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LETTER FROM WASHINGTON

D.C. IMPROVES ITS CAPTIVE LAW

By Robert H. Myers

Since the passage of the first captive law in the District of Columbia in 2000, DC has become one of the premier captive domiciles in the United States. In 2006, the captive law was significantly enhanced by the enactment of protected cell legislation. DC was the first domicile in the nation to have an incorporated cell capability, which has proven to be very popular. The DC Council recently passed the Captive Insurance Company Amendment Act of 2014 ("2014 Amendments"), which was designed to streamline the chartering, licensing and operation of DC domiciled captives.

One of the most attractive aspects of the DC Captive law is its protected cell regime. However, the minimum capitalization requirements have proven to be an unnecessary burden. The 2014 Amendments grant the Commissioner the authority to reduce or eliminate the minimum capital requirement for both the cells and the "core" (the cell representing the protected cell company), so long as the capital is adequate for the "type, volume and nature of insurance that is transacted…." This decision is placed entirely within the discretion of the Commissioner, and means that, going forward, no cell will be required to have excess capital.

A second problem addressed by the 2014 Amendments is the concern about the accessibility of captive information to the public under the DC Freedom of Information Act ("DC FOIA"). The new law provides an express exception from DC FOIA for

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WAS THE SONY HACK AN "ACT OF TERRORISM" UNDER TRIA?

by Joseph T. Holahan

Was the cyber attack directed at Sony over the motion picture "The Interview" an "act of terrorism" as defined by the Terrorism Risk Insurance Act ("TRIA" or the "Act")?

It is doubtful Congress had any such thing in mind when it enacted TRIA. Yet the event arguably meets TRIA's definition of an "act of terrorism" on its face. Moreover, it shares some common elements with more violent attacks aimed at squelching freedom of expression that likely would qualify as acts of terrorism if they occurred in the U.S. Regardless of the answer, the question highlights the ambiguities surrounding what is, and is not, an act of terrorism for purposes of the Act. It also raises important issues that may confront federal officials if similar attacks occur in the future.

TRIA provides that if an "act of terrorism" causes market-wide insured losses in excess of $100 million, insurers will be reimbursed for 85 percent of insured losses after meeting a deductible equal to 15 percent of the insurer's direct written premiums for the previous year. Under the reauthorization of TRIA enacted in January of this year, the $100 million "trigger" for recovery will be increased by $20 million each year, beginning January 1, 2016, until it reaches $200 million. At the same time, the amount of federal compensation will

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HASSETT'S OBJECTIONS

THE FILED-RATE DOCTRINE: COMPETING LINES OF CASES UNDERMINE ITS RELIABILITY

By Lewis E. Hassett

The essence of the filed-rate doctrine is that a rate that is filed or approved by a governing regulatory authority is *per se* reasonable and unassailable in judicial proceedings. The doctrine originated in cases involving federal regulatory agencies but over the years has spread to state agencies (particularly utilities) and increasingly to insurance company filings with state departments of insurance. *See Coll v. First Am. Title Ins. Co.,* 642 F.3d 876, 886 (10th Cir. 2011) (title insurance); *Clark v. Prudential Ins. Co. of Am.,* 736 F. Supp. 2d 902, 913-914 (D.N.J. 2010) (health insurance); *Schilke v. Wachovia Mortg., FSB,* 820 F.Supp.2d 825 (N.D.Ill. Sept. 28, 2011) (hazard insurance) (vacated on other grounds); *and Richardson v. Standard Guar. Ins. Co.,* 371 N.J.Super. 449, 853 A.2d 955, 964 (N.J.Super. A.D. 2004) (holding the filed-rate doctrine applies to the insurance industry and noting "the considerable weight of authority from other jurisdictions that have applied the filed-rate doctrine to ratemaking in the insurance industry").

