Compensation For Terrorism's Casualties --

Civil Justice Remedies or Government Awards?

by

Ronald R. Robinson, Esq.
Chair of the Defense Research Institute's
TRIA Subcommittee

with

Robert H. Berkes, Esq.

Berkes Crane Robinson & Seal LLP
515 So. Figueroa Street – Suite 1500
Los Angeles, California 90071
rrobinson@bcrslaw.com
rberkes@bcrslaw.com
(213) 955-1150

TABLE OF CONTENTS

I. Introduction.

The United States' federal government created a controversial "relief" paradigm in response to the September 11, 2001, terrorist attack against the World Trade Center ("WTC") and the Pentagon ("9/11"). This novel approach permitted a suspension of the historic role of the civil justice system because the demand for compensation and the assignment of responsibility for 9/11 losses was effectively wrested from U.S. courts and replaced by a federally controlled liability limitation/compensation scheme that performed neither function. The mechanism employed to accomplish this sea change was comprised of The Federal Air Transportation Safety and Systems Stabilization Act of 2001; amended first to add the Aviation and Transportation Security Act of 2001 (herein collectively the "Act") and then assertedly "balanced" by a second amendment entitled the September 11th Victim Compensation Fund of 2001 ("Fund")[1].

How was this accomplished? The Act provided federally mandated liability "caps," sheltered assets and provided loss subsidies to protect those persons and entities -- other than the terrorists themselves -- that might be alleged to be, in part, responsible for 9/11 losses from suits to be brought by 9/11 "victims." This "class" of potential defendants included airlines, building owners, and the police, emergency care providers and local, state and federal government entities responsible for public safety on 9/11 (herein "protected parties"). In turn, the Fund offered strong incentives to specified 9/11 claimants (the representatives of those killed, the injured and their families (herein

[1] The term "Casualty" Compensation Fund might have been more accurate a title for this amendment, given the similarities between the causes of the 9/11 fatalities and injuries, and the causes of casualties in a conventional war. Many friends and families of these so called "victims" see any terrorist attack in this light; i.e., as a circumstance parallel to traditional warfare. This title would also have been more in keeping with the way many argue that their dead ought to be remembered at the WTC Ground Zero Memorial, as casualties, not victims, of a new kind of non-traditionally defined war.

families (herein "casualties")), who might otherwise seek redress of grievances against the protected parties in court, to opt out of the civil justice system. The Fund accomplished this diversion by means of "relief" awards to casualties who agreed to waive their rights to seek "compensation" in court. Such an election, however, also meant that there would be no moral accounting by the alleged "injurers" to the "injured," no assignment of responsibly for the losses and no sanctions imposed that might result in changes in offending or damaging infrastructures, conduct or statutes.

Facing the prospects of a decade or more of hard fought litigation and the pressure of no immediate financial help, about 10,000 casualty claimants -- fully aware of the fact that plaintiffs in the 1994 Oklahoma City Federal Building attack suits were only in early pre-trial preparation -- opted out of the civil justice system and elected federal awards under the Fund. Only about 70 casualty claimants sued United and American airlines, the WTC, Boeing, security and safety entities (public and private) and other allegedly relevant third parties. Their grounds included inadequate intelligence gathering, government response to the obvious threat, security planning, fire prevention measures, safety plans and communication and coordination of rescue efforts. The federal court responsible for these suits has, to date, concluded that the means and scope of the 9/11 attack present traditional questions of foreseeability, negligence, failure to warn, and duty to protect. Trial, of course, is years away

The Fund and the Act (herein sometimes the "Casualty Acts") were, in a very real sense, non-insurance based bodily injury, property and casualty terrorism loss "relief" programs. Funded entirely by the federal government, they were the pre-cursers to the Terrorism Risk Insurance Act of 2002 ("TRIA"). TRIA, a federal government/private market statutorily mandated and controlled $100 billion insurance program, covers losses from *future* foreign terrorist attacks on American soil as well as on its ships, aircraft

and embassies/missions, wherever located. The TRIA "Program" is administered by the United States' Treasury Department. TRIA's coverage, which ends on December 31, 2005, unless extended, is made up of Property, Casualty and Workers Compensation insurance, offered on a voluntary basis, for events "certified" by the Treasury Secretary, the Attorney General and the Secretary of State to comply with TRIA's scope of coverage. It is, in effect, a hybrid of federal law, administrative regulations and existing coverage provisions in private market insurance policies that provide government "re-insurance" at public expense to cover TRIA losses.

