

Journal of Civil Rights and Economic Development

Volume 18
Issue 2 *Volume 18, Spring 2004, Issue 2*

Article 2

March 2004

Federal Response to Insurance Coverage Issues Created by 9/11

Wayne A. Cimonis

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

FEDERAL RESPONSE TO INSURANCE COVERAGE ISSUES CREATED BY 9/11

WAYNE A. CIMONS*

My presentation is on TRIA, the Terrorism Risk Insurance Act [“the Act”].¹ It’s helpful to address why the Act was needed in the first place. After the attacks of September 11th, the bottom line was that the insurance industry, human life, and all of us had suffered a terrible loss. What we faced in the insurance industry was a situation whereby subsequent attacks could not be withstood without impairing the capital or even the solvency of a number of insurance companies. This was primarily because of two reasons. First, reinsurers who were not necessarily regulated by the states had the option of getting out of the insurance business.² Reinsurers are basically the insurers for insurers.³ After the terrorism attacks, reinsurers were paying a lot of the bill; now they were getting out. Second, many state laws required insurers to provide coverage with no exclusions.⁴ Thus, while the easiest answer for an insurer to escape terrorism loss was to say they would not cover it as part of a policy, that was not necessarily an option. Workers’ compensation is one of the biggest examples. If you had twenty thousand workers who lost their lives due to a terrorist attack, this would have to be paid for by an insurance company. However, I am not sure how

* These remarks are an actual transcript of the author’s comments at the St. John’s Journal of Legal Commentary Symposium on Mar. 14, 2003.

¹ Terrorism Risk Insurance Act, Pub. L. No. 107-297, 116 Stat. 2322 (2002) (codified in 15 U.S.C. § 6701 (2003), 28 U.S.C. § 1606 (2003)) (setting forth United States’ Terrorism Insurance Program in response to Sept. 11th attacks).

² See generally *Insuring the Insurers*, N.Y. TIMES, Oct. 28, 2001, at 12 (noting insurers who had covered terrorist attacks prior to Sept. 11th attacks were hinting at not renewing existing policies in response to losses suffered).

³ See Charles F. Corcoran, III, *Reinsurance Litigation: A Primer*, 16 W. NEW. ENG. L. REV. 41, 41 (1994) (defining reinsurers as “insurance company’s insurer[s]”).

⁴ See Diane Levick, *State Insists on Terror Coverage; Regulators Aren’t Allowing Insurers to Exclude It*, HARTFORD COURANT, Dec. 15, 2001, at E1 (noting that after Sept. 11th attacks insurance regulators in Connecticut forbid insurers from excluding terrorism coverage in commercial and personal insurance policies).

many companies in the United States have the capacity to handle those losses. So you had a situation where the insurance industry faced the real potential of substantial losses from terrorism with no reinsurance available to mitigate the risks. Whether or not insurers should have considered this before is another issue, but you had a situation with the potential for real losses, which threatened the solvency of the industry.⁵ In the near term you could have had insolvency problems; in the longer term you would have had people getting out of the business altogether. Insurance for terrorism losses would not be available, which is the situation that Congress faced when it looked at the Terrorism Risk Insurance Act.

We like to think that Congress looks at all these issues and then sits down and sees what is best for the country. To a large extent it does that, but for the most part Congress and legislators tend to approach issues in the context of interest groups.⁶ Who is coming to them? Who are the winners? Who are the losers? How are these winners and losers reflected within my own constituency? After September 11th, Congress faced a range of competing interests or interest groups. First were the insurers who, for the reasons already explained, wanted to have some protection against insolvency and complete ruin in the event of another terrorist event. You also had policyholders who want to have coverage for losses that they were at risk for and they want to have coverage at the lowest cost possible—even free. You also had state regulators. Insurance is traditionally regulated at the state level.⁷ There are no federal insurance companies, except for a handful of exceptions. Consequently, state regulators had an interest in preserving the state role in the regulation of insurance. Next, there were “consumer” groups, who I’ll essentially characterize as not being fans of business and who think that insurance companies are rich, fat, happy, and out to

⁵ See Dee DePass, *Insurance Execs Predict Strong 2003*, STAR TRIBUNE (Minn., MN), Oct. 5, 2002, at 2D (highlighting cost of Sept. 11th attacks as close to \$40 billion in insurance claims).