The filed-rate doctrine promotes two policy goals: (1) to eliminate discrimination among rate payers and (2) to preclude disguised judicial rate-making. As a result, the filed-rate doctrine bars not only breach of contract claims, where the insured claims the insurer promised a rate less than the filed-rate, but also has been applied to bar tort claims where the relief sought would be essentially a disguised deviation from the filed-rate. *See Armour v. Transamerica Life Ins. Co.,* 2012 WL 234032 (D.Kan. January 25, 2012). *See also Uniforce Temp. Pers., Inc. v. Nat'l Council on Comp. Ins., Inc.,* 892 F.Supp. 1503, 1512 (S.D.Fla. 1995) ("In order for this Court or a jury to award damages, it would be necessary to measure the difference between the properly approved... insurance rates paid by plaintiffs and those mythical rates which would have been applicable but for the dedendants' concerted activity. This undertaking is not within the province of the courts but should reside with the respective state regulators with authority over rate-setting."); *Decambaliza v. QBE Holdings, Inc.,* 2013 WL 5777294, at *7 (W.D.Wis. Oct. 25, 2013) (plaintiffs' "focus[] on the lawfulness and purpose of the benefits that defendants derived from the excessive premiums and not on what constitutes a reasonable rate" was an "illusory distinction because the alleged fraud necessarily implicates the reasonableness of the filed rates"). While the rule is "sometimes harsh and seemingly merciless," it accords with the legal presumption that all persons are presumed to know the filed rates. *Armour*, at *3.

In *Armour*, the court dismissed a putative class action as barred by the filed-rate doctrine. The plaintiff alleged that Transamerica had sold long-term care policies under an unreasonable actuarial assumption which, unknown to the plaintiff but allegedly known to Transamerica, would and did result in subsequent rate increases. Based on that premise, the plaintiff asserted purported causes of action for fraud, negligent misrepresentation, breach of duty of good faith and fair dealing, breach of contract and unjust enrichment. *Id.* at *2. Transamerica moved to dismiss the case under the filed-rate doctrine. Because it had filed its rates with the Kansas Department of Insurance, Transamerica claimed those rates could not be altered collaterally via litigation. The court agreed and dismissed the case.

Armour is one of the most favorable filed-rate decisions in the insurance context. It applied the filed-rate doctrine where the regulator did not affirmatively approve rates but retained the right to disapprove them. *Armour* at *4. *See also In re Title Ins. Antitrust Cases*, 702 F.Supp. 2d 840, 848-849 (N.D. Ohio 2010) (filed-rate doctrine barred antitrust claim involving rates set in file and use state, because state provided that the commissioner "shall review" rate filings). The *Armour* court held it did not matter whether the public was allowed to comment on proposed rates prior to implementation. *Id.*

But application of the filed-rate doctrine in the context of insurance is far from universal. Some courts refuse outright to apply the doctrine to state regulation, while others draw various distinctions between challenges to rates and ratemaking versus challenges to post-ratemaking conduct. *See Clark v. Prudential Ins. Co. of America,* Civ. No. -08-6197, 2011 WL 940729 (D.N.J. Mar. 15, 2011) (rejecting outright the application of the filed-rate doctrine to state insurance rates); *Jackson v. U.S. Bank, N.A.,* 2014 WL 4179867 *3-4 (S.D.Fla. Aug. 22, 2014) (collecting cases refusing to apply filed-rate doctrine to cases involving forced-place insurance); *Kunzelmann v. Wells Fargo Bank, N.A.,* 2012 WL 2003337, at *3 (S.D.Fla. June 4, 2012) ("plaintiffs' claims are not barred by the filed-rate doctrine [where they do] not challenge the rates filed by insurers [but r]ather challenge [] the manner in which Defendants select insurers, the manipulation of the force-placed insurance process, and the impermissible kickbacks that were included in the premiums."); *Hoover v. HsBC Mortg. Corp.* (USA), 2014 WL 1280441 at *9 (rejecting application of filed-rate doctrine where plaintiffs "d[id] not challenge the rates charged by Defendants (as opposed to challenges to allegedly improper conduct underlying the rates, such as kickbacks)").