The current Republican Administration in the United States is, as a matter of doctrine, hesitant to enter into or offer government funded or administrated "insurance" programs, or place itself in competition with this private sector enterprise. In its view, TRIA must end as scheduled on December 31, 2005. Republicans are using that position to create political leverage that may permit them to interject elements of their civil justice reform legislative agenda into the now raging TRIA extension/succession debate, including: general litigation and tort reform measures; specific prohibitions on punitive damages; specified limitations on recovery of non-economic losses; the elimination of joint and several liability; specified limitations on pain and suffering awards; and changes in standards of proof.

Many believe that the administration may propose to replace TRIA with emergency programs like the Act and the Fund. Consequently, all of the previously raised concerns about how the Casualty Acts operated to force a waiver of civil rights by 9/11 casualties, largely left unresolved (as discussed more fully below), are today at the forefront of the TRIA debate.

The civil justice system grants any citizen access to due process of law to "discover" the reasons for a loss and the party allegedly at fault as well as

to assign responsibility for that fault and have the consequences thereof borne by that party. Those consequences may well require changes in infrastructures, conduct or statutes. Any tort/litigation reform agenda can easily be made a part of the TRIA extension/succession debate because of the pervasive role insurance plays in the civil justice system. Insurance drives the economic infrastructure that supports, in large measure, the civil justice system itself. It is insurance that pays for most civil dispute based settlements and court/jury awards. These, in turn, pay the plaintiff counsel's contingency fees. Insurance also pays the defendant's attorney. Without insurance, most ordinary citizens and smaller businesses would not have the financial ability to access compensation for or protection from loss that the civil justice system provides.

If TRIA ends, will it be because the paradigm of the Act and Fund is re-asserted as a "replacement" for the current government role in terrorism insurance? Some are already suggesting just such an approach. Because our courts provide access to every citizen to protect and preserve his or her "life, liberty and pursuit of happiness," any fundamental change in this paradigm is a serious Constitutional issue. In a democracy, the power of law must remain available to each individual citizen and not become the province of only the rich, the powerful, the Congress or the Executive Branch. Knowing this fundamental truth, the founders of this republic made the courts a co-equal branch of government.

This paper tells the story of what may well be unintended consequences of the Act and the Fund and how they might impact the unfolding TRIA extension/succession debate in Congress. It is a cautionary tale of the pitfalls of massive government economic protection and indemnity schemes that operate outside of the civil justice system/insurance paradigm. The lessons taught by these after-the-fact crises driven solutions to catastrophic loss, if heeded, can serve to inform the debate on TRIA and provide insight on why it is

best to address terrorism risks in an insurance/civil justice based paradigm. More importantly, to do so in a way that has been planned, implemented and made operational well before the next attack.

II. THE CURRENT ANALYSIS OF INSURED/UNINSURED 9/11 LOSSES.

A. Early Insured Loss Projections.

Demands for insurance to cover 9/11 losses were made on various types of policies offered under all three general lines of domestic and foreign based insurance available in the United States. Personal Lines of cover include accident, auto (physical damage), health, life and workers' compensation insurance. Property Lines of cover include first party property (fire and tangible and intangible damages) and business interruption insurance. Casualty Lines of cover include various forms of third party liability insurance held by individuals (home and auto protections), businesses, organizations, institutions and local, state and federal governmental agencies.

Personal Lines (Life and Health) responded without debate to the horrific injuries and loss of life suffered by the thousands of people who were casualties of the 9/11 attack. These covers have no war risk or like exclusions, conditions and limitations. Property and Casualty Line policies provided coverage for the catastrophic business and commercial losses, despite the presence of their war risk exclusions, conditions and limitations. Target defendants for 9/11 property and casualty policy claims included building owners, lessors, airlines, and the local, state and federal government agencies (i.e., agencies responsible for the prevention of such attacks and for the protection and/or rescue of those at risk or lost in the attack.) These entities are the ones that became the protected parties under the Act shortly after 9/11.

Highly regarded analysts initially estimated that, if quantified only in terms of dollars, as opposed to the very real misery and suffering that resulted from this attack, all 9/11 losses combined amounted to approximately $50 billion. Insurance was first projected to cover the majority of these losses, categorized by coverage type, as follows: Workers' compensation, $5.0 billion (approx. 4,500 claims); Life (and Health), $6.0 billion (approx. 2500 claims); Property, $12.0 billion (approx. 8300 Personal Property, 12,250 Commercial property, and 4,500 Business Interruption claims); and Casualty, $18.0 to $20.0 billion (an unknown number of claims). Thus, the *insured* loss was projected to total $41 to $43 billion. The policyholders were responsible for and/or the uninsured retained between $7.0 to $9.0 billion in losses that were paid directly by these various individuals, businesses, institutions, organizations and governmental entities, as opposed to insurers.

