

# News flash

## World Trade Centre Litigation Moves On

**SR International Business Insurance Company Limited -v- World Trade Centre Properties LLC**

**The Second US Circuit Court of Appeals upholds the ruling of New York District Judge John S Martin.**

A further significant step has been achieved in the ongoing World Trade Centre litigation with the Judgment handed down last Friday, 26 September 2003 by Chief Judge John M Walker Jnr of the Second US Circuit Court of Appeal.

The appeals concerned (i) the granting of Summary Judgment in favour of Hartford Fire Insurance Company, Royal Indemnity Company and St Paul Fire & Marine Insurance Company. The appeal concerned whether the binders they issued were governed by the WilProp form and that under the definition of "occurrence", in that form, the destruction of WTC was one occurrence as a matter of law and (ii) the finding of the District Judge that where an insurance policy uses the term "occurrence" without defining it, then as a matter of law that term is ambiguous. This occurred in the binder issued by Travelers. Silverstein argued that the term was not ambiguous and was well established by reference to New York legal precedent as constituting two occurrences.

The Court found against Silverstein on both appeals.

### **Background**

As a condition of its 99 year lease of the WTC, Silverstein engaged Willis to set up a multi-layered insurance program, which consisted of a primary insurance layer and 11 excess insurance layers providing a total of approximately \$3.5 billion insurance on a "per occurrence" basis. In soliciting Insurers for the program, Willis circulated a property underwriting submission containing information regarding the proposed placement which, with respect to at least the four Insurers involved in the appeals, also contained a specimen copy of Willis' own "broker" form - the WilProp form.

Of the four Insurers in the appeal Travelers was the only insurer to submit its own specimen policy form during the course of negotiating terms of coverage. The policy was not agreed, however, until September 14th, three days after the loss. Whereas the Travelers form did not define the term "occurrence", the WilProp form defined "occurrence" as follows:

*"Occurrence shall mean all losses or damages that are attributable directly or indirectly to one cause or one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occur".*

All Insurers in the appeal had bound coverage on the various layers as of 20 July 2001. As of 11 September 2001 none of the Insurers involved in the appeal had issued a final policy form, nor had Willis issued the WilProp form as a final policy form.

### **The WilProp Form**

On appeal Silverstein argued that in construing the binders issued by the appellee Insurers, the District Court erred in rejecting evidence of the Insurers agreement to "follow the (Travelers) form".

Silverstein argued that it was industry practice in layered placements for a lead insurer to act as the negotiator of policy terms on behalf of the participating Insurers and that the other participating primary and excess Insurers customarily agreed to "follow the form" of the lead insurer.

The Appeal Court found that whilst the practice of "follow the form" is established Silverstein failed in their appeal because they did not come close to establishing that the "form" that was to be followed was of necessity the Travelers' form. Only one insurer, Allianz issued a final policy prior to September, 11th. It was therefore incorrect to state that the three appellant Insurers had agreed to "follow the (Travelers) form" when the form had not at that stage been issued and none of excess Insurers had even had the opportunity to review it. Consequently the Appeal Court concluded that the Travelers policy, issued three days after the loss, had no bearing on the appeal.

The only question the Court had to decide therefore was what the term "occurrence" meant under the specific binders that the three appellee Insurers had issued.

▶ The Court agreed with District Judge Martin that the binders issued by the three appellee Insurers were issued on the basis of negotiations involving the WilProp form, and that the parties intended and understood the binder to incorporate the terms of the WilProp form except as expressly modified.

In a damning indictment on Silverstein's prospects of success Chief Judge John Walker Jnr stated "*Our conclusion is supported by the fact that until the total destruction of the WTC on September, 11th it was in Silverstein Properties' interest to incorporate into their insurance coverage a definition of "occurrence" that would minimise the number of "occurrences" in order to minimise the number of deductibles that would apply in the event of a loss or series of losses. This goal was accomplished by the WilProp form's inclusive definition of "occurrence"*".