The competing lines of cases are irreconcilable. Two recent decisions bear discussion.

First, most recently, in *North Carolina St. Bd. of Dental Examiners v. Federal Trade Commission*, No. 13-534, (U.S. Feb. 25, 2015), the Supreme Court of the United States further restricted the state action defense applicable in anti-trust cases. *See Parker v. Brown*, 317 U.S. 341 (1943) (state law authorizing anticompetitive conduct trumps antitrust enforcement). Specifically, the *Dental Examiners* decision rejects state regulatory antitrust immunity where the state's sovereign involvement is tangential. While that case involved an industry-controlled state board, the Court focused on the involvement by the state as a sovereign.

While most courts have not directly analogized to antitrust immunity in addressing the filed-rate doctrine, some have. *See Daluere v. Kentucky*, 119 F.Supp. 2d 683, 688 (W.D.Ky. 2011) ("[T]he policy foundations for ... state action [antitrust] immunity coincide interestingly with the filed rate doctrine."). In a file and use state, where the state's authority is limited to rejecting rates, courts may resist application of the filed-rate doctrine. While decisions of the commissioner of insurance should constitute acts of the sovereign, courts may drill into the extent of the regulatory analysis. It is difficult to imagine an inquiry capable of more judicial mischief than one into ratemaking.

With respect to insurance cases specifically, the split in the courts may best be illustrated by the recent decision in *Wilson v. Everbank, N.A.,* No. 14 CIV 22264 (S.D.Fla. Jan. 6, 2015). That case involved a putative class action attacking forced-placed insurance. The plaintiffs argued that they were not challenging the insurance rates but only "the manner in which [the defendants] select insurers, the manipulation of the force-placed insurance process, and the impermissible kickbacks that were included in the premiums." *Id.* at *20.

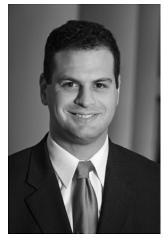
Conversely, the insurers argued that the distinction between process and rate purely is semantic. By attacking the composition of the filed-rate and alleging that some portion of the approved rate passed on to them was an unearned kickback, Plaintiffs necessarily challenge the reasonableness of the rates – which included the alleged kickbacks – approved by state regulators.

The court punted, holding that it must accept the plaintiff's distinction on a motion to dismiss but would re-examine the question on a motion for summary judgment. *Wilson*, at *21. But class action plaintiffs are like guerilla insurgents – "They win by not losing." Kissinger, Henry: "The Vietnam Negotiations," *Foreign Affairs*, Vol. 48, No. 2, Jan. 1969. Deferring the adjudication of the filed-rate doctrine, a purely legal question, until summary judgment prolongs the lawsuit's life, thereby sustaining the plaintiffs. While many defendants will continue to defend, at least through summary judgment, others opt to settle. While payments to avoid the risk of greater liability makes sense to the particular defendants, it is debatable whether such transfers of wealth benefit society as a whole.

Lew Hassett is Co-Chair of the firm's Insurance and Reinsurance Practice and Chair of the firm's Litigation Practice. His focus is complex civil litigation, including insurance and reinsurance matters, business torts and insurer insolvencies. Mr. Hassett received his bachelor's degree from the University of Miami and his law degree from the University of Virginia.

EXCESS INSURER CAN PURSUE BAD FAITH FAILURE TO SETTLE CLAIM AGAINST PRIMARY INSURER ABSENT AN EXCESS JUDGMENT

By Brian Levy



The Supreme Court of Missouri recently held in *Scottsdale Ins. Co. et al. v. Addison Ins. Co. et al.,* No. SC 93792 (Mo. Dec. 9, 2014) (en banc), that an excess insurer has a claim against a primary insurer for an alleged bad faith failure to settle even without the entry of a judgment in excess of the policy limits. The underlying action arose from the death of a motorist killed by a truck driven by an employee of the insured, Wells Trucking, Inc. Wells Trucking had a $1 million general liability policy with United Fire & Casualty Company and an excess insurance policy with Scottsdale Insurance Company with a limit of $2 million over the $1 million primary policy.