B. Today's Insured Loss Estimates.

The Insurance Information Institute's current estimate of *insured* 9/11 losses total $31.7 billion, as opposed to the original estimate of $41 to $43 billon. A comparison of the projected to the current estimates of insured loss by policy type reveals the following: Life and Health, paid $1 billion (not $6 billion) Workers' Compensation policies paid $1.8 billion (not $5.0 billion); Property policies paid $20.4 billion (*not* $12.0 billion), broken down as follows – Business Interruption $9.8 billion - Other Property $5.4 billion - World Trade Center $4.7 billion - Aviation Hull, $.5 billion; and Casualty policies paid $8.5 billion (*not* $18.0 to $20.0 billion), broken down as follows – Other Casualty, $4.0 billion – aviation Hull, $3.5 billion - Event Cancellation $1.0 billion.

In brief summary: Workers Compensation losses are 150% less than projected; Property losses are 66% higher than projected; Casualty losses are 100% less than projected and Life and Health losses are 500% less than projected.

III. THE ACT, FUND AND CHARITIES PROVIDED BILLIONS OF DOLLARS IN "PUBLIC" RELIEF.

A. The Casualty Acts' "Relief" Paradigm.

The Act guarantees governmental financial protection for the pool of potential 9/11 defendants. U. S. Treasury dollars of up to $5 billion are available to these protected parties to cover their property losses and to reimburse them for §any post 9/11 increases in insurance premiums. Third party liability protection is also provided to these parties, should they be sued, of up to $1.5 billion for any 9/11 "event" damages awards.[2] The liability of the protected parties for any *future* terrorist damages is limited to $100 million, in the aggregate, after which the government steps in with "excess" cover of up to a $1.5 billion limit *per event*. Coverage for punitive damages is prohibited under the Act. Most importantly, all of this protection is provided in addition to, rather than in lieu of, other benefits and private compensation programs available to the protected parties; i.e., there are no offsets against the protected parties' other assets under the Casualty Acts.

Fund awards to casualty claimants were originally projected to be $8.5 billion in death benefits and $1.5 billion in injury benefits ($10.0 billion). Current Fund award estimates are $6.0 billion for deaths and $1.0 billion for injuries ($7.0 billion). This $3 billion in "savings" is due in large measure to the fact that casualty claimants, unlike the potential parties, are subject to a Byzantine set administrative regulations that are out to reduce or eliminate this relief. All non-Fund claimant benefits, including previously purchased private protections, are deducted from awards based on a "needs" paradigm. This approach is inverse to and opposite from the paradigm for protected parties of unfettered access to all non-program benefits owned by or given to them,

[2]There is ongoing litigation as to whether this attack was comprised of one, three or four separate "events." A finding of multiple *events* might cause some to argue there are multiple $1.5 billion liability limits available to protected parties.

claimants thus had the Hobson's choice of accepting an award, much reduced by personal asset set offs, or risking litigation that may or may not provide any compensation. In the end, many awards were reduced to zero and these claimants had waived their right to sue.

B. The Issues Raised by the Casualty Acts' Alternative to Civil Justice "Compensation."

Some take great exception to the assertions of those who insist that the Casualty Acts have created a fair "balance" of protection and relief as between the protected parties and their potential claimant population. These critics argue that the Casualty Acts have favored the protected parties by keeping their non-Act/Fund benefits safeguarded and free from offset while their potential liabilities are limited or eliminated outright. They contrast this reality with the one faced by claimants, who must choose between: (1) salvaging their non-Fund benefits and electing to litigate to be made whole (a choice that might or might not result in a liability judgment that exceeds the fund award they waived); or (2) opting for a Fund award that deducts privately purchased or earned benefits. Some critics argue that this imbalance exists because the protected parties are, in some way, the favored constituents of powerful politicians. They conclude that the Casualty Acts neither serve nor protect the potential claimant population. What are the facts underlying this debate?

The 9/11 losses are today approximately $41-$43 billion. The Act's liability caps/limitations appear on their face, therefore, to favor the protected parties at the expense of the claimants. The option to wave an award and sue the protected parties does not give the claimant population the traditional tort guarantee of all the damages one can prove: i.e. the damages are capped at the $1.5 billion limit. There is no balance here because the "forfeit" of an award in favor of suit does not restore a claimant's unfettered access to the full array of civil remedies.

