

Insurance Enters the Fray: Southern District of New York Finds Insurrectionary Intent Sufficient to Apply War Exclusion

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In a September 22, 2022 decision, the U.S. District Court for the Southern District of New York held a commercial general liability policy's war and financial services exclusions barred coverage for a suit arising out of the crash of Malaysia Airlines Flight 17 in eastern Ukraine.

The Donetsk People's Republic (the "DPR"), a Russian-backed separatist group in eastern Ukraine, infamously shot down the flight in 2014. An underlying action filed by a family of one of the victims alleged that the insureds, the Western Union Company and Western Union Financial Services (together, "Western Union"), provided "financial support" to the DPR by facilitating money transfers. Western Union tendered the lawsuit to its commercial general liability insurer, Hartford Fire Insurance Company, which disclaimed coverage under its policy's war exclusion.

In the subsequent declaratory judgment action, the district court, considering motions for partial judgment and to dismiss, determined that Hartford Fire had no duty to defend or indemnify Western Union under Colorado law because the Hartford Fire policy's war and financial services exclusions apply. *See Hartford Fire Ins. Co. v. W. Union Co.*, 2022 U.S. Dist. LEXIS 171694 (S.D.N.Y. Sept. 22, 2022).

The policy's war exclusion precludes coverage for:

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

The court held that the underlying action's allegations fell "squarely" within the exclusion for "insurrection," which federal courts, such as the Second Circuit in *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989 (2d Cir. 1974), have defined to mean "a violent uprising by a group or movement . . . acting for the specific purpose of overthrowing the constituted government and seizing its powers." The DPR shot down Flight 17 by a surface-to-air missile from territory it controlled. According to the underlying complaint, the DPR sought "to . . . creat[e] a proto-state, Novorossiya, through the control of territory in Ukraine acquired through acts of intimidation and coercion." The district court concluded that, as alleged, the DPR was engaged in a violent uprising intended to overthrow the constituted government and, thus, an insurrection, in shooting down the flight.

Citing *Home Insurance Co. of N.Y. v. Davila*, 212 F.2d 731, 736 (1st Cir. 1954), the court rejected Western Union's argument that the DPR was not solely engaged in insurrection because it had other goals, such as profit and the intimidation and coercion of civilians and other governments. According to the court, "such other motivations are not inconsistent with insurrection," and it did not matter if there were additional motivations so long as the "maximum objective" remained overthrow of the government. The court also distinguished

Holiday Inns Inc. v. Aetna Insurance Co., 571 F. Supp. 1460 (S.D.N.Y. 1983), on which Western Union relied, because *Holiday Inns* did not involve an identifiable group or movement that intended to topple the government.

Finally, given that the underlying action challenged Western Union's financing services, the court held that, even if the war exclusion does not defeat coverage, the Hartford Fire policy's financial services exclusion does. The exclusion precludes coverage for "bodily injury' . . . resulting from the rendering of or the failure to render financial services by an insured to others" and defines "financial services" to "include . . . [a]cting as . . . [an] exchange agent, . . . clearing agent, or electronic funds transfer agent," arranging for "interbank transfers," and "[s]elling or issuing travelers checks, letters of credit, certified checks, bank checks or money orders." According to the court, the underlying action did not "accuse Western Union of doing anything other than facilitating money transfers to the DPR," and, thus, fell fully within the ambit of the financial services exclusion.

The court rejected Western Union's contention that the underlying action alleged that Western Union also provided "material support," which might go beyond financial services, to the DPR. The court explained that "material support" is a legal term derived from the Antiterrorism and Effective Death Penalty Act of 1996 rather than a factual allegation of specific conduct and, further, the complaint's other allegations clarify that "material support" in this context referred only to the rendering of financial services.

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