The decedent's family negotiated with United Fire to settle its claims against Wells Trucking and the employee involved in the accident. United Fire refused to settle the claim within the policy limits, and the decedent's family sued Wells Trucking and the employee for wrongful death.

Settlement negotiations continued after the commencement of the lawsuit, and the decedent's family provided United Fire with another opportunity to settle for its $1 million policy limits. Scottsdale was informed of the lawsuit and demanded that United Fire settle the lawsuit for up to its policy limits while it still had the opportunity to do so. United Fire declined. The decedent's family then withdrew its $1 million settlement demand and raised its demand to $3 million.

The litigation eventually settled during mediation for a total of $2 million, with United Fire paying its $1 million policy limit and Scottsdale tendering an additional $1 million. Wells Trucking then assigned to Scottsdale its rights to pursue a bad faith refusal to settle claim against United Fire.

Following the settlement, Scottsdale and Wells Trucking filed suit against United Fire alleging that United Fire had acted in bad faith in refusing to settle the wrongful death action within the $1 million limit. Scottsdale sought the $1 million it paid to settle the claim. The trial court granted United Fire's motion for summary judgment, and Scottsdale and Wells Trucking appealed.

The Supreme Court of Missouri reversed the trial court and held that Scottsdale and Wells Trucking could pursue claims against United Fire for bad faith failure to settle. Specifically, the Court held that (1) an excess judgment is not essential to a bad faith refusal to settle the action; (2) a primary insurer's ultimate settlement for its policy limits does not negate its earlier bad faith refusal to settle; and (2) an excess insurer could pursue the insured's claim for bad faith refusal to settle.

The Court ruled that an excess judgment is not required to maintain an action against an insurer for bad faith refusal to settle because "[r]equiring an excess judgment would force the insured to go to trial after its insurer wrongfully refuses to settle instead of permitting the insured to protect itself from further liability by settling." The Court

Announcements

Skip Myers was named fifth in the Captive Review Power 50 for the third year in a row.

Lew Hassett was selected as a 2015 Georgia Super Lawyer in the area of business litigation. Super Lawyers includes top lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The final selections represent no more than 5 percent of the lawyers in Georgia.

November 13 – **Skip Myers** presented a series of complimentary webinars on topical issues affecting the captive insurance industry at The Risk Retention Group Marketplace.

November 13 thru 14 – **Lew Hassett** attended the AIDA Reinsurance and Insurance Arbitration Society's (ARIAS) Fall Conference and Annual Meeting in New York City.

On November 30, **Skip Myers** hosted a meeting with Mr. Gao Dahong, the Director of the China Insurance Regulatory Commission. Director Gao was visiting the U.S. to learn about U.S. insurance regulation and, in particular, captive regulation.

January 29 thru February 1 – **Chris Petersen** attended the Professional Insurance Marketing Association's 40th Annual Meeting in Marco Island, Florida.

February 4 – **Skip Myers** spoke at the World Captive Forum in Boca Raton, Florida on federal/state regulatory issues affecting captives.

Lew Hassett has been retained to advise a national mutual insurer on insurance coverage issues relating to a cyber-intrusion into its policyholder records. **Sam VanVolkenburgh** is working with Lew on the matter.

March 10 – **Joe Holahan** participated in a panel discussion at the Captive Insurance Companies Association's 2015 International Conference in Orlando, Florida on the topic of "Designing and Implementing a Cyber Risk Insurance Program."

March 11 – **Skip Myers** spoke on "Recent Developments in Risk Retention Group Regulation" at the Captive Insurance Companies annual conference in Orlando, Florida.

March 18 thru 19 – **Lew Hassett** attended the Association of Insurance & Reinsurance Run-Off Companies (AIRROC) Spring Membership Meeting in New York City. MMM is a corporate sponsor of the organization.