Are the awards a fair trade off for this limit on recovery? Initially, the Fund offered each fatality's "family" a grant of $250,000 for "pain and suffering." Additional grants of $50,000 each for a surviving spouse and the child(ren) of such a fatality were available. The awards were immediate, but not subject to claimant contest on any grounds. The administrative regulations that followed to implement the Fund broadened the amount of certain grants, but also created uncontestable rules that permitted set offs to those awards. These subjective provisions served to deduct from a given claimant's Fund award any of his or her charitable gifts, privately purchased benefits, and other personal assets based on a "needs" criteria set unilaterally by an administrator, the Special Master, who was given very broad discretion to make these decisions.

There are few, if any, institutionalized checks or balances on the Fund's "needs" based agenda. Thus, no matter how heartfelt or compassionate the decision makers view their own intentions, there is no avenue for redress available to the claimants who object to but must endure the "needs" set offs that reduce their awards, other than moral persuasion. Thus, 401(k) retirement benefits, social security, workers compensation, life insurance, savings, and other collateral sources or benefits (including charitable gifts, investments and certain levels of family income or property value) serve as "set offs" from the award.

Many involved in creating, supporting and passing the Casualty Acts did not understand that rules such as these would necessarily follow from the legislation, let alone be imposed in the manner that they were. Moreover, the expansive discretion to "tailor" awards on whatever "needs" criteria the Special Master thought appropriate resulted in an absence of claim predictability and constant disputes over the Fund's mandate. Many family members argue that claimants who agreed to accept awards in lieu of litigation were, therefore, subjected to ambiguous, uncertain and inequitable treatment in the very forum

that should have safeguarded them because of the mandatory waiver of litigation rights and caps in liability should they sue.

In the end, the Fund became a hybrid of the Workers Compensation and arbitration paradigms, with the protections of neither and no appeal of the award granted. Moreover, opting for an award ended any opportunity to access discovery, have a judge or jury make determinations or assign accountability in order to deter future damaging behavior. If negligent or irresponsible persons and entities can damage others or deprive them life, property or liberty without consequence, there is little reason for such persons or entities to change their behavior in the future. The Fund awards came, therefore, at a price far greater than the private benefits that were deducted from claimants awards.

C. The Question Raised is Whether "Relief," Based on Equality of "Need," Ought to Replace "Compensation," Based on Equality of "Loss."

The arguments in favor of a dollar-by-dollar "needs" based exercise are not asserted because of a lack of caring or compassion. They are rooted in a fundamental disagreement over whether equality of "need" or "loss" ought to govern redress of grievance paradigms. The Fund's set off arguments are based on the premise that *equality of need – not loss* - ought to be the core of a moral covenant for "relief" between the claimants and the citizens of the United States. The intentions of the "need" proponents are, in the main, neither untoward nor indifferent to the "loss" at issue. They simply disagree with compensation based on *equality of the loss*. In other words, the issue is whether the government should provide "relief based on needs" or whether claimants should have access to courts and the right to seek "compensation for loss."

Shortly after Fund awards were actually being calculated and the magnitude of the set offs became apparent, a growing force of active, savvy and

organized coalitions of 9/11 families began to argue that any pain and suffering grant based on need was, in effect, "closet" tort reform. These groups brought a great deal of public attention to the imposition of "need" based regulations and argued they were unnecessary, demeaning or too costly to administer. More importantly, they argued that "need" was unrelated to the sole relevant fact underlying each claimant's "loss" - the deaths or injuries were equally horrific, person to person, and thus, the loss was equal and ought not be "adjusted" based on needs.

The public debate 9/11 families demanded at all levels, including within the White, resulted in individual spouse and children awards under the Victim's Fund being increased from $50,000 to $100,000, but the $250,000 pain and suffering grant for each "family" of a fatality was not increased. However, the 9/11 family coalitions failed in their attempts to stop award "set offs" from awards based on life insurance and workers compensation benefits (to the extent already paid), as well as certain other benefits. Of particular concern to these groups were the adverse eligibility distinctions made because a recipient had been prudent (*i.e.*, had savings accounts, retirement funds, life insurance or investments). Many 9/11 claimants had a strongly negative reaction to any reduction of award amounts on these grounds.