Although the Silverstein parties attempted to argue that this definition of occurrence was ambiguous the Appeal Court adjudged that no finder of fact could reasonably fail to find that the intentional crashes into the WTC of two hijacked airplanes, 16 minutes apart, as a result of a single, co-ordinated plan of attack was, at the least, a "series of similar causes". Accordingly the Court therefore agreed with the District Court that "***under the WilProp definition, the events of September, 11th constitute a single occurrence as a matter of law***".

#### Occurrence

Silverstein also argued that the term "occurrence" (undefined in the Travelers Binder) was well established by reference to New York legal precedent and that as a matter of law the events of September 11th constituted two occurrences.

The Court again confirmed that the appropriate wording was that set out in the binder as the Travelers policy had not been agreed upon until September, 14th.

Silverstein argued that the term "occurrence" was not ambiguous because it was typical for insurance policies not to define "occurrence" and that the WilProp definition was "atypically broad". This argument failed, however, as two other WTC Insurers had provided their own forms for coverage each of which defined occurrence. The Silverstein Parties case was not helped by the fact that a Willis forms specialist testified that she did not believe the WilProp form definition of an occurrence as losses attributable to "one series of similar causes" deviated from the commonly understood meaning of "occurrence".

Silverstein relied on a number of cases one being Newmont Mines Limited -v- Hanover Insurance Company where the jury found that there were two partial losses and two occurrences in respect of two separate parts of a roof which collapsed several days apart as a result of heavy rainfall. The Court found, however, that a whilst a jury may find two occurrences in the Silverstein case, as it did in Newmont Mines, it could also "find that the terrorist attack, although manifested in two separate airplane crashes, was a single, continuous, planned event causing a continuum of damage that resulted in the total destruction of the WTC and, thus was a single occurrence".

#### Outcome

Consequently the Appeal Court upheld the Judgments of the District Court that the meaning of the undefined term (occurrence) was an open question as to which reasonable finders of fact could reach different conclusions. The matter is therefore to be tried before a jury.

This Judgment is another setback for Silverstein in his attempt to argue that the September, 11th terror attacks were two occurrences as a matter of law. As we predicted in our previous article on the WTC, the Appeal Court upheld the Circuit Courts grant of Summary Judgment for the three insurance carriers, who were indisputedly governed by the WilProp form and that the term "occurrence" in the WilProp form rendered the attacks a single event.

Even though these three carriers represent only 3% of the total coverage at issue, Willis' understanding of the definition of "occurrence" is a favourable piece of evidence for the attorneys representing the various insurance interests to argue before the jury. It also gives encouragement to the Insurers' attorneys that one carrier with a major stake in the litigation, Swiss Re International Business Insurance Company, was also potentially bound by the WilProp form.

#### Jurisdiction Issues

One further interesting matter that was discussed by the Court was in relation to jurisdiction. Shortly after September 2001, the US Government rushed through Congress the Air Transportation and System Stabilization Act of 2001. This provided a new federal cause of action for losses arising out of the terrorism act. It asserted that the Federal Court for the Southern District of New York should have exclusive jurisdiction over "all actions brought for any claim (including any claim for loss of property, personal injury or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001". This was clearly wide enough (ostensibly at least) to apply to insurance disputes over WTC losses, and there was much concern as to whether this statute would pre-empt contractual jurisdiction clauses in many insurance / reinsurance contracts.

In a reinsurance case decided in July this year (*Canada Life v Converium Rückversicherung*), the US Court of Appeals held that it would be wrong to construe the statute as covering all claims for economic loss relating to September 11, as this would raise serious doubts as to the statute's constitutionality. The Court refused to spell out definitively what would be covered by the statute's jurisdiction and what would not. However, the decision does provide a limited finding that there is no statutory federal jurisdiction over actions involving economic losses that would not have been suffered "but for" the events of September 11th but otherwise involve no claim or defence raising an issue of law or fact involving those events. The Silverstein decision keeps this issue very much alive.

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