

PROTECTING AGAINST TERRORISM LIABILITIES

Being the target of a terrorist attack is not the only terrorism-related exposure an organization may face, as the Port Authority of New York and New Jersey discovered when a jury found them negligent in safeguarding the World Trade Center before the 1993 terrorist attack. In an ironic twist, the SAFETY Act of 2002, designed to protect companies from liability when they develop and deploy anti-terrorism programs, may also present a liability exposure.

RISK AND THE SAFETY ACT

As a part of the Homeland Security Act of 2002, Congress enacted landmark tort liability protection for approved anti-terrorism products, technologies, procedures or services. This section is known as the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 or by its acronym, the SAFETY Act. The law was designed to encourage the development and deployment of anti-terrorism products and programs. It automatically confers very broad limitations, caps and affirmative defenses for suits stemming from a terrorist act, where the approved products, technologies, procedures, equipment or services were deployed for terrorism

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prevention, detection, response or recovery. A physical presence within the U.S. is not necessary to qualify.

Any entity involved in terrorism prevention or mitigation, whether for themselves or others, has a fiduciary responsibility to explore the broad protections that could be afforded them under the SAFETY Act. The financial impact on owners, directors and officers as a result of failure to apply for SAFETY Act protection if they could otherwise qualify, could be severe.

THE VERDICT IS FINAL

In October 2005, a six-member jury in New York State Supreme Court found that the Port Authority did not heed warnings that the World Trade Center underground garage was vulnerable to terrorist attack and should be closed to public parking. This failure, the jury said, was "a substantial factor" in allowing the bombing to occur. The explosion killed six people and injured 1,000. A motion to dismiss based on sovereign immunity was denied by the court. In 2007, the appeal process denied all the Port Authority's post-trial motions, leaving the 2005 verdict intact. Since the jury apportioned more than half the blame (68%) to the Port Authority, under NY law, the agency will have to pay all of the estimated \$2 billion in claims. Unlike most of the financial risks organizations face today, liability for a terrorist act – even partial liability – can threaten an entire enterprise.

In addition to the horrific personal tragedies, more than \$35 billion in insured losses, and incalculable uninsured losses and overall economic impact, the 9/11 attacks brought a profound change in our awareness of terrorism risks. As evidenced in the Port Authority case, it is now much more likely that juries will view terrorist acts as "reasonably foreseeable." Victims may attempt to recover from any entity seen as potentially negligent in preventing or mitigating the attack. All related security and anti-terrorism products, services, equipment, engineering, technologies, manufacturing, research, development, testing, policies, protocol, decisions, procedures, facilities and infrastructure will be intensely scrutinized.

Can you successfully defend yourself against a terrorism-related suit? What resources will it take? At what cost? What if you lose? Can insurance products protect you?

FINDING ANSWERS

Today, terrorism coverage is once again available in the commercial insurance market. However, because underwriters view terror-related risks as catastrophic in nature, the cost of such coverage is prohibitive for many buyers. Further, the global insurance marketplace does not have the capacity to provide sufficient liability limits to assure adequate protection.

Perhaps even more importantly, nuclear, biological, chemical or radiological (NBCR) terrorist events are excluded. Although NBCR attacks would likely be limited in scope, any perceived failure in preventing even a small bio or chemical event could be financially devastating. Insurance alone is unlikely to assure financial survival after the highly emotional litigation that can be expected to follow any terrorist attack.

Willis, in keeping with our commitment to the delivery of state-of-the-art customized risk solutions, is the market leader in specialized consultation on liabilities associated with terrorism. The SAFETY Act in particular has many nuances that call for professional experience, as they can drastically impact insurance and risk management programs. The application process must be carefully managed to maximize the protections afforded by the Act and to optimally dovetail with your existing risk management and insurance programs. In the post-9/11 age, such issues are unavoidable in the pursuit of comprehensive and effective risk management.

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