Journal of Air Law and Commerce

Volume 72 | Issue 2 Article 8

2007

Business Interruption Claims in the Aftermath of the September 11 Terrorist Attacks - Dispute as to Scope of Coverage in Ambiguous Insurance Policies: *United Airlines, Inc. v. Insurance Company of the State of Pennsylvania*

Alyson Moses

BUSINESS INTERRUPTION CLAIMS IN THE AFTERMATH OF THE SEPTEMBER 11 TERRORIST ATTACKS—DISPUTE AS TO SCOPE OF COVERAGE IN AMBIGUOUS INSURANCE POLICIES: *UNITED AIRLINES, INC. V. INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA*

ALYSON MOSES*

IN THE WAKE of the devastating terrorist attacks of September 11, 2001, the unprecedented damage and destruction left behind wreaked havoc on the insurance industry. Among the many complicated insurance issues that arose after the attacks, courts faced mounting litigation regarding insurance policies containing business interruption coverage.[1] Battles arose between insurer and insured as to the interpretation of arguably ambiguous contract language and the extent to which such policies covered damages caused by the attacks. The case of *United Air Lines, Inc. v. Insurance Co. of the State of Pennsylvania*[2] exemplifies the types of egregious mistakes courts have made in response to the complex issues and arguments arising in these business interruption coverage disputes. United Air Lines (United) sued its insurance provider, the Insurance Company of the State of Pennsylvania (ISOP), for loss of revenue stemming from interruptions to the airline's business following the September 11 attacks.[3] The Second Circuit refused to consider ambiguities in the language of the insurance policy that reasonably could have led to an alternate interpretation of the terms in the policy and erroneously held that United could not recover damages for its business interruption claims.[4]

---

* J.D. Candidate, SMU Dedman School of Law, 2008; B.A., Washington University in St. Louis, 2005. I would like to thank my parents, Buddy and Rochelle Moses, for their continued love, support, and encouragement.

[1] *See* Andrew B. Downs & Sean K. Hungerford, *Business Interruption Coverage: A Primer on the Physical Loss Requirements*, NEV. LAW., June 2004, at 12.

[2] 439 F.3d 128 (2d Cir. 2006).

[3] *Id.* at 128.

[4] *Id.* at 129.

Shortly after the hijacked planes crashed into the World Trade Center towers, the Pentagon, and a field in Pennsylvania on September 11, 2001, the Federal Aviation Administration (FAA) ordered a nation-wide shutdown of the entire aviation system, which included a notice to close all operations at all airports nationwide.[5] Though the "ground stop" order was lifted on September 14, 2001, Ronald Reagan Washington National Airport remained closed until October 4, 2001.[6] Although United's facilities at Reagan Airport suffered no significant physical damage as a result of the nearby attack on the Pentagon, United claimed a loss of gross earnings that totaled approximately $4.7 million for the two-week period that the airport remained closed.[7] According to United, its "Property Terrorism & Sabotage" insurance policy with ISOP entitled it to recover these losses.[8]

While the parties appeared to be in general agreement on the facts of the September 11 events, they disagreed on the manner in which the insurance policy terms and conditions applied in the context of those events.[9] Based on its interpretation of the language in the policy, United reasoned that it was entitled to compensation for the lost earnings at issue and provided persuasive arguments to support its position.[10] United argued that it was entitled to recover these earnings under the "Civil Authority Clause" contained in a separate section of the policy because the post-attack order to shut down the airport was a direct result of physical damage to the Pentagon, which was on "adjacent premises."[11]

On July 14, 2003, United brought suit in the United States District Court for the Southern District of New York seeking a declaratory judgment and recovery in breach of contract under its "Property Terrorism & Sabotage" insurance policy with ISOP.[12] ISOP answered the complaint and submitted seven counterclaims, seeking declaratory judgment that it was not obli-

---

[5] United Airlines, Inc. v. Ins. Co. of the State of Pa., 385 F. Supp. 2d 343, 346 (S.D.N.Y. 2005).

[6] *Id.*

[7] *Id.* at 347.

[8] *Id.*

[9] *Id.* at 347–48.

[10] United Airlines, Inc. v. Ins. Co. of the State of Pa., 439 F.3d 128, 129 (2d Cir. 2006).

[11] *Id.* at 130.