⁶ See generally Larry J. Pittman, *The Federal Arbitration Act: The Supreme Courts Erroneous Statutory Interpretation State Decides and a Proposal for Change*, 53 ALA. L. REV. 789, 806 (2002) (positing feasibility of Congress putting forth laws which benefit interest groups more than public).

⁷ See Tommy G. Thompson, *A Governor's Perspective on the Trade*, BUS. AMERICA, May 6, 1991, at 13 (noting service industries, such as insurance and legal industries, are regulated at the state level).

rip consumers off. They think any insurance that they provide, similar to policyholders, should be free if possible.

You had taxpayer groups, in light of September 11th and the so-called bail-out of the airline industry,⁸ saying that there should be no federal money at all going to bail out insurance companies. They claimed this is something that should be left to private markets and that there was no role for the federal government at all.⁹ Economic policymakers were also involved. These are the people in the laboratory trying to determine what is best for the country. They were asking, "What is the real economic impact of this terrorist event in insurance markets on the country, and how do we approach this? Which is the best answer to get this country moving forward and promote economic growth?"

Finally, you had the plaintiffs' attorneys, who essentially wanted to preserve the right to profit by suing anyone, anywhere, anytime and for anything.

This led to competing proposals. The first one, which was sort of touched upon by another panelist, was Pool-Re.¹⁰ This was something put together by the insurance industry where the insurers would create a a federally-chartered insurance entity.¹¹ Basically, numerous insurers would get together and form a federal insurance company, pool their assets, and have a government backstop for losses upon a certain amount.¹² Unfortunately, this proved to be extremely complicated. As with all legislation--and anything you deal with in the law, the devil is always in the details, and this involved a lot of details.

⁸ See Deirdre Shesgreen & Cynthia Wilson, *Congressional Leaders Work on Bailout Plan for Airlines*, ST. LOUIS POST-DISPATCH, Sept. 15, 2001, at 11 (discussing multi-billion dollar bailout package for airline industry proposed by House leaders in response to shutdown of air travel because of Sept. 11th attacks).

⁹ See, e.g., David Keating, *Insuring Against Catastrophe*, WASH. POST, Nov. 28, 2001, at A34 (arguing proposals for federal terror insurance paying insurance company claims would be unreasonable in light of premiums).

¹⁰ See Greg Farrell, *Insurers Offer Plan for Terror Coverage*, USA TODAY, Oct. 11, 2001, at 3B (discussing insurance companies' proposal for creation of reinsurance pool in response to Sept. 11th attacks).

¹¹ See *id.* (explaining how reinsurance proposal involved federal government paying insurance claims for 2002 calendar year of terrorism damage to allow new industry fund to build up enough money to pay for terrorism damage on its own afterwards).

¹² See *id.* (quoting Maurice Greenberg, chairman of American International Group, saying "there's going to be a need for a reinsurer of last resort," in reference to federal government's proposed relationship with insurance industry).

The House of Representatives was the first to jump on the bandwagon by saying that there was a need for federal legislation, and they came up with a plan that was essentially a federal loan facility.¹³ If there were terrorist losses, the federal government would loan money to the insurance industry to pay off the losses and the insurance industry would pay back these loans.¹⁴ Needless to say, that was not something that we favored.

The White House plan came out after the House plan and it was more conceptual. In fact, it ultimately was the foundation for the final plan. They basically said that there was a serious issue on the economic policy grounds. There were negative impacts on the economy and uncertainty in the aftermath of 9/11. What the government should do is provide a federal cost share system whereby the federal government would pay all losses above a certain amount and for a temporary amount of time.¹⁵ In many respects I think the White House may have thought that if there were losses that were uninsured, the federal government would have been paying the bill anyway. What they tried to do is establish a quasi-private-public transitional system until the marketplace could figure out or try to get its arms around terrorism risk and price the product in the future.