Lew Hassett and **Cody Goff** are representing an insurer in a dispute with a commercial property owner regarding environmental issues and liability.

Lew Hassett and **Joe Holahan** are performing a reinsurance treaty review for a national health and disability insurer to ensure up-to-date coverages and cedant protections.

March 20 – **Tony Roehl** participated on a panel discussing the topic of "Telematics and the Future of Automobile Insurance" at the Atlanta CPCU Society Industry Day.

Lew Hassett has been retained to represent a governmental pool on coverage and allocation issues arising from an automobile accident where both CGL and automobile coverages may apply. **Kelly Christian** is working with Lew on the matter.

March 28 thru 31 – **Skip Myers** and **Chris Petersen** will attend the National Association of Insurance Commissioners meeting in Phoenix, Arizona.

Skip Myers was quoted in an article in A.M. Best regarding the U.S. Senate Finance Committee having recently moved to pass legislation that could make 831(b) microcaptives more attractive to companies and wealthy individuals

April 28 – **Skip Myers** will speak on "Challenges to Captives" at the Risk Insurance Management Association annual conference in New Orleans, Louisiana.

Lew Hassett and **Brian Levy** are representing an automobile insurer in an indemnity dispute with a program manager.

May 19 thru 21 – **Skip Myers** and **Joe Holahan** will attend the USA Risk Group's 10th Annual Executive Educational Conference in Charlotte, North Carolina. Skip will speak on legal issues relating to the formation of a captive insurer.

fund that "[t]he insurer's duty is to protect the insured's financial interests," and "[w]hen the insurer refuses to settle, the insured loses the benefit of an important obligation owed by the insurer." The Court reasoned that an excess judgment is unnecessary because "[t]his loss is suffered regardless of whether there is an excess judgment or settlement." Other courts agree. *See Cont'l. Cas. Co. v. Reserve Ins. Co.,* 238 N.W.2d 862, 867 (Minn. 1976) (excess judgment not necessary for claim for bad faith failure to settle). *But see Mathies v. Blanchard*, 959 So.2d 986, 988-89 (La. Ct. App. 2007) (excess judgment a prerequisite to an action for bad faith failure to settle).

Similarly, the Court rejected United Fire's argument that its ultimate settlement at the mediation for the policy limits negated a claim for bad faith failure to settle. The Court determined that a finder of fact could conclude that United Fire's failure to act on the decedent's family's earlier settlement demands was in bad faith and caused Wells Trucking to lose its opportunity to settle the claim within United Fire's policy limits. As such, "United Fire should not be able to evade liability by later agreeing to pay its policy limits" because its "mere payment up to the policy limits does not make Wells Trucking whole or put Wells Trucking in the same position as if United Fire performed its obligations to settle in good faith."

Having determined that the absence of an excess judgment and the primary insurer's ultimate payment of its policy limits did not bar a claim for bad faith failure to settle, the Court turned its attention to whether an excess insurer could assert such a claim against the primary insurer. United Fire asserted that Missouri law did not recognize an action for bad faith refusal to settle between a primary insurer and an excess insurer.

The Court agreed with United Fire that a primary insurer does not have an independent duty to an excess insurer to settle in good faith because the duty to settle in good faith arises from the insurance contract between the insured and the insurer, while a primary insurer and excess insurer do not have an applicable contract. Other courts agree. S*ee Commercial Union Ins. Co. v. Medical Protective Co.,* 393 N.W.2d 479, 486 (Mich. 1986) (primary insurer does not owe direct duty to excess insurer to settle claim in good faith). *But see St. Paul Fire & Marine Ins. Co. v. U.S. Fid. & Guar. Co.*, 375 N.E.2d 733, 733 (N.Y. 1978) (primary insurer owed direct duty to excess insurer to settle in good faith).

