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Potential Claim and Insurance Implications of the Boston Marathon Bombings Webinar

QUESTIONS & ANSWERS

Q: Who ultimately deems an alleged terrorist event "certified"?

A: In order for an event to be a certified "act of terrorism" under TRIA (as amended), it must be certified as such by the Secretary of the Treasury Department, Secretary of State and Attorney General.

In order for an act to qualify for an "act of terrorism" under the statute, the act must meet several qualifications, including the following:

i. it must be an act of terrorism;
ii. it must be a violent act or an act that is dangerous to human life, property or infrastructure;
iii. it must have resulted in damage within the U.S. (or an a U.S. air carrier or vessel or on a U.S. mission);
iv. it must have been committed by an individual or individuals as part of an effort to coerce the civilian population of the U.S. or to influence the policy or affect the conduct of the U.S. government by coercion; and
v. property and casualty losses resulting from the act must exceed $5,000,000 in the aggregate.

TRIA (as amended), Section 102(1). You can view the entire amended statute by clicking here.

Q: Is there a time frame for certification under TRIA to take place? How long can insurance companies delay paying claims while waiting for certification or non-certification?

Q: How long does the government have to declare the incident an act of terrorism or not?

A: There is no precedent for an event like this – TRIA was initially enacted in 2002 after the events of September 11 and (fortunately) has never been tested or utilized.

We do note that TRIA, as amended, states that "[t]he Secretary shall provide an initial notice to Congress not later than 15 days after the date of an act of terrorism, stating whether the Secretary estimates that aggregate insured losses will exceed $100,000,000,000." (TRIA (as amended), Section 103(e)(3).)

This issue is not just a TRIA issue, but is also an issue for the Massachusetts Division of Insurance (DOI), in light of the guidelines and regulations the DOI issued regarding claims processing procedures. The DOI and the Department of

Treasury can provide guidance regarding the interpretation and application of the statutory language and guidelines and may offer recommendations for implementing the statute in the wake of this tragedy.

Q: With regard to the man-hunt, was there an "order" issued by the government to close activities on Friday, April 19, 2013, or was the suspension of activities merely "advised"?

A: A "Shelter-in-Place" alert was issued by the City of Boston, Massachusetts State Police and Massachusetts Governor Deval Patrick on Friday, April 19, 2013 due to the ongoing manhunt. While it was referred to by the media as an "order," the facts do not necessarily support the use of this term. To our knowledge, no formal written order was issued in connection with the Shelter-in-Place alert. In addition, the government's communications concerning the manhunt, which were disseminated almost exclusively through social media and the press during televised statements, indicate that the alert was an advisory. For example, various government agencies, including the Massachusetts Emergency Management Agency (MEMA), referred to it as the "Shelter-in-place request" or "shelter-in-place advisory," noting that area residents were "advised to stay indoors," that they "should stay in their residences" and "should not congregate outside," and that a "city-wide shelter in place [was] advised." In light of these pronouncements, the Shelter-in-Place alert appears to be an advisory.

Q: Although they concern different insureds and policies, can you reconcile event cancellation coverage, where loss is due to a cancellation of which the cause is beyond the control of the insured, and CGL coverage, where liability will endeavor to attach based on control? One could prove the other, or bar coverage.

A: A typical event cancellation policy might provide: "This Insurance is to indemnify the Insured for their Ascertained Net Loss should any Insured Event(s) be necessarily Cancelled, Disrupted, Rescheduled which necessary Cancellation, Disruption or Rescheduling is the sole and direct result of a cause not otherwise excluded which occurs during the period of insurance and is beyond the control of both the Insured and the Participant therein [where "Participant" means any party who is contracted by the Insured to perform a function critical to the successful fulfillment of the event]." (emphasis added).

As applied to the Boston Marathon event itself, it is at least conceivable that an insured with event cancellation coverage for this event might also have exercised "control" over the conditions of the event for purposes of establishing its liability as, for instance, an event sponsor. If the exercise (or non-exercise) of that "control" – for instance the failure to provide adequate security – contributed to the cause of the cancellation, the conditions for event cancellation coverage may not be satisfied. Therefore, in this narrow and perhaps unlikely instance, we agree that there is some tension between establishing "control" for purposes of

liability coverage and the absence of "control" for purposes of establishing event cancellation coverage.

That said, it seems to us that this issue is unlikely to arise with respect to the cancellation of other events, like the Boston Red Sox, Boston Symphony, etc., unless an insured for those events was also in a position of "control" over the conditions of the Boston Marathon. Finally, as we mentioned in the presentation, the intervening criminal acts of the bombers loom large here, and may very well sever the causal connection between any "control" exercised by a sponsor and the ultimate cancellation of the Boston Marathon and other events.

Q: Have insurers been adopting an open-minded, generous approach so far, notwithstanding the possible invocation of technically plausible limitations?

A: At this point in time, we do not have enough data to draw conclusions about the claims handling practices of insurers generally with respect to claims arising from the Boston bombings. However, we are aware of no issues reported to regulators regarding insurers' handling of claims to date.

Q: Is there potential for product liability claims against pressure-cooker manufacturers for not warning that the "product may be used as a makeshift bomb"?

A: As we understand Massachusetts law, a manufacturer has no duty to warn in situations where the danger is obvious.