This led to a Senate compromise, which was the flesh and bones of the White House plan. What was interesting about the Senate compromise was that it contained a provision that held up passage for over a year: no punitive damages.¹⁶ This was agreed to by the responsible Democratic Senators, Christopher Dodd and Paul Sarbanes, and Phil Gramm of Texas on the Republican side.¹⁷ This was the ultimate agreement and they felt this way was the best way to go forward. When this plan was brought to the Senate Democratic leadership, however, Senate

¹³ See *Terrorism Insurance*, DENVER POST, Dec. 4, 2001, at B-06 (explaining House plan required federal government to offer low-interest loans to insurers if damages from terrorist acts exceeded one billion dollars).

¹⁴ See *id.* (noting House plan allowed federal government to recover loaned money by imposing surcharges on commercial policyholders where losses exceeded \$20 billion dollars).

¹⁵ See generally *Terrorism Risk Insurance Act* § 103 (providing for United States federal government to temporarily provide compensation for certain losses).

¹⁶ See *Terrorism Insurance Act*, S. 1744, 107th Cong. (2001) (excluding provision for punitive damages).

¹⁷ See Senate Vote No. 153, 107th Cong. (2003) (showing that Senators Dodd, Sarbanes, and Gramm all voted in favor of enacting bill without provision for punitive damages).

Democratic leader Tom Daschle heard from the trial lawyers and they said, "No punitive damages, no bill." We basically went another year before having a final bill, until the White House came off its insistence on barring punitive damages in all terrorism cases.¹⁸

Another proposal, the Hollings bill,¹⁹ did not really get a lot of attention. It mostly reflected the interests of consumer groups.²⁰ This proposal would have entailed another type of federal loan facility paid off by surcharges on the insurance industry.²¹ But what the bill did, and brought into play at a more formal level, was giving the Department of Commerce and the federal government the authority to review insurance rates.²² That could have been an invitation for federal rate regulation for terrorism insurance. This was important because it solidified the notion that if we were going to enact a federal backstop, there were a number of people in Congress that wanted to make sure that the rates were not open-ended.²³

Ultimately in November 2002, President Bush signed the law.²⁴ It was largely based upon the Senate compromise.²⁵ There were some features to address concerns of taxpayer groups that allowed the federal government to recoup any federal assistance paid, but it was not mandatory.²⁶

¹⁸ See *Terrorism Risk Insurance Legislation: Summary of Key Provisions*, (2002), at http://www.ncci.com/media/pdf/key_provisions/pdf. (last visited Oct. 21, 2003) (describing agreement between President and Senate Democrats regarding language concerning punitive damages).

¹⁹ S. 1743, 107th Cong. (2001) (offering alternative bill addressing terrorism risk insurance sponsored by Senator Earnest F. Hollings).

²⁰ See *id.* (showing language favorable to consumer groups).

²¹ See *id.* (indicating insurance industry would have absorbed weight of costs).

²² See *id.* (granting federal government greater control of cost of terrorism insurance to consumers).

²³ See *id.* (demonstrating introduction of Hollings bill revealed some Congressional support for federal government's ability to cap terrorism insurance rates).

²⁴ See *President Bush Signs Terrorism Insurance Bill*, (2002), at <http://www.georgewebush.com/News/read.aspx?ID=1668> (last visited Oct. 21, 2003) (indicating that President Bush signed Terrorism Risk Insurance bill on November 26, 2002).

²⁵ See generally *Negotiators Finish Terrorism Insurance Deal*, PITT. TRIB. REVIEW, Oct. 18, 2002, available at http://livesite.pittsburghlive.com/x/tribune-review/terrorism/archive/s_97545.html (stating "agreement was on a three-year, \$100 billion package that would have the government cover 90 percent of all terror losses after insurance companies pay an initial amount of \$10 billion").

²⁶ Terrorism Risk Insurance Act Terrorism Risk Insurance Act § 101(7), Pub. L. No. 107-297, 116 Stat. 2322 (2002) (granting option to taxpayers of allowing federal government to recover assistance paid).