[12] *Id.* at 129.

gated to cover the claims alleged by United in the complaint.[13] On June 1, 2004, United moved for summary judgment.[14] ISOP opposed United's motion and cross-moved for summary judgment on all claims.[15] The district court denied United's motion for summary judgment and granted ISOP's cross-motion for summary judgment.[16]

On appeal, the Second Circuit agreed with the district court's conclusion that ISOP was not obligated to cover United's claims for business interruption coverage under the terms of the "Property Terrorism & Sabotage" insurance policy (the Policy).[17] Therefore, the Second Circuit affirmed the district court's judgment against United.[18]

The Second Circuit rejected United's arguments set forth as a basis for recovery of the business interruption claims under the Policy.[19] In accordance with ISOP's interpretation of the Policy language, the Second Circuit agreed that to recover gross earnings, United needed to demonstrate that the business interruption at issue resulted from either: (1) physical damage to property at the insured location (the airport); or (2) from an order of civil authority issued as a direct result of physical damage to property adjacent to the insured location in question (the Pentagon).[20] The court found the language of the insurance policy to be unambiguous, and because United could not show that its loss of gross earnings resulted from physical damage to its property or from an order of civil authority issued in response to damage to an adjacent property, the Second Circuit denied recovery for the losses.[21]

United also sought to recover its loss of gross earnings under the "Civil Authority Clause" in the Policy.[22] In order to recover under this clause, the Second Circuit determined that United must show that it was denied access to its property at the airport during the government's suspension of incoming and outgoing flights "as a direct result of damage to adjacent premises."[23]

---

13 *Id.*
14 *United Airlines, Inc.*, 385 F. Supp. 2d at 345.
15 *Id.*
16 *United Airlines, Inc.*, 439 F.3d at 130.
17 *Id.* at 129.
18 *Id.* at 135.
19 *Id.* at 129–30.
20 *Id.*
21 *Id.* at 129.
22 *Id.* at 134.
23 *Id.*

Though the district court determined that the Pentagon did not qualify as an "adjacent premise" under the Policy provision, the Second Circuit conceded that the term "adjacent" could indeed be ambiguous, as maintained by United.[24] United argued that two properties could be adjacent without necessarily sharing a border,[25] and the court agreed with this conclusion.[26] The Second Circuit acknowledged that both United's argument and the district court's reasoning were persuasive with regard to whether the Pentagon fit the definition of an "adjacent premises" for the purpose of the "civil authority" provision.[27] The Second Circuit, however, ultimately determined that it did not need to resolve this issue, holding that even if the Pentagon was "adjacent" to United's property, United could not show that the airport was shut down "as a direct result of damage to" the Pentagon.[28]

In contrast to United's belief that the FAA shut down the airport under order of civil authority as a direct result of the terrorist attack at the Pentagon and its impact, the Second Circuit concluded that the government's decision to halt operations at the airport was instead based on fears of future attacks.[29] The Second Circuit further noted that the airport was reopened when it was able to comply with more rigorous safety standards and that the timing of the ground-stop order "had nothing to do with repairing, mitigating, or responding to the damage caused by the attack on the Pentagon."[30] The court cited other courts' interpretations of civil authority clauses after September 11, and found that, in concluding that the business interruption was caused by fears of future attacks rather than actual physical damage inflicted on the Pentagon, its causation analysis was consistent with that of the other courts.[31]

There are a number of weaknesses and oversights in the Second Circuit's analysis of United's business interruption insurance coverage. For example, the court failed to address proper standards for judicial interpretation of ambiguities in contract

---

[24] *Id.*; Haber v. St. Paul Guardian Ins. Co., 137 F.3d 691, 695 (2d Cir. 1998) ("As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading.").

[25] *See, e.g.*, United States v. St. Anthony R.R. Co., 192 U.S. 524, 538–40 (1904).

[26] *United Airlines, Inc.*, 439 F.3d at 134.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 135.

[31] *See, e.g.*, Chicago v. Factory Mut. Ins. Co., No. 02C7023, 2004 WL 549447, at *4 (N.D. Ill. Mar. 18, 2004).

language, causing the court to rebuff alternate interpretations supporting United's position. Nowhere in the court's analysis did the Second Circuit address the principle that, "under New York law, which governs this case, an ambiguous provision in an insurance policy is construed most favorably to the insured and most strictly against the insurer."[32] The insurer bears a heavy burden of proof to establish that the words and expressions used in the insurance policy are not only susceptible of the construction sought by the insurer, but that it is the only construction which may fairly be placed on them.[33]

According to this accepted principle of insurance contract interpretation under New York law, the Policy should have been construed in a way most favorable to United, as the insured. In the case at bar, ISOP failed to fulfill its burden, and yet the Second Circuit avoided resolving the conflicting interpretations of ambiguous contract terms rather than giving United's understanding of the language due, preferential consideration. The court recognized the ambiguity of the term "adjacent" in the Policy language but refused to resolve the question of whether the Pentagon qualified as "adjacent" to United's property.[34] The court acknowledged the strength of United's argument that the Pentagon was an "adjacent" premises, and upon construing the Policy language in United's favor, should have concluded that the Pentagon was "adjacent" to United's property as required by the Policy's "Civil Authority Clause."

