

TERRORISM

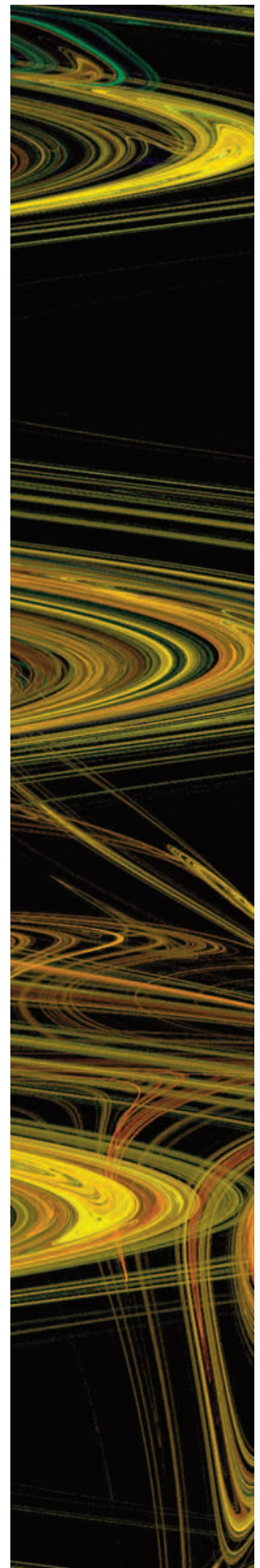
EVOLVING LIABILITIES IN THE AGE OF TERRORISM

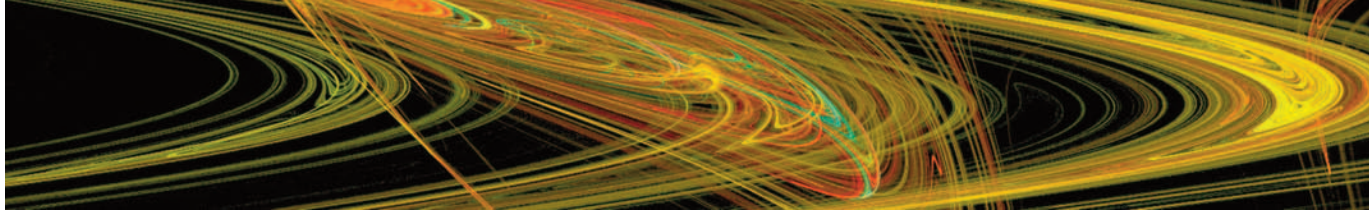
With the global economy in disarray, American forces committed to conflicts in Iraq and Afghanistan and a gathering storm south of our own border, the forces of disorder and instability seem to be growing. Compounded by a widening imbalance in the global distribution of wealth, the increasing ease of access to weapons, including those of mass destruction, and unrestricted access to global communication networks, these forces may fuel radicalization and extremism worldwide. The potential for a terrorist attack against the U.S. remains very real.

The potential for a new breed of home-grown terrorist factions to take hold is also very real, by virtue of their unpredictability and the sheer number of communities throughout America where they might be able to hide. Terrorists are exploiting open global financial markets and complex cyber networks to fund activities. It is critical that American companies remain vigilant and take steps to recognize, monitor and control those risk factors where possible. Businesses have a role to play in mitigating the vulnerability of the public and a responsibility to protect not just their U.S. assets, but also those around the world.

Several steps will help organizations accomplish these urgent tasks:

- Design a secure and flexible protective environment in which to operate
 - Monitor the local political environment wherever operations are located
 - Develop a disaster recovery and business continuity plan
 - Control the financial impact of loss from an attack by transferring risk, where possible and cost effective
- To accomplish the latter, companies must understand how liabilities have evolved in the age of terrorism and the public-private partnership that has developed in response.
- Maintain appropriate risk assessment partnerships to keep informed of threats





RISING LIABILITIES

The liability landscape has changed in recent years, increasing pressure on companies to exercise due diligence in preventing or mitigating the consequences of an attack. A decision last year by the New York Court of Appeals relating to the 1993 bombing of the World Trade Center (in *Nash v. Port Authority*) determined that by failing to take appropriate risk prevention action, the Port Authority of New York was more liable for the ensuing harm (68%) than the terrorists who perpetrated that act (32%). This decision demonstrated the resolve of the U.S. legal system to place blame squarely on any party who should have known of the possibility of an attack and taken reasonable steps to prevent it.