The Act creates a three-year federal cost-sharing program for losses arising from acts of terrorism.²⁷ It is a shared program between private insurance and the federal government.²⁸ TRIA covers most commercial property and casualty lines, and one of the key features is that all commercial property and casualty insurers covered by law are required to offer coverage for terrorism insurance on the same terms and conditions as other coverages.²⁹ Just to simplify, if you are offering a million dollars worth of coverage with a two hundred thousand dollar deductible for destruction of a building by any cause, you have to offer that same type of coverage for an act of terrorism.

The Act also contained some key definitions. What is “an act of terrorism?” It is defined in the Act as, “an act that is violent or dangerous to human life, property or infrastructure that occurs in the United States, including its territories.”³⁰ It also extends to air carriers, U.S. vessels and U.S. missions.³¹ The act has to be committed on behalf of a foreign interest as certified by the Secretary of the Treasury in concurrence with the Attorney General,³² and excludes acts in the course of a declared war with the exception of workers compensation.³³ The workers compensation coverage for a declared war is really a technical fix because insurers cannot exclude losses for workers compensation resulting from acts of war. One interesting part is that acts “on behalf of a foreign interest”³⁴ excludes domestic terrorism.³⁵ As Congress started to look at this a bit more, they realized that this did not necessarily make sense. When you look at Timothy McVeigh and you try to define religious terrorism, which can have a domestic origin, why should such acts be excluded? In

²⁷ See *id.* § 101(b), § 108(a) (forming cost sharing program between insurance industry and federal government for losses arising from acts of terrorism).

²⁸ See *id.* § 101(6) (stating that creation of a federal program is important to stabilize economy while plan for terrorism risk insurance is formulated).

²⁹ See *id.* § 103(c) (requiring all insurance entities to provide adequate coverage).

³⁰ *Id.* § 102(1)(A).

³¹ See *id.* § 102(1)(A)(iii)(1) (mandating which acts of terrorism are covered).

³² See *id.* § 102(1)(A) (codified at 15 U.S.C. 248, 1610, 6701) (identifying who may define an “act of terrorism”).

³³ See *id.* § 102(1)(B)(i) (limiting the definition of an “act of terrorism”).

³⁴ See *id.* § 102(1)(A)(iv) (defining acts of terrorism as acts committed “on behalf of a foreign person or foreign interest” against the United States “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”).

³⁵ See *id.* § 102(1) (excluding domestic acts of terrorism in definition of “act[s] of terrorism”).

general I think a lot of people in Congress wanted to put domestic coverage in. However, there was an earlier wrinkle on a bankruptcy bill, which was held up because of the manner in which abortion protesters were characterized.³⁶ They were viewed by pro-abortion individuals as perhaps engaging in acts of violence and terrorist acts.³⁷ Abortion opponents thought that if they extended the terrorism bill to domestic acts of terrorism then it could somehow sweep in these abortion protesters.³⁸ This caused so many problems dealing with the bankruptcy bill that Congress did not even want to touch the issue. It is a real interesting sidelight and gives you a window into how some of the things work in Congress.

How is property and casualty insurance defined in the Act? It is generally commercial property, casualty, excess insurance, workers compensation, and surety.³⁹ It excludes medical malpractice, federal flood insurance, crop insurance, and mono-line financial guaranty insurance.⁴⁰

What is "an insurer" under the Act? Generally, it is an insurer licensed in any state, admitted in any state, or alien surplus lines carriers, and the insurer must receive direct earned premiums for the types of property and casualty coverage under the Act.⁴¹ In short, you have to meet the licensing or admitted requirements⁴² and you also have to collect premiums for the losses that are covered under the bill.⁴³ An insured loss under the

³⁶ See Michael J. Whidden, *Unequal Justice: Arabs in America and United States Anti-Terrorism Legislation*, 69 *FORDHAM L. REV.* 2825, 2858 (2001) (referring to violence by abortion protesters as "anti-abortion terrorism"); John Kifner, *Finding a Common Foe, Fringe Groups Join Forces*, *N.Y. TIMES*, Dec. 6, 1998, at 3 (commenting on anti-abortion fringe groups teaming up with right-wing militias).

