Global Business & Development Law Journal

Volume 17
Issue 1 *Symposium Bordering on Terror Global Business in Times of Terror -- The Legal Issues*

Article 13

1-1-2004

Panel Two: Liability -- Shifting the Balance of Terror

Lucien J. Dhooge
University of the Pacific, Eberhardt School of Business

Panel Two: Liability—Shifting the Balance of Terror

Commentary by Lucien J. Dhooge*

Thank you. Let me start by thanking the University of the Pacific, McGeorge School of Law for the opportunity to participate in this seminar. It is an honor to be here.

My topic this afternoon is the issue of liability with respect to the destruction of the World Trade Center as a result of the events of September 11, 2001. One of the many issues arising from the events of that day is whether the attacks constituted one or two occurrences for insurance purposes. This issue is presently headed for resolution in the U.S. Court of Appeals for the Second Circuit. In deciding to hear this case, the court noted that "[t]here was substantial ground for differences of opinion as to whether the planes each represented a separate occurrence for insurance purposes."

A short summary of the facts is in order. A group of entities assumed control of the World Trade Center properties in July 2001 as tenants pursuant to leases with the Port Authority of New York and New Jersey. These leases had ninety-nine year terms with annual rent in excess of $107 million. The tenants' obligations increased to $143 million when $36 million in debt service attributable to financing associated with acquisition of the leases was included. The leases were valued at $3.2 billion.

The tenants subsequently employed a broker to obtain insurance coverage. The estimated replacement cost of the World Trade Center at that time was $5 billion. The lessees ultimately obtained insurance coverage for $3.5 billion. Incredibly, the lessees initially expressed interest in a lesser amount of insurance, but their lenders insisted on at least $3.5 billion of coverage. The initial binder issued for the complex defined the term "occurrence" as all losses or damages attributable directly or indirectly to one cause or a series of similar causes. However, in e-mails exchanged between the broker and prospective insurers in late July 2001, this definition was allegedly deleted. In its place, the parties allegedly agreed to utilize the definition of the term "occurrence" as it exists pursuant to applicable New York law. If true, this is a crucial fact as New York law has some very different things to say about what constitutes a single occurrence.

---

* Associate Professor, University of the Pacific, Eberhardt School of Business, specializing in ethics, international business and real estate law. Before joining Pacific, Professor Dhooge spent eleven years in the practice of law with the Federal Trade Commission in Washington, D.C. and with private firms in Denver, Colorado. In addition to classroom instruction, Professor Dhooge has authored pieces on constitutional law, international law and ethics. The Academy of Legal Studies in Business recently named him the best junior business law professor in the United States.

The lack of certainty of the term "occurrence" for purposes of triggering a claim is striking. In this case, we have lessees, financial institutions and insurance companies involved in multi-billion dollar transactions without having all of the pieces of the insurance puzzle in place. In any event, based upon applicable New York law, the lessees subsequently claimed that the events of September 11th were two separate occurrences entitling them to $7 billion in recovery from their insurers. This issue is currently being litigated as well as numerous other issues arising from the attacks. In this regard, the destruction of the World Trade Center serves as a lesson for insurance companies: whatever can go wrong will, and has in this case.

This case also speaks to the need for certainty in the drafting of insurance policies. Applying the initial definition set forth in the parties' agreement, it is clear that there is one occurrence for insurance purposes. This conclusion is based upon a number of factual similarities, specifically, departure of the flights from the same airport in Boston, the same destination (Los Angeles) and involvement of individuals from the same organization (Al-Qaeda) with the same result.

However, the application of New York law results in a very different conclusion. New York law utilizes a four-factor test to determine if there is one occurrence or multiple occurrences for insurance purposes. The first factor is whether there was a common origin. Specifically, the issue is whether there was a single continuous event resulting in the loss. It may very well be contended that there is more than one single continuous event here. After all, there were separate instrumentalities of destruction, specifically, separate airplanes, airlines and groups of hijackers, different times at which the hijackings occurred, and the airplanes subsequently impacted the buildings.

