Specific Exclusions Likely – and They Are Available

- Lloyd's Non-Marine Association 5564: all losses arising from cyber operations excluded
- LMA 5565: coverage with specific limits for losses that do not stem from “retaliatory” hacking by China, Russia, France, Germany, Japan, UK or USA Along with hacking that has a “major detrimental impact” on a government’s security, defense or “essential services.”

More More Specific Exclusions

- LMA 5566 – Same scope as LMA 5565 but with no specified limits/sublimits
- LMA 5567 – also covers impact on “bystanding cyber assets” and these are defined as “a computer system used by the insured or its third-party service providers that is not physically located in an impacted state but is affected by a cyber operation”

But Will They Be Used?

- The *Pan Am* Problem: one pillar of the Court's determination of coverage was that Exclusions for Hijacking, etc. were available but were not used by the Pan Am insurers.
- Does failure to use a more specific exclusion (e.g., terrorism, politically motivated crime) prevent more insurer-favorable judicial interpretation of a general exclusion?
- Or are the greater insurance industry concerns economic rather than legal? Will more use of more specific exclusions make policies harder to sell?

What Future for War Exclusions?

- More targeted use of exclusions seems inevitable
- Replication of the post 9/11 experience
- Fueled by the more recent problem of arguably government-supported (or at least government-tolerated) hacking
- The War Exclusion will still be with us
- But probably with plenty of perhaps expanded references to “civil commotion” and its cousins
- With specific “Cyber War” exclusions
- And (if you can afford them) specialized policies for coverage akin to political risk insurance.

Risk Management and Public Policy Concerns

- How difficult is the Cyberwar risk compared to others short of traditional war?
- If sufficiently sufferable, insurers would logically allow policyholders to “buy their way out” of exclusions, at least in part.
- Through higher retentions, policy sub-limits, higher premiums
- And similarly should be willing to sell target coverage akin to pollution liability insurance, pandemic insurance, political risk insurance.
- Maybe even a secondary market after the loss occurs but while resolution and calculation of final cost remains open
- But if the Cyberwar is as disruptive of insurance assumptions as traditional war, perhaps it becomes a latter-day asbestos or pollution with coverage only available through specific policies in “hard market” economics

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Questions