³⁷ See Kifner, *supra* note 36, at 3 (indicating that violence acts by anti-abortion fringe groups were terrorism).

³⁸ See Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA PATRIOT Act*, 80 *DENV. U. L. REV.* 375, 410 (2002) (positing that if domestic terrorist acts were covered under proposed terrorism bills, government could overreach and include strikes or protests over abortion rights, animal rights, civil rights and the environment as acts of terrorism).

³⁹ See Terrorism Risk Insurance Act § 102(12)(A) (listing areas covered under property and casualty insurance).

⁴⁰ See *id.* § 102(12)(B) (excluding specific types of insurance from coverage).

⁴¹ See *id.* § 102(6) (defining "insurer").

⁴² See *id.* § 102(6)(A)(i) (mandating that insurers are entities "licensed or admitted to engage in the business of providing primary or excess insurance in any State").

⁴³ See *id.* § 102(6)(B) (stipulating that insurers are entities that collect premiums for commercial property and casualty insurance).

bill is basically any loss that meets the definition of property and casualty insurance.⁴⁴

Another key part of TRIA is the insurer deductible.⁴⁵ This is the amount of money the insurer has to pay before federal aid kicks in.⁴⁶ This was set at one percent in the Transition period, which has now passed, seven percent in 2003, ten percent in 2004, and fifteen percent in 2005.⁴⁷ The deductible is that percentage multiplied by the amount of direct earned premium collected by the insurer.⁴⁸ Essentially, it covers all the writings that you have by yourself and your affiliates for covered losses under the Act.⁴⁹ I think that number for AIG in 2003 is roughly one billion dollars.⁵⁰ To give you an idea of how this legislation works, if the World Trade Center had occurred with this bill in place, I don't believe AIG would have received one dime from the federal government.

Let me now move to the Program's mechanics. There are some basic mandatory requirements. All insurers must participate and offer coverage for acts of terrorism at materially similar term amounts and other coverage limitations for losses that arise apart from acts of terrorism.⁵¹ This mandatory requirement exists in 2003 and in 2004 and the Secretary of Treasury has an option to make it mandatory in 2005 depending upon how the program moves forward.⁵² What is the federal share of losses? The federal share is ninety percent of the losses above an insurer's deductible (that amount of an insurer's direct earned

⁴⁴ See *id.* § 102(5) (stipulating that insured losses are "any loss[es] resulting from an act of terrorism that [are] covered by primary or excess property and casualty insurance").

⁴⁵ See *id.* § 102(7)(A)-(E) (defining term "insurer deductible").

⁴⁶ See *id.* (establishing methodology used for measuring direct earned premiums of insurers).

⁴⁷ See *id.* (outlining calculation of insurer deductibles throughout program years of Act).

⁴⁸ See *id.* (noting insurer's deductible is calculated by multiplying value of insurer's direct earned premiums over the immediately preceding calendar year by a variable percentage rate).

⁴⁹ See *id.* § 102(6) (defining "insurer" as any entity or affiliate meeting TRIA's established criteria).

⁵⁰ See Richard G. Clemens, *Terrorism Risk Insurance Act of 2002*, BOWNE INSURANCE AND FINANCIAL SERVICES REPORT, at 6 (2003) (reporting that actuarial firm Tillinghast-Towers Perrin estimated retention of AIG in 2003 would be about \$893 million dollars).

⁵¹ See *Terrorism Risk Insurance Act* § 103(c)(1)(A)-(B) (establishing mandatory availability of property and casualty insurance by insurers for all losses notwithstanding if they arise from acts of terrorism).