However, the Court held Scottsdale could pursue a bad faith failure to settle claim against United Fire under the theories of assignment, conventional subrogation, and equitable subrogation, each of which allowed Scottsdale to assume Wells Trucking's right to bring an action for bad faith failure to settle. *See Kaplan v. Harco Nat'l Ins. Co.,* 708 So.2d 89, 92 (Miss. Ct. App. 1998) (bad faith refusal to settle claim assignable); *Great S.W. Fire Ins. Co. v. CAN Ins. Cos.,* 557 So. 2d 966, 968 (La. 1990) (excess insurer conventionally and equitably subrogated to insured's bad faith claim).

The Supreme Court of Missouri's holdings in *Scottsdale Ins. Co.* reinforce a primary insurer's duty to settle in good faith a third-party liability claim while providing ammunition for excess insurers to recover amounts it paid on behalf of the insured where the primary insurer fails to act in good faith.

Brian J. Levy is an associate in the firm's Insurance and Reinsurance and Litigation Practices. Mr. Levy received his bachelor's degree from the University of Virginia and his law degree from William and Mary School of Law.

NARAB II AND THE FUTURE OF MULTI-STATE PRODUCER LICENSING

By Tony Roehl

When President Obama signed the National Association of Registered Agents and Brokers legislation ("NARAB II") into law on January 12, 2015, insurance producers operating in multiple states finally realized their long sought goal. NARAB II is the next step in streamlining multi-state licensing for insurance producers and is intended to drastically simplify that process. This article provides an overview of multi-state license under NARAB and the role of state Departments of Insurance going forward.

The new law authorizes the creation of the National Association of Registered Agents and Brokers ("NARAB") which will operate as a non-profit membership based corporation. NARAB's role will be to establish the procedures and mechanism to enable individuals and agencies to simultaneously satisfy the licensing requirements in multiple non-resident states. An insurance producer or agency is eligible to become a member of NARAB if they have an active license in their home state and the license is not subject to suspension or revocation. NARAB applicants will be required to complete a criminal background check and NARAB may deny membership based on criminal history. States will have an opportunity to object to a producer becoming a member of NARAB. Any other qualifications for membership can be no less protective to the public than contained in the NAIC's Producer Licensing Model Act. Membership is conditioned on the producer satisfying continuing education requirements. The NARAB continuing education requirements are required to be similar to the requirements in a majority of states. NARAB members will receive credit for the continuing education they complete in their home state and are not required to satisfy NARAB's continuing education requirements if the requirements are equivalent to the home state requirement. States, other than the producer's home state, are prohibited from imposing a continuing education requirement on a NARAB member.

Once a NARAB member identifies the states where it desires to be licensed and pays the required licensing fees, then the agency or producer is authorized to operate in the designated states as if it was a foreign producer licensed in the state. It is intended to be that simple and quick. Membership in NARAB will be valid for two years. NARAB is expected to be funded through the collection of membership fees.

NARAB has the authority to place a member on probation or suspend or revoke its membership if the member is found to violate certain standards of conduct, such as: failing to meet the membership criteria or other standards established by NARAB; being subject to disciplinary actions by a state, including suspension or revocation of a license; or being convicted of a crime that would have resulted in denial of membership at the time of application.

NARAB is required to become operational by the later of January 2017 or within two years after the date of NARAB's incorporation. NARAB will be governed by a thirteen member board of directors.

The Board will be responsible for establishing and operating NARAB. Directors will be appointed by the President and approved by the Senate. The board will include eight state insurance commissioners and five private sector representatives.

Role of State Insurance Departments of Insurance

State Departments will continue to be responsible for regulating the business of insurance. However, Departments of Insurance are not permitted to restrict the licensing or impose additional requirements on members of NARAB. Agency members of NARAB are not required to register with a Secretary of State as a foreign corporation. However, NARAB members are not exempt from state oversight and regulation. State Departments of Insurance will continue to enforce state laws related to unfair trade practices, consumer protection and generally regulate the business of insurance within their jurisdictions. This would include limiting, suspending or revoking an agent's ability to do business if the producer or agency was found to be violating state law or regulatory requirements (regardless of membership in NARAB).