With regard to the causation requirement in the Policy's "Civil Authority Clause," the Second Circuit blatantly misstated the Policy language. The Second Circuit reasoned that, in order to recover under the Policy's "Civil Authority Clause," "United must show that it was denied access to its locations at the [a]irport as a direct result of damage to adjacent premises."[35] The Policy actually stated that the section "specifically extended to cover a situation when access to the Insured Locations is prohibited by order of civil authority as a direct result of damages to adjacent premises."[36] A direct causal relationship between United's lost business income and the "ground-stop" order differs entirely from a direct causal relationship between the lost income and damage to "adjacent premises." The Second Cir-

---

[32] *See, e.g.*, Vargas v. Ins. Co. of N. Am., 651 F.2d 838, 839–40 (2d Cir. 1981).
[33] *See, e.g., id.* at 840.
[34] *United Airlines, Inc.*, 439 F.3d at 134.
[35] *Id.*
[36] *Id.* at 129 (emphasis added).

cuit began its causation discussion by confusing these two distinct relationships, and the muddled analysis of the "Civil Authority Clause" causation requirement continued thereafter.

The Second Circuit's analysis of the causation requirement in the Policy's "Civil Authority Clause" overlooked the important distinction between the concepts of purpose and causation. The Second Circuit concluded that the business interruption was caused by fears of future attacks and not by the actual physical damage on the Pentagon.[37] The proposition that the FAA's "ground-stop" order was not issued as a result of the horrifically destructive terrorist attack on the Pentagon (and World Trade Center towers) is preposterous. Although it might be true that fear of future attacks operated as a main purpose behind the government's decision to impose the "ground-stop order," it can hardly be said that the physical damage inflicted on the Pentagon was not a prime causal factor in the government's decision to shut down the airport. Black's Law Dictionary defines proximate cause as "[a] cause that directly produces an event and without which the event would not have occurred."[38] The safety concerns cited by the court as the cause of the business interruption would not have come about in the first place had the terrorist attacks on the World Trade Center and the Pentagon not occurred. It is counterintuitive to suggest that the airport closure did not result from damage to the nearby Pentagon.

The "Civil Authority Clause" in the case at bar did not call for a purpose requirement in lieu of, or in addition to, a causation requirement, but even if the Second Circuit's application of a purpose element had been warranted, the analysis employed by the court was misguided. The Second Circuit claimed that, "[t]he evidence . . . indicate[d], not surprisingly, that the government's subsequent decision to halt operations at the Airport indefinitely was based on fears of future attacks."[39] The Second Circuit, however, endeavored to make this purpose determination without specifying the source of business interruption on which the court based its analysis. The FAA "ground-stop" order was lifted nationwide on September 14, 2001, but Reagan Airport remained closed until October 4, 2001.[40] It is unclear whether the Second Circuit's reference to the "government's

---

[37] *Id.* at 135.

[38] BLACK'S LAW DICTIONARY 234 (8th ed. 2004).

[39] *United Airlines, Inc.*, 439 F.3d at 134.

[40] United Airlines, Inc. v. Ins. Co. of the State of Pa., 385 F. Supp. 2d 343, 346 (S.D.N.Y. 2005).

subsequent decision to halt operations at the Airport indefinitely . . . ."[41] was alluding to the FAA's nationwide "ground-stop" order or to Reagan Airport's prolonged closure. The Second Circuit explained, however, that the federal government required that the airport remain closed until October 4, 2001 because of the location of the airport, the fact that the airport's flight paths take aircraft near the White House, Pentagon, and Capitol, and because "the [airport] was reopened when it was able to comply with more rigorous safety standards."[42] From these explanations, it appears that the Second Circuit based its conclusion (that the government's decision to halt airport operations was due to a fear of future attacks) on the airport's prolonged closure, rather than the FAA's initial nationwide "ground-stop" order. Yet the Second Circuit referred to the nationwide "ground-stop" order throughout its opinion, never differentiating between the FAA order and the airport's continued closure.