The second factor is causation. There must be an unbroken causal chain resulting in injury. The results are unclear when applying this factor to the World Trade Center. Certainly, there were common elements before the attack, including a common criminal conspiracy. However, the ultimate cause of the loss, the fires that weakened the infrastructure of the buildings causing their collapse, was sparked at different times by different airplanes seized by different groups of people. Furthermore, although the buildings were part of a larger complex, they were geographically separate. There is also no evidence to date suggesting that the collapse of one of the twin towers caused the collapse of the adjoining tower.

One case of considerable significance is the Second Circuit Court of Appeals' holding in *Newmont Mines, Ltd. v. Hanover Insurance Company*.[1] In this case, the Second Circuit held that the collapse of separate sections of the roof of one building occurring at separate times as the result of a common cause (excessive snow) constituted two separate occurrences. The facts in this case are not unlike those involving the World Trade Center, specifically, two buildings

1. Newmont Mines, Ltd. v. Hanover Ins. Co., 784 F.2d 127 (2d Cir. 1986).

within the same complex collapsing at different times as a result of a common criminal enterprise.

The third factor is the geographic relation of the properties. In order to be deemed a single occurrence, New York law provides that the events cannot be widely separated. Applicable case law does not define what is a "wide separation" sufficient to render a single event multiple occurrences for insurance purposes. Interestingly, the leading opinion on this issue comes from the New York Court of Appeals in the 1959 case of *Arthur A. Johnson Corporation v. Indemnity Insurance Company*.[2] In that case, the sub-basements of two adjoining buildings flooded as a result of the breach of temporary walls erected during construction. The buildings flooded at separate times, albeit, as a result of the same cause, specifically, the failure of the temporary walls to restrain water. Despite their proximity, the sharing of a common wall and the instrumentality common in their damage, the court held that the buildings were geographically separate. If one applies this reasoning to the World Trade Center, it is difficult to conclude that they are geographically inseparable, thus rendering their destruction a single occurrence.

The final factor is the temporal relationship of the losses. Specifically, losses widely separated in time are separate occurrences for insurance purposes. As in the case of geographic relation, there is no clear judicial definition of what constitutes a wide separation in time. In *Hartford Accident & Indemnity Company v. Wesolowski*,[3] decided in 1973, the New York Court of Appeals held that multiple losses occurring within seconds of one another in an automobile accident arise from a single occurrence. On the other end of the spectrum, in *Stonewall Insurance Company v. Asbestos Claims Management Corporation*,[4] decided in 1995, the Second Circuit Court of Appeals held that multiple exposures to asbestos occurring over a fifty-one year period are temporally separate as to constitute multiple occurrences. These holdings are not of much guidance. A fifty-one year period of time is chronologically distinct as to constitute two separate occurrences, but events within seconds of one another constitute a single occurrence. So where does the World Trade Center case fit?

The answer may lie in the *Johnson* case. In *Johnson*, the collapses of the walls that ultimately caused the flooding of the adjoining buildings occurred fifty minutes apart. The court found this temporal separation sufficient to constitute two separate occurrences. The result still remains unclear applying this reasoning to the World Trade Center. The strikes upon the towers were separated by twenty-one minutes. Their ultimate collapses occurred twenty-nine minutes apart. Despite this uncertainty, I would submit that a distinction between fifty minutes constituting two occurrences and twenty-one or twenty-nine minutes

2. Arthur A. Johnson Corp. v. Indem. Ins. Co., 164 N.E.2d 704 (N.Y. 1959).
3. Hartford Accident & Indem. Co. v. Wesolowski, 305 N.E.2d 907 (N.Y. 1973).
4. Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178 (2d Cir. 1995).

constituting one occurrence is legal hairsplitting. I remain unconvinced that the resolution of a $3.5 billion question should turn on the basis of a twenty minute difference in time, especially given the application of the three previous factors.

Finally, there is a presumption in insurance cases favoring one occurrence in mass tort cases. This presumption serves to maximize recovery by adding claims together in order to quickly reach the level of any applicable deductible. A finding of multiple occurrences makes such a result more difficult as each individual claim would be required to meet the deductible in order to be payable. However, this presumption does not serve to maximize recovery for the lessees in the World Trade Center case. Rather, concluding that there were two separate occurrences maximizes recovery. This approach increases the lessees' total recovery from $3.5 billion to $7 billion. Given that the parties apparently did not answer these difficult issues for themselves, it remains to be seen what remedy the U.S. Court of Appeals for the Second Circuit will craft for them. Thank you.