Most troubling to the families was the continued broad discretion to determine "need" that remained with the Special Master. They argued that the guiding principle for the dissemination of public "relief" funds should have been the fact of the equality of loss suffered by each claimant. The notion that the needs resulting from each loss were "different," they asserted, ignored the reality of the event. In every case, an irreplaceable life was ended by the same violent attack; a fact that by definition is not relevant to the circumstances of "need" for a particular fatality's survivors.

Should one claimant be considered more deserving than any other based on need? Should distinctions be made based on economic prudence or status? Should an objective *equality of loss* or a subjective *equality of need* standard determine a "relief" award? Sadly, this debate has too often degenerated to allegations by both sides of political agendas, greed, arbitrariness and indifference. This clearly is a cautionary tale of the dangers of creating - whole cloth - a relief paradigm in times of crisis.

D. How The Victim's Fund Awards Program Actually Played Out.

As noted above, Fund awards were originally projected to be $8.5 billion in death benefits and $1.5 billion in injury benefits ($10.0 billion). Current Fund award estimates are $6.0 billion for deaths and $1.0 billion for injuries ($7.0 billion). The Fund's death claim awards have a $2.0 million average payout and a $1.7 million median pay out; the range being $250,000 to $7.0 million. About 60% of the fatalities earned under $100,000 per year, while 5% earned over $200,000 per year. The injury claims averaged $390,000 and a $110,000 median pay out; the range being $500,000 to $8.6 million.

The 70 or so of the 10,000 casualty claimants that opted out of they Fund's award program forfeited that "relief' merely by the act of filing a complaint (notice of suit for purposes of the statutes of limitation does not trigger the forfeit). Why was the choice so lopsided? The Fund's Special Master is argued by some family members to have created the impression that they are unlikely to get answers to questions of negligence and accountability even if they sue. In addition, some family members have asserted that a review of numerous pronouncements made in many venues by commentators, legal experts and those who created and implemented this governmental relief program have served to discourage them from directly challenging the constitutionality of the Casualty Acts.

More disturbing to these plaintiffs is that their defendants are protected under the Act such that any damages awarded are limited to the amount of their respective insurance coverages. These restrictions will, in turn, engender multiple coverage disputes over how the limited insurance resources of these entities are to be allocated; *i.e.*, by date of claim filing, by claimant economic circumstance or by *per capita* and other equitable *pro-rata* sharing theories. It bears noting that the government has reserved its right to engage in subrogation litigation respecting all claims it pays and can seek recovery from any third party defendant. In short, while the supposed evils of "citizen" lawsuits have been controlled by the Fund's waiver rule, the parallel evils of "federal" litigation against the same target groups have been preserved.

Have these circumstances made the price of engaging in the fact and fault finding process of litigation a fearful prospect? Did they create undue pressures that convinced 9/11 casualties to forfeit the compensation that a suit on the issues can provide? The answers to these questions are hotly debated. What is clear, however, is that the "all or nothing" choices presented by the Fund are a powerful tool of persuasion. Only a few have chosen to risk compensation by filing suit.

E. Charitable Relief Programs, Structured Much Like the Acts' Paradigm, Were Subject to the Same Objections.

Certain established charities, such as the Red Cross, and new ones created solely to provide relief to 9/11 casualties, solicited hundreds of millions of dollars from the public to fund their relief programs. Appeals were made *via* rock concerts, T.V. specials and ad campaigns. Many of these charities also established rigid documentation and economic screening criteria to govern the gifts they distributed. These criteria were based primarily on each charities' subjective views of "need." For example, the Red Cross imposed cost limits on services and supplies for medical care similar to those used by HMOs. It also

spent over $65 million to administer the elaborate claim verification, and assessment distribution bureaucracy it created to dispense hundreds of millions of dollars in private gifts that funded its program. This contrasts with the Fund's administrative overhead of $87 million to process $7 billion in awards. Like the Fund, charities also tried to direct recipients to spend the "gifts" in certain ways. Some have asserted that the charitable gift "screening" criteria were even more arbitrary, in many cases, than the Fund's award set-off regulations and much less efficient.

Thus, the unconditioned and unrestricted donations of their fellow Americans was not only limited and restricted when distributed to the 9/11 casualties; additional monies were diverted from these claimants to cover the cost of the administration of yet another elaborate "needs" based qualification criteria. None of the donors of the literally hundreds of millions of dollars to these charities understood that these rules would be imposed, let alone consented to them. The compassion that drove gifts by millions of people worldwide to these charities for exclusive distribution to casualty claimants was the loss suffered by 9/11 family members - the murder or bodily injury inflicted in horrific circumstances on a beloved husband, father, wife, mother, brother, sister or child. The needs based criteria that governed distribution, however, was not consistent with that intent.