To support its contention that United could not show that the airport was shut down as a direct result of damage to the Pentagon, the Second Circuit also pointed out that there was "apparently a temporary halt of flights into and out of the [a]irport on 9/11 before the Pentagon was struck."[43] In citing this detail, the Second Circuit once again ignored important factual distinctions with regard to the unfolding of events of September 11. Approximately half an hour before the FAA issued its nationwide "ground-stop" order, the Metropolitan Washington Airports Authority (MWAA) made the decision to close Reagan Airport.[44] The Second Circuit erroneously insinuated that the MWAA's decision to close the airport before the attack on the Pentagon verified its conclusion that the airport could not have been shut down as a direct result of damage to the Pentagon. The Second Circuit failed to make necessary specifications with regard to critical background facts and carelessly misused those facts as evidence to support its analysis of United's business interruption claims (which, once again, was an analysis erroneously based on purpose rather than causation). In other words, the Second Circuit employed a misguided analysis using a purpose requirement (a requirement that did not even exist in the

---

[41] *United Airlines, Inc.*, 439 F.3d at 134 (emphasis added).

[42] *Id.* at 135.

[43] *Id.* at 134.

[44] *United Airlines, Inc.*, 385 F. Supp. 2d at 346.

insurance policy), and did so under the false guise of a causation analysis.

Further, the authority cited by the Second Circuit to support its causation argument should be distinguished from the case at bar due to critical distinctions ignored by the court. In the case of *City of Chicago v. Factory Mutual Insurance Co.*, which also dealt with business interruption claims resulting from the FAA's "ground-stop" order after the September 11 attacks, the district court held that the FAA ultimately imposed the "ground-stop" order to protect against any future terrorist attacks.[45] The Second Circuit, however, ignored important differences between the language found in the insurance policy in *City of Chicago* and the language in the case at bar. The "civil authority clause" in *City of Chicago* specifically limited coverage to business interruptions caused by temporary actions "to prevent immediately impending physical loss or damage insured by this policy."[46] That insurance policy specifically looked to purpose as a condition upon which recovery relied. Recovery for business interruption losses depended upon civil authority action intended for the purpose of preventing "immediately impending physical loss or damage."[47] The policy at hand contained no such limitation, instead specifying that it covered business interruption losses if caused by "damage to or destruction of the Insured Locations, resulting from terrorism . . . [and] extended to cover a situation when access to the Insured Locations is prohibited by order of civil authority as a direct result of damage to adjacent premises . . . ."[48] Unlike the policy language in *City of Chicago*, the civil authority clause in the case at bar conditions recovery for business interruption losses on a causation requirement, as opposed to a purpose requirement. The district court's assertion that the "ground-stop" order was imposed to protect against future terrorist attacks was made in the context of arguments based on dissimilar insurance policy language, and thus the Second Circuit should not have relied on *City of Chicago* for authority in the case at bar.

Had the Second Circuit applied proper principles of contract interpretation—namely the rule of construing ambiguities in insurance policies most favorably to the insured—the court most

---

[45] *See* Chicago v. Factory Mut. Ins. Co., No. 02C7023, 2004 WL 549447, at *4 (N.D. Ill. Mar. 18, 2004).

[46] *Id.*

[47] *Id.*

[48] *United Airlines, Inc.*, 385 F. Supp. 2d at 345.

likely would have ruled in favor of United, granting recovery for the business interruption claims at issue in this case. Instead, the court employed skewed logic in its analysis of the causation requirement in the Policy's "Civil Authority Clause," resulting in a counterintuitive conclusion which further disfavored United's credible claims. The Second Circuit recognized that "the purpose of business interruption insurance is to indemnify the insured against losses arising from an inability to continue normal business operations and functions due to damage sustained as a result of the hazard insured against."[49] The Policy in this case plainly clarifies that terrorism is a "hazard insured against," and United's losses did, in fact, arise from an inability to continue normal business operations due to the "ground-stop" order issued in response to the damaging September 11 terrorist attacks. Thus, United's business interruption claims in the case fit squarely within the definition of proper business interruption insurance coverage, as advanced by the Second Circuit. Yet, the Second Circuit failed to utilize proper standards for interpreting ambiguous contracts, blatantly misstated policy language, employed a purpose requirement where none existed (rather than appropriately employing a causation requirement analysis), misused critical background facts in its misguided analysis, and cited authority that did not actually support its flawed argument. It is no great surprise, following blunder after blunder, that the Second Circuit erroneously concluded that United could not recover its business interruption claims.

---

[49] United Airlines, Inc. v. Ins. Co. of the State of Pa., 439 F.3d 128, 131 (2d Cir. 2006) (quoting 68A N.Y. JUR. 2D *Ins.* § 539 (2005)).


SOUTHERN METHODIST UNIVERSITY
DALLAS, TEXAS