⁵² See *id.* § 103(c)(1)-(2) (noting Secretary of State will determine whether mandatory requirement will be extended through Program Year 3).

premium multiplied by the applicable times the percentage rate).⁵³

The Act also contains liability caps.⁵⁴ Federal assistance is capped at one hundred billion dollars of insured losses annually.⁵⁵ These are not federal payments, but actual losses.⁵⁶ Liability for the insurers is eliminated above this amount, but only conditionally because Congress then has the opportunity to decide how it might pay for losses above this amount, and there are no real ideas as to how Congress will do that.⁵⁷ They could say, AIG, you pay fifty percent, or AIG, you pay nothing. That will be something to be worked out. Hopefully it will never have to be worked out. That is a test I think all of us never want to see.

There are also conditions to qualify for federal assistance.⁵⁸ Primarily, insurance companies have to provide clear and conspicuous disclosure of the availability of terrorism insurance and premium to their policyholders.⁵⁹ This was extraordinarily complicated because the Act became effective immediately and in the first ninety days there were all sorts of requirements related to this condition.⁶⁰ We are past that now but a lot of administrative expense and difficulty went into meeting this provision. This is a very difficult provision. Essentially insurance companies have to tell the insured how much they are paying for the coverage.⁶¹ The only other real mechanic in the federal bill is that it does not allow duplicative federal

⁵³ See *id.* § 103(e)(1)(A) (announcing federal share will be ninety percent above losses incurred and will be paid once insurers meet deductible required under Act).

⁵⁴ See *id.* § 103(e)(2) (discussing caps on federal assistance).

⁵⁵ See *id.* § 103(e)(2)(A)(i) (announcing Congressional cap on annual liability of aggregate insurance losses as one hundred billion dollars).

⁵⁶ See *id.* § 103(e)(2) (indicating Secretary of State shall notify Congress if estimated or actual aggregate insured losses exceed one hundred billion dollars).

⁵⁷ See *id.* § 103(3)-(4) declaring that if insured losses exceed one hundred billion dollars, Congress will determine appropriate procedures for and sources of payments for such excess insured losses).

⁵⁸ See *id.* § 103(b)(1)-(4) (outlining requirements for receiving federal payments).

⁵⁹ See *id.* § 103(b)(2) (stating that "insurer provides clear and conspicuous disclosure to the policyholder of the premium charged for insured losses covered by the program").

⁶⁰ See Patrick Bonner, *Admiralty Law in the Wake of Terrorism: Insurance and Liability Relating to an Oil Spill Caused by Terrorism*, 77 TUL. L. REV. 1157, 1178 (2003) (enumerating actions required within ninety days of TRIA's enactment).

⁶¹ See Lucien J. Dhooge, *The Terrorism Insurance Market After Sept. 11: The Case for Limited Federal Intervention*, 34 MCGEORGE L. REV. 27, 51 (2002) (maintaining that insurers must provide notice to policyholders in order to be eligible for reimbursement of certified terrorism losses under TRIA).

compensation.⁶² Thus, if insurance companies or policyholders received federal aid under another federal program then they may not receive anything more under this program.⁶³

Reinsurance is not covered under the Act directly.⁶⁴ In other words, the federal government will not provide a backstop to reinsurance companies, but an insurer can reinsure its deductible.⁶⁵

There are also interesting parts of the mandatory and discretionary recoupment of federal aid.⁶⁶ There is a mandatory industry payment before the taxpayer is on the hook.⁶⁷ That is, if there is a terrorist event, the industry must assume a certain amount of the loss before open-ended federal aid is available.⁶⁸ The Act does that by having mandatory recoupment provisions and then beyond that, discretionary recoupment provisions.⁶⁹ As an example, assume AIG's deductible is one billion dollars and we suffered a loss of two billion dollars. Our deductible is one billion dollars plus ten percent of the remainder. That would be \$1.1 billion dollars. Nine hundred million dollars of federal assistance would be provided to our policyholders to pay for those losses. Yet, because it is below the ten billion dollar mandatory recoupment amount, all commercial policyholders in the United States would be assessed a surcharge to pay back that nine hundred million dollars.⁷⁰ AIG itself on its policies qualifies for

⁶² See Terrorism Risk Insurance Act § 103(e)(1)(B) (announcing that federal compensation under TRIA will be reduced by amount of federal compensation for insured losses under any other federal insurance or reinsurance program).