F. The Statutory and Charitable Relief Efforts Created Problems Not Present in Civil Justice/Insurance Based Solutions.

The 9/11 casualties were in fact traumatized further by the ambiguities and uncertainties attending the unbridled discretionary administration of the charitable gifts and the Fund awards that were the core of these relief efforts. The commercial entities that comprised the protected parties under the Act in fact were protected to a far greater extent than these claimants.

These entities received financial protection suffered no set offs based on "needs", while the casualties' legal rights were curtailed and their financial compensation was restricted by "needs" off sets. It was an inverse arrangement. The protected parties paid less (and received more) than they could achieve in a traditional court setting. This is not a "balanced" zero sum result. Is "relief" to be the approach for future losses, or should protections and compensation be achieved in the civil justice system/insurance paradigm?

The Funds' awards and the charitable gifts proven to be unwieldy, unresponsive and frustrating to many, as well as sometimes damaging to those they sought to serve. No matter how one views the decisions of those who administered these efforts, these entities simply did not have the experience or the time necessary to create a new relief distribution mechanism. Moreover, in the absence of real checks and balances on evolving relief decision-making powers, the entire effort was, in the final analysis, governed by the kind of personal and political agendas that are all too easily asserted outside of the civil justice system.

The Fund and the concerned charities *de facto* sought to re-invent a mechanism that already exists, is proven and is better equipped to handle catastrophic losses - the civil justice/insurance paradigm. Insurance claims are resolved based on contract law and have civil justice safeguards, equally available to policyholders and claimants alike, to prevent personal agendas from becoming a binding criteria. When insurance pays your claim it does not ask if your investment portfolio, your mortgage or your income is great or small. It pays the loss. The lesson learned from the crisis-driven creation and operation of these relief mechanisms is a warning of the danger inherent in creating catastrophic loss relief programs after the fact.

Traditional insurance-based compensation, as "checked" by the civil justice system, provides a clear and understandable scope of coverage, a payment criteria that is loss based and an "award" related solely to the terms of a contract. The contract between the insurer and the insured is a legal covenant. Each party to that contract has recourse to the courts if there is a dispute. This approach to relief is far more resistant to political and personal prerogative than the Casualty Acts. This fact alone argues for preservation of the traditional civil justice system/insurance based paradigm for all losses, including those caused by terrorists.

IV. THE CIVIL JUSTICE/ INSURANCE PARADIGM IS BEING CHALLENGED ANEW IN THE TRIA RE-AUTHORIZATION DEBATE NOW UNDERWAY IN CONGRESS.

What sort of terrorism risk program ought, could, can—and will be—developed to replace TRIA? How will the disparate demands for solutions to this problem and for protection from the catastrophic terrorism losses faced by all Americans be satisfied? What public resources, private coverage programs or government and insurance community risk transfer partnerships should be developed and implemented to replace TRIA? What scope of terrorism risk coverage should be available in Personal, Property, and Casualty Lines in 2006? Are there viable international applications of TRIA's coverage principles in the global marketplace? Most fundamentally, will a successor program further alter the civil justice/insurance compensation paradigm or will it turn back the clock and leave the Act and the Fund as historic artifacts of an emergency circumstance?

Because all twelve-month TRIA program policies in force after January 1, 2005 will continue in place after TRIA sunsets, the succession issue will be moot unless all the above questions are addressed and, in large part resolved, by December 31, 2005, when TRIA expires. A White Paper by one of

the authors of this article outlines the components of the succession debate and presents a proposal for a successor to TRIA. See The Terrorism Risk Insurance Act ("TRIA") 2002 to 2005 - The Risk Transfer & Insurability Debates Surrounding TRIA's Successor, by Ronald R. Robinson, Esq.

A. The U.S. Treasury Department Sets the Tone for the TRIA Debate.

The U.S. Treasury Department administers the TRIA Program and, as mandated, has now produced a 135 page analysis of: (1) its effectiveness; (2) private market capacity to offer such insurance if TRIA is not extended; (3) the availability and affordability of post TRIA coverage; and (4) the market impacts of continuing, altering or abandoning TRIA. (See "Assessment: The Terrorism Risk Insurance Act of 2002;" http://www.treas.gov/press/releases/js2618.htm)

What then is Treasury's "take," if you will on TRIA? While TRIA provided insurers a necessary "transitional period" to assume terrorism risk in a post 9/11 world, Treasury concludes that, "TRIA's effectiveness for these purposes does not imply continuation of the Program." Insurers should, Treasury opines, continue coverage of this risk alone and rely, not on TRIA, but instead on "... the development of the private re-insurance market and other risk transfer mechanisms ..." to replace TRIA's "free" federal reinsurance. Treasury's analysis candidly leads it to the startling finding that "... the immediate effect of the removal of the TRIA subsidy is likely to be less terrorism insurance written by insurers, higher prices and lower policy takeups."