NARAB is required to maintain a process to receive consumer complaints. It will not investigate the complaints; instead, complaints will be referred to Departments of Insurance who are required to report the results of their investigation to NARAB.

A huge amount of work remains to be completed to make NARAB operational and there will be substantial industry involvement in that process. NARAB II is not a revolutionary change in the regulation of insurance since it preserves the states' role in regulating, if not directly licensing, producers within their borders. Once NARAB is fully operational, it should be a simple and straightforward process for agents and agencies to become licensed throughout the United States or within a subset of the states in a quick and efficient manner. NARAB II is a significant victory for multi-state producers who have been clamoring for a simple solution for multi-state licensing for almost 20 years. NARAB II continues the march towards greater federal involvement in the business of insurance and is the latest example of increased federal interest in the regulation of the insurance industry.

Tony Roehl is a Partner in the firm's Insurance and Reinsurance and Corporate Practices. Mr. Roehl's principal areas of concentration are insurance regulation and corporate matters involving entities within the insurance industry. Mr. Roehl received his bachelor's degree from the University of Florida and his law degree from the University of Michigan.

LETTER FROM WASHINGTON

By Robert H. Myers

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business information, financial pro formas, contracts and other captive documents. This information will not be subject to discovery or subpoena in a civil suit. However, it can be shared with other regulators and the NAIC so long as those authorities are willing to maintain the confidentiality of the information.

The third significant improvement to the law is that the Commissioner will have the discretionary authority to waive the requirement that a captive be examined at least once every five years under the following conditions: (a) the captive has filed unqualified audited financial statements since its last examination; (b) the Commissioner finds that the audited statements demonstrate that the captive has sufficient surplus to satisfy all of this obligations to its policyholders and creditors; (c) the captive is in compliance with all applicable DC laws and regulations; and (d) the captive is not a risk retention group ("RRG"). This latter requirement is due to the multi-state nature of RRGs. The value of an examination for a single parent captive, or really any captive that only covers first party risk, has long been subject to question when qualified auditors have already examined the captive each year and signed off on the bona fides of its financial activity. The cost of the examination of a single parent captive seemed unreasonable in this context.

The 2014 Amendments made a few other changes to improve efficiency. The Unfair Claims Practices and Claims Settlements Act were made applicable to DC – domiciled RRGs, these RRGs will also be required to file quarterly statements (which had been required by the Department of Insurance, Securities and Banking previously), and all references to "segregated accounts" were removed from the law to avoid confusion.

In sum, the DC captive law has been improved by addressing three problematic areas: minimum capitalization for cells, the protection of confidential information, and the burden of unnecessary and sometimes excessively expensive financial examinations. These are significant changes and should help DC maintain its position as one of the most efficient and responsive captive domiciles in the United States.

Robert "Skip" Myers is Co-Chair of the firm's Insurance and Reinsurance Practice and focuses in the areas of insurance regulation, antitrust and trade association law. Mr. Myers received his bachelor's degree from Princeton University and his law degree from the University of Virginia.

WAS THE SONY HACK A TRIA "ACT OF TERRORISM"?

by Joseph T. Holahan

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be reduced by one percent each year until it reaches 80 percent.[1]

TRIA's definition of an "act of terrorism" states, in relevant part,

> The term "act of terrorism" means any act that is certified by the Secretary [of the Treasury], in consultation with the Secretary of Homeland Security, and the Attorney General of the United States—
>
> (i) to be an act of terrorism;
>
> (ii) to be a violent act or an act that is dangerous to—
>
> (I) human life;
>
> (II) property; or
>
> (III) infrastructure;
>
> (iii) to have resulted in damage within the United States…; and
>
> (iv) to have been committed by an individual or individuals as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

TRIA § 102(1)(A).

