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and
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A commentary article reprinted from the June 7, 2013 issue of Mealey's Litigation Report: Reinsurance

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Commentary

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2012 saw one reinsurer twice fight over the number of World Trade Center losses. Two arbitration panels convened. One found one loss, the other found two. For disputes with so much in common, they make for an interesting contrast on the question of whether the losses were caused by hijack.

I. Aioi's One-Event Position

Aioi Nissay Dowa Insurance Co., Ltd. reinsured low-level catastrophic risks in the aviation market. It consistently asserted that the WTC loss was one event under all of its contracts. Challenging this position were two of Aioi's cedants, Heraldglen Ltd. and ProSight Specialty Management Co. Heraldglen's contract contained the aggregation clause LSW 351, which combined losses to the extent they were a series of losses "arising out of one event." ProSight's contract contained the aggregation clause LSW 339, which, for "perils as stipulated in paragraph (g) of clause AVN.48B," made one loss out of "the total of all losses . . . which arise out of or follow from each act of hijack separately." For all losses arising from the other perils stipulated in clause AVN.48B, LSW 339 made one loss out of all losses "which occur during any one period of 24 consecutive hours and within a radius of 10 miles." Clause AVN.48B is an exclusion disclaiming cover for "claims caused by" "(d) Any act . . . for political or terrorist purposes" or by "(g) Hi-jacking or any unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight."

Aioi and its cedants had differing views of the WTC attack. In the cedants' view, two separate aircraft were hijacked and crashed into a different Twin Tower, each of which fell on its own. In Aioi's view, terrorists planned and executed an attack against America by coordinating hijackings to destroy the World Trade Center.

II. Heraldglen's Position That The WTC Losses Did Not Arise From One Event

A British panel decided Heraldglen's dispute in favor of two events. English law applied, and therefore this panel considered the "unity" of cause, locality, time, circumstances and purposes of the persons responsible for the WTC attack.

This method is founded in a famous 1972 arbitral opinion that considered the number of losses at Dawson's Field. In a four-day period in 1970, a Palestinian group, the PFLP, hijacked four planes, all of which had departed from different cities. The PFLP flew one to Cairo and the rest to a Jordanian locale known as Dawson's Field. By the time each of the three planes arrived at Dawson's Field, or shortly thereafter, the PFLP packed it with explosives. The planes were parked

next to each other, with at least two connected by wires the PFLP ran between them. Frustrated in their negotiations for the release of prisoners, the PFLP emptied the planes of their passengers and blew up the planes. It exploded the three at Dawson's Field in five minutes. Explosives on one of the planes may not have detonated with the rest, and the PFLP might have used small-arms fire to explode that plane.

The Dawson's Field arbitrator found that the destruction of the three planes arose out of one event: He concluded that the aircraft were destroyed by an order to detonate the explosives being carried out without anyone being able to approach the aircraft between the first explosion and aircrafts' destruction. The execution of an order to blow them up together was one event, even though all the aircraft were not exploded simultaneously.

In considering the WTC loss, the Heraldglen panelists put themselves in the position of an informed observer who witnesses all of the events on both planes from the terrorists' check-in at Boston's Logan airport through the planes' collisions with the Towers. They assumed the observer would be aware of the facts as they are now known, not as they might have appeared to the observer witnessing all of these events on September 11. The panelists noted two hijackings of separate aircraft that then collided into two different buildings. They deemed the timing of the events of each flight not so similar as to compel a conclusion of one occurrence, noting that if measured by the first in-flight injuries and deaths through the collapse of each Tower, Flight 11 was twice as long as Flight 175. They discounted the common plan that plotted the hijacks and crashes, as the parties agreed that a plan alone is not an event. The panel concluded that an "independent objective observer [first] watching each of the hijackings and then death and personal injury on board would have concluded that there were two separate hijackings" and then watching the WTC "would have observed two aircraft flying into the Twin Towers and would clearly have in his mind two incidents." Thus the loss did not "arise from one event."[1]

III. ProSight's Position That The WTC Losses Were Caused By Hijacking

An American panel decided ProSight's dispute in favor of one event. As this panel viewed the dispute, the issue was whether the WTC losses arose out of the hijacking peril or the terrorism peril. Undoubtedly, they arose from terrorism. The closer question was whether they should be properly characterized as having arisen from the hijacking peril. At the time the AVN 48 form came into the market, the hijacking peril included the destruction of airplanes and the murder of passengers. The panel decided that the form did not extend the hijacking peril to encompass "large scale intentional ground losses arising from 'a complex international terrorist operation to inflict catastrophic harm' upon third party property by 'using hijacked aircraft as weapons' to destroy such property." The panel therefore applied LSW 339's 24-hour, 10-mile boundaries to conclude that the WTC losses amounted to one event only.

IV. Two Different Kinds Of Hijack

Perhaps it seems these panels are at odds with each other. While the Heraldglen panel found that "two separate hijackings caused separate loss and damage," the ProSight panel concluded that, though the aircraft were hijacked, the WTC loss was not caused by hijack. The difference in outcomes can be attributed to the difference in language: one event when the language defined the issue as a choice between terrorism or hijack; two when the losses could be accumulated only if they "arose out of one event."

In essence, the two panels considered the hijackings in two different natures. The Heraldglen considered hijack as an act in and of itself. When called to locate an event from which the WTC losses sprang, the Heraldglen panel could not see unity in taking two planes and smashing them into neighboring buildings. The cause the panelists saw for losses from an attack on one tower was the taking of the aircraft that hit it, and the cause they saw for losses from the attack on the other tower was the taking of the other aircraft that hit it. That taking they described as hijack. They would have been equally right to call each taking an act of terrorism, and whatever they called it, it would not have changed their decision.

The ProSight panel considered hijack as an instrument of a purpose. It did not matter whether the panel believed the WTC losses to arise from one event or two. The panelists had to decide whether the concept of hijacking or the concept of terrorism was the purpose of the acts leading to the losses. The number of events would be one per 24-hours within a 10-mile radius once the panelists decided whether the cause was

terrorism and not hijacking. What they called the cause made all the difference.

Endnotes

1. This result is not inconsistent with the Second Circuit's opinion in *World Trade Center Properties v. Hartford Fire Insurance Co.*, 345 F.3d 154 (2d Cir. 2003), which found one occurrence under first-party property insurance. That insurance defined "occurrence" to accumulate "all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes." The Second Circuit reasoned that "no finder of fact could reasonably fail to find that the intentional crashes into the WTC of two hijacked airplanes sixteen minutes apart as a result of a single, coordinated plan of attack was, at the least, a 'series of similar causes.' " *Id.* at 180. If that were not enough, the Second Circuit cast doubt on whether its opinion is helpful to resolve third-party insurance disputes such as Heraldglen's: the Second Circuit deemed an analysis of "occurrence" in a third-party case to begin with the acts for which the insured it held liable, which acts are not at issue in a first-party case. *Id.* at 187-88.

   A jury found two occurrences upon considering WTC property insurance that accumulated one "occurrence" from any series of losses "arising out of one event." *SR Int'l Business Ins. Co. v. WTC Props.*, 467 F.3d 107 (2d Cir. 2006). ■

MEALEY'S LITIGATION REPORT: REINSURANCE
edited by Andrew McCue
The Report is produced twice monthly by

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Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1049-5347