Insurers bear, and are able to reinsure, about $35 to $40 billion of TRIA's $100 billion coverage program; depending on the varying circumstances of losses, insurer deductibles and federal premiums. This "share" of terrorism risk equals about 10% of the relevant insurers' $375 billion total policy surplus. A.M. Best's insurer solvency analysis concludes that any loss significantly above

10% of this "total policy surplus" can raise rating concerns. One 9/11 scale attack would reach 10% of total surplus. Two, three or four would cripple or destroy many of the insurers who provide it. Add to this risk the historic losses of natural catastrophes and the economic impact on insurers of the end of TRIA is stark and unacceptable.

Treasury's Assessment painstakingly analyzes a blizzard of relevant figures, facts, and projections, concluding that insurers ought to assume more of this risk. Its' analysis accurately discloses that, without TRIA, insurers will be unable to fund the current governmental share of Program coverage; approximately $70 billion in federal "reinsurance." Prior to TRIA, the unavailability of private re-insurance caused insurers to withdraw terrorism coverage through exclusions. This market reality will repeat if TRIA expires. As Treasury reports, 47 states and the District of Columbia (exceptions being Florida, Georgia, and New York) have today authorized property loss exclusions post TRIA. Most analysts expect broader exclusions to follow.

Throughout its exhaustive inquiry, Treasury's Assessment provides refreshingly frank non-partisan data that ought to be viewed as a valuable resource for Congress' TRIA extension debate; now poised to start. As such, it is silent on the ultimate questions at issue; not the least of which is whether less terrorism insurance at higher prices for fewer people is an appropriate trade-off for withdrawal of TRIA's protection. Nevertheless, "spin-masters" are already advancing the goals of their disparate agendas wrapped up as "Assessment Conclusions."

The current House bill mandates TRIA's extension for two years, a greater private share of risk and the end of any governmental role. The competing Senate bill contemplates a similar risk sharing change and extension period. However, the Senate bill would also astutely impanel a Presidential

Working Group, consisting of the "brightest and best" stakeholder advocates, charged to develop proposals for viable long term terrorism insurance programs; with the key question of governmental participation to be debated, not decided by legislative fiat. The pending Senate TRIA extension bill's proposed Presidential Working Group is a viable forum for meaningful analysis and debate of TRIA and the future of terrorism insurance.

National security requires a thorough and independent debate of terrorism insurance's critical questions. Specifically, TRIA extension and reform should not be tied to litigation and tort reform agendas, as currently advocated by many in Congress and the current administration. If interjected into the TRIA debate, these issues will absolutely skew, delay, or derail the opportunity to create a solvent and comprehensive insurance program. Yet, just as with the Fund and the Act, these agendas will have to be dealt with as the TRIA debate unfolds. In this sense, the civil justice/insurance compensation paradigm is being challenged anew.

Now is the time to find the common ground that resolves TRIA's issues. Congress, the administration and private marketplace stakeholders should have but one priority. They must focus the TRIA debate: on the issues that bear directly on providing financial security in the face of terrorist attacks; on an open consideration of all governmental and private market resources; and on treatment of the marketplace's need for solvent and comprehensive terrorism risk insurance at reasonable rates. Treasury's Assessment can fairly serve as a cornerstone of this debate.

B. The Defense Research Institute's ("DRI") TRIA Successor Debate Initiative.

The Defense Research Institute, the United States' premier defense lawyer association, recently undertook a major project dedicated to facilitating

and advancing a non-partisan and comprehensive analysis of TRIA, the core questions of insurability and transfer of risk that it raised and successor program alternatives. DRI is committed to a rigorous debate on all of these issues and has endorsed the concept of TRIA extension and the Senate bill's proposed Presidential working Group. This forum is well equipped to examine of all the issues relevant to TRIA extension and succession. The DRI's Insurance Law Committee undertook this mission through the creation of a Subcommittee on the Terrorism Risk Insurance Act of 2002 (the "TRIA Subcommittee").