Leaving aside subsection (i) for the moment, let's consider subsections (ii) – (iv). Although the event involving Sony thankfully did not involve violence, one could reasonably conclude it was dangerous to property and infrastructure within the meaning of subsection (ii). According to news reports, Sony's internal data centers were wiped clean and 75 percent of its servers destroyed. Some of the servers reportedly were located in the U.S. TRIA does not define "property" or "infrastructure," but nothing in the Act suggests that computer servers or data should not be considered property. The Merriam-Webster online dictionary defines "infrastructure" as "the basic equipment and structures (such as roads and bridges) that are needed for a country, region, or organization to function properly." Computer servers almost certainly qualify as basic equipment needed for a corporation like Sony to function properly.

For the same reason the event meets the criteria set forth in subsection (ii), it also should meet the requirement "to have resulted in damage within the United States" under subsection (iii). As discussed above, Sony's servers reportedly suffered considerable damage. In addition, nothing in TRIA limits the type of damage covered to "physical loss or damage" to property, as is the common formulation for commercial property insurance, or "physical injury to tangible property," as one typically finds in commercial general liability policies. Thus, "damage" within the meaning of subsection (iii) arguably could include damage to data.[2]

The last element of the definition, subsection (iv), requires the act to have been committed "by an individual or individuals as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion." One might argue that the Sony hack was not committed "by an individual or individuals" because it purportedly was undertaken at the direction of the North Korean government. If this is the case, it might be better characterized as an act of war, rather than an act of terrorism. On the other hand, individuals, of course, ultimately executed the hack, regardless on whose behalf they were acting.

In addition, aspects of the event clearly were intended to coerce the civilian population of the U.S. In a message citing the planned opening of "The Interview" the hackers referenced 9/11 and warned that people who chose to see the film would suffer "a bitter fate." The attack also may have been part of an effort to influence the U.S. government by coercion. Last June, a spokesman for the North Korean Ministry of Foreign Affairs said in a statement that the country would take a "decisive and merciless countermeasure" if the U.S. government permitted Sony to release "The Interview."

Finally, let's consider subsection (i) of the definition, which requires that an act of terrorism be an "act of terrorism." You can't get more circular than that. On its face, subsection (i) adds nothing to the definition, but one could argue that it evinces Congress's intent that only events conforming to common conceptions of what constitutes an act of terrorism should be certified as such. Such an interpretation could be used by the Secretary of the Treasury to broaden his discretion over what types of events will be certified as an "act of terrorism."

Was the Sony hack an "act of terrorism" as defined by TRIA? By one measure, it was merely attempted extortion or criminal harassment. Yet many acts committed by terrorists blur the line between terrorism and mere criminality. For example, the kidnappings perpetrated by ISIS seem to be as much about extracting ransom payments as they are about influencing governmental policy or public opinion.

One also might argue that the event was not an act of terrorism because it was aimed primarily at influencing the behavior of a single actor—Sony—rather than the public at large or the U.S. government. From this view, it is not a risk that should qualify for governmental support. Nevertheless, the attack bears many similarities to acts of terrorism aimed at limiting free expression that, although retributive, also appear to be designed as a warning to others who might engage in such speech.

In the end, the hybrid nature of the Sony hack illustrates the difficulties that may confront federal officials in determining whether any particular act constitutes an act of terrorism under TRIA. It also highlights the questions Congress may consider answering when deciding what types of events should be covered by TRIA if the Act is reauthorized in the future.

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1. In addition, beginning in 2015, the amount of losses insurers must retain on an aggregate market-wide basis increases from the 2014 level of $27.5 billion by $2 billion per year until it reaches $37.5 billion. The U.S. Treasury Department is required to recoup federal outlays under TRIA until insurers have retained at least this minimum amount on a market-wide basis.

2. This article does not consider the related issue of whether losses suffered by Sony were covered under the company's insurance, which would be prerequisite to any recovery under TRIA by its insurers.

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