In order to meet this burgeoning responsibility, businesses will need help. They will need partners qualified to assess the threat and determine appropriate measures to protect operations, whether as owner, occupant, manufacturer or service provider. Experts in these risks can also help organizations plan for contingencies in the event of an attack, minimizing disruption to personnel and business operations.

Likewise, most organizations will benefit from an experienced view of terrorism insurance options. While traditional insurance mechanisms disappeared from the market following the events of 9/11, they were gradually replaced by a responsive global stand-alone terrorism insurance marketplace, which has matured to the point where it can address the specific nuances and potential devastation of various attacks in various settings.

GOVERNMENT RELIEF

The U.S. government remains in the picture as a potential ally in the struggle to address terrorism liabilities. The government reaffirmed its commitment to help relieve the public of the potentially devastating consequences of such attacks by continuing to provide liability protections for U.S. companies and individuals through the extension of the Terrorism Risk Insurance Act in 2007 and the SAFETY (Support Anti-Terrorism by Fostering Effective Technologies) Act.

The SAFETY Act is a striking piece of liability reform, providing very broad liability protections, caps and other incentives for qualified entities involved in the development, sale or deployment of anti-terrorism technologies. These protections apply to any claims resulting from an act of terrorism when a qualified technology was deployed. The SAFETY Act took on a new prominence in early 2009 when the National Football League (NFL) joined other beneficiaries in securing the unprecedented liability exemptions the program offers. By certifying the NFL's security procedures for protection under the act, the Department of Homeland Security (DHS) signaled an expanded understanding of the broad scope of antiterrorism activities implemented by American companies and the persistent liabilities which remain. The benefit to the NFL is "fairly obvious," said NFL security chief Milt Ahlerich in a March 10, 2009 *USA Today* article ("NFL exempt from terrorism lawsuits"). "An attack from a terrorist organization could put us out of business," he said. League guidelines, developed shortly after 9/11, include digital security cameras in stadiums, quick searches on entering spectators and barriers that keep cars and trucks 100 feet from a stadium.

The SAFETY Act's purpose is to ensure that the potential for runaway liability awards as a result of a terrorism attack does not limit or deter the private sector's deployment, production or utilization of products, technologies and services that could save lives.

In receiving certification for a qualified antiterrorism program, technology, service or product, a company will be granted:

- A maximum cap on liability claims as a result of a terrorist attack
- Exclusive jurisdiction in federal court for all related suits
- A prohibition on punitive damage claims, non-compensatory damages and non-economic damages (such as pain and suffering, unless the plaintiff was physically harmed)
- A prohibition on joint and several liabilities for non-economic damages, so that only the percentage of the ultimate claim amount directly attributed to a defendant's negligence is recoverable

The SAFETY Act also protects those who *purchase* those services or products if the purchaser is held liable for losses connected to the services or products.

SAFETY Act certification may well become a de facto standard that companies will want to meet for several reasons:

- The security measures taken to achieve the certification will reduce the exposure to terrorist risks.
- The SAFTEY Act protections perform a powerful risk management function.
- The official recognition of quality safety measures may ease concerns of shareholders and customers.
- Failure to apply could have the converse effect of not only highlighting but heightening a company's vulnerability to financial loss – directors and officers could face liability for failing to secure those indemnities and protections.

UNDERLYING INSURANCE

Prior to achieving a designation or certification under the SAFETY Act, the DHS will determine an appropriate level of liability insurance that must be maintained to satisfy otherwise compensable third-party claims that could arise from an act of terrorism. The SAFETY Act requires organizations to maintain a reasonable level of insurance, typical of the amount carried to protect similarly situated assets or operations. That level, determined on a case-by-case basis, is subject to negotiation and may change according to market conditions.

PUBLIC-PRIVATE PARTNERSHIP

Businesses will best be able to withstand the potentially dire consequences of a terrorist attack by a prudent combination of risk assessment, risk management and the support of private-public partnerships that have developed to provide important property and liability protections. Global terrorism insurance products now widely available in the commercial marketplace provide the private component. TRIA (and its extensions) along with the SAFETY Act deliver the public part. Together, they provide a framework for maintaining protection from terrorist attacks, which continues to be an essential piece of responsible risk management in an era of rising instability.

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