To facilitate the debate, the TRIA Subcommittee has created a database of published articles and papers on TRIA in particular, and terrorism insurance in general. Based on this resource, the TRIA Subcommittee wrote and published 16 in-depth non-partisan "white papers" that deal with the insurability and risk transfer questions that encompass the various issues of the debate. Both of these resources are contained in a DRI Educational Compendium entitled "The Future of Terrorism Insurance." DRI has contributed compendiums to members and senior staff of the United States Congress and to Treasury Department Officers and their staffs. These are the officials charged with implementing TRIA extending it and considering what, if any, program will follow it in 2006. The Compendium is available from DRI, headquartered in Chicago, Illinois. Contact thowes@dri.org.

V. CONCLUSION

The casualties were penalized, even if they accepted Fund relief, because they were required to abandon their civil justice system due process rights to "discover" the reasons for their loss. Thus, they were required to relinquish their power under the law to seek to assign responsibility to the party that allegedly caused their loss and/or damage and to have the consequences of that act borne by that party. Their ability to seek to hold the rich, the powerful or

the government responsible for loss and to require the resultant reforms, revisions and/or re-engineering of systems and infrastructures that would flow from imposition of sanctions and compensation was, they assert, impermissibly affected and influenced by those who, in part, allegedly caused the loss – the protected parties.

In the end, the ACT and the Fund stood a core principle of democracy on its head and rendered a previously co-equal branch of government, our courts, a non-player in the national response to 9/11 losses. What are the risks to a democracy that this paradigm creates? What should we do next time? Will the government's role in TRIA's successor program be an extension to the Fund/Act relief approach? These questions are very much in play as the TRIA debate begins in earnest this fall in the United States.

ACKNOWLEDGEMENTS

The analysis, opinions, suggestions and proposals in this paper are the sole responsibility of the authors. It is, however, important to note that others commented upon and critiqued this paper including Ms. Beverly Eckert, Co-Chairperson of the Voices of September 11, a family Advocacy Group. The authors also relied in great part on a white paper from the DRI Compendium – *"The future of Terrorism Insurance"* – by Gillian K. Hadfield entitled "The September 11th Victim Compensation Fund: 'An Unprecedented Experiment in American Democracy.' "

ABOUT THE AUTHORS

Ronald R. Robinson is a founder of Berkes Crane Robinson & Seal LLP ("BCRS"), in Los Angeles, California and serves as its Executive Partner. He has 25 years of experience as a trial and appellate attorney specializing in complex, multi-party and multi-district litigation. His national insurance coverage practice includes: underwriting advice, litigation and ADRs; casualty, E&O, D&O, and reinsurance advice, litigation and ADRs, with an emphasis on bad faith, asbestos, toxic tort, environmental and entertainment-related insurance. His practice also includes entertainment and intellectual property advice, litigation and ADRs.

Mr. Robinson is a member of the Federation of Defense and Corporate Counsel ("FDCC") and of the Defense Research Institute ("DRI"). He has previously served on DRI's Law Institute Committee, as Chair of its Insurance Law Committee, as Chair of its Excess & Reinsurance Committee, and as co-founding Editor of *"Covered Events,"* DRI's quarterly national coverage newsletter. He presently serves as Chair of DRI's Subcommittee on the Terrorism Risk Insurance Act of 2002. He speaks at conferences hosted by the American Law Institute of the American Bar Association, the American

Conference Institute, the Defense Research Institute, the Emerging and Environmental Claims Managers Association, Executive Enterprises, the Midwest Environmental Claims Association, the Practising Law Institute and the World Jurist Association. He has published over 25 white papers and articles on critical coverage issues facing the insurance community.

Robert H. Berkes is also a founder of Berkes Crane Robinson & Seal LLP ("BCRS"), in Los Angeles, California. Mr. Berkes' has concentrated his 28 years of practice on the trial of civil cases, with particular emphasis in the trial of toxic exposure cases. He has extensive jury trial experience in cases involving general liability insurance coverage; products liability; construction litigation; employment disputes; and accounting malpractice. He also has extensive experience over the past 20 years in successfully arbitrating over a dozen complex insurance disputes over coverage for asbestos-related claims arising out of the Wellington Agreement ("Agreement Concerning Asbestos-Related Claims"). As a result of his creative jury trial skills demonstrated in his defense of asbestos-related bodily injury cases, Mr. Berkes was the featured lawyer in the cover article for the Verdicts & Settlement section of the Los Angeles Daily Journal on March 3, 2000. Mr. Berkes has authored many articles in the field of insurance and defense litigation.