⁶³ See generally Anne Gron & Alan O. Sykes, *Terrorism and Insurance Markets: A Role for the Government as Insurer?*, 36 IND. L. REV. 447, 447 (2003) (stating that terrorism loss coverage after Sept. 11th attacks has been "difficult or impossible to obtain").

⁶⁴ See Terrorism Risk Insurance Act § 103(g) (discussing how insurers are not prevented from obtaining reinsurance coverage for insurer deductibles or insured losses).

⁶⁵ See *id.* § 103(g)(2) (noting participating insurance companies' deductibles throughout TRIA's enforcement).

⁶⁶ See *id.* § 103(e)(7)(A)-(D) (detailing recoupment of federal amounts).

⁶⁷ See Dhooge, *supra* note 61, at 51 (explaining there are mandatory recoupment of payments by insurance companies before public has to pay).

⁶⁸ See Terrorism Risk Insurance Act § 103(e)(1)(A) (stating that governmental share of compensation for insured losses during the one-year period after TRIA's enactment and every year of the program shall be equal to ninety percent of insured losses which exceed insurance company deductibles required to be paid).

⁶⁹ See Dhooge, *supra* note 61, at 53 (discussing how discretionary recoupment under TRIA is assessed to the extent federal assistance exceeds any mandatory recoupment amount).

⁷⁰ See Terrorism Risk Insurance Act § 103(e)(6)(A)-(C) (outlining insurance marketplace aggregate retention amounts for specific years under said TRIA).

the federal assistance, but because the industry as a whole has not met that minimum amount, all policyholders must repay the assistance that is provided to AIG policyholders. Those numbers would also go up in the subsequent years of the Act.⁷¹ Had we suffered a loss of twelve billion dollars then there would not be a mandatory recoupment, but with lots of factors at his discretion, the Secretary of the Treasury can in fact assess surcharges on all companies to recoup the entire amount, all the way up to roughly eighty billion dollars.⁷² Theoretically, this could be imposed upon all policyholders at a later date.

A captive insurer is basically a company forming its own insurance entity and obtaining a license to self-insure itself.⁷³ Originally it was thought that captives were not covered by the Act because there were provisions for the Secretary to bring them in later.⁷⁴ However, recently issued Treasury regulations and guidance make it clear that if you are a captive insurance company and you are licensed, then you are covered under the Act.⁷⁵

Personal lines products such as your auto insurance, your homeowners insurance, and life insurance are not covered under the Act.⁷⁶ The Treasury however did make provisions to study the extent of whether this should be covered in the future.⁷⁷ I think that in a large part because we did not have the crisis in reinsurance for life insurance policies that we did in property and casualty insurances; therefore there was not a compelling need to cover life insurance immediately.⁷⁸ Incidentally, the Treasury is doing a study on this issue right now.⁷⁹

⁷¹ See *id.* § 103(e)(6)(A)-(C) (announcing applicable rate increases each year of TRIA's existence).

⁷² See *id.* § 103(e)(7) (articulating recoupment policy).

⁷³ See William B. Barker, *Federal Income Taxation and Captive Insurance*, 6 VA. TAX REV. 267, 267-69 (1986) (defining captive insurers as insuring risks via insurance companies they control).

⁷⁴ See Terrorism Risk Insurance Act § 103(f) (announcing provision to bring in captive insurers if necessary).

⁷⁵ 31 C.F.R. § 50.5(f)(1)(i)(A) (2003) (promulgating that licensed captive insurance companies are covered under TRIA), available at <http://www.ustreas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/regulations/final-rule07072003.pdf>. (last visited Oct. 21, 2003).

⁷⁶ See Terrorism Risk Insurance Act § 102(12) (listing types of insurance covered).

⁷⁷ See *id.* § 103(h) (mandating that Secretary of Treasury conduct studies to investigate possible expansion of reinsurance plan to personal insurance).

⁷⁸ See generally Dhooge, *supra* note 61, at 32-33 (discussing life insurance losses due to September 11th were less than losses for commercial casualty, property and liability

After September 11th, but prior to enactment of TRIA, insurers started utilizing exclusions for terrorism coverage.⁸⁰ The Act generally pre-empted those exclusions, and allowed for the reinstatement of coverage.⁸¹ It provided an exclusive definition for acts of terrorism so New York State, for example, cannot make up its own definition and decide what coverage is going to be.⁸² TRIA retained the general state authority--the existing state regulatory regime for insurance, although we would believe this is inconsistent with the federal guidelines and the national objectives.⁸³ Generally speaking, state approval of rates and forms is preserved, but the states are not allowed to require prior approval of those rates and forms in 2003.⁸⁴

On the litigation front, the Act creates an exclusive federal cause of action for property damage, personal injury or death.⁸⁵ Punitive damages were allowed pursuant to state law but are not to be covered under the TRIA as insured losses,⁸⁶ although there are some issues as to how those might relate to deductibles going forward.⁸⁷

All state actions for these types of claims — that is property damage, personal injury or death — otherwise available under state law were preempted.⁸⁸ That created some interesting questions that we really have not seen much of. But going

insurance).

⁷⁹ See Terrorism Risk Insurance Act, § 103(i)(1) (requiring Secretary of Treasury to study effects of terrorism to assess future availability to life insurance under TRIA).

⁸⁰ See Jeff Woodward, *The ISO Terrorism Exclusions: Background and Analysis*, IRMI INSIGHTS, Feb. 2002 (arguing that exclusions for terrorism coverage existed before TRIA), available at <http://www.irmi.com/insights/articles/woodward006.asp>.

⁸¹ See Dhooge, *supra* note 61, at 50-53 (discussing how TRIA pre-empted terrorism exclusions and allowed for reinstatement of policies).

⁸² See Terrorism Risk Insurance Act § 106(a)(2)(A) (providing that 'terrorism,' as defined by TRIA, supercedes state law definitions of this term).

⁸³ See *id.* § 106(a) (explaining areas where state power is preserved).

⁸⁴ See *id.* § 106(2)(B) (announcing that states are not allowed to require prior approval of insurance rates and forms in 2003).

⁸⁵ See *id.* § 107(a)(2)-(3) (articulating preemption of state causes of action); see also Dhooge, *supra* note 61, at 44 (stating that TRIA granted parties injured through terrorism exclusive federal cause of actions to litigate).

⁸⁶ See *id.* § 107(a)(5) (announcing that punitive damages would not count as losses under TRIA).

⁸⁷ See, e.g., Simon Cooper & Carmel Walsh, *The US Terrorism Risk Insurance Act 2002 (TRIA)*, ALL REGIONS, June 27, 2003 (listing potential problems with TRIA include calculation of deductibles).

⁸⁸ See *Terrorism Insurance Conference Report- Key Features*, INS. CHRONICLE, Oct. 29, 2002 at 7 (recognizing that property loss, personal injury, and death, arising from terrorist events, are governed by state law).

forward, what does this mean even for the adjudication process for workers compensation? There may be some novel theories. Again, we hope none of this ever gets tested, but in the event something arises, there may be some novel legal theories that could arise under the Act.

For the next steps, Treasury regulations will be issued.⁸⁹ They issued their first set of regulations recently. Finally, we still wait for state actions on this law.⁹⁰

⁸⁹ See, e.g. *Treasury Department Announces Interim Guidance on Terrorism Insurance for Insurance Industry Treasury and State Insurance Commissioners Work Closely Together*, FDCH FED. DEP'T. & AGENCY DOCS. REGULATORY INTELLIGENCE DATA, Dec. 3, 2002 (discussing Treasury interim guidance for insurers with drafted regulations).

⁹⁰ See *Industry Likes How Treasury's Terrorism Backstop Regulations Are Unfolding*, BESTWIRE, Apr. 18, 2003 (noting Treasury regulations were issued following TRIA's passage and that the Treasury was continuing work on new regulations).

