To Insure or Not to Insure, That is the Question: Congress' Attempt to Bolster the Insurance Industry after the Attacks on September 11, 2001

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INTRODUCTION

President Franklin Delano Roosevelt predicted that December 7, 1941 would be a date that lived in infamy.¹ He was correct,

¹ See President Franklin D. Roosevelt, Address before Congress (Dec. 8, 1941) available at http://odur.let.rug.nl/~usa/P/fr32/speeches/ph.htm (last visited Apr. 13, 2003) ("Yesterday, Dec. 7, 1941 – a date which will live in infamy – the United States of America was suddenly and deliberately attacked by naval and air forces of the Empire of Japan"); see also Japan and the Past it Denies, CHI. TRIB., July 14, 2001, at 25 (quoting Roosevelt’s speech and claiming that “it changed the course of history”), http://www.pearlharborattacked.com/ (last visited Apr. 13, 2003) (discussing the President’s speech to Congress and the subsequent declaration of war by the United States).
ask people alive at the time and they remember it vividly. They recall where they were and the accompanying feelings coursing through the country. This generation has experienced a similar if not more devastating event in the criminal acts perpetrated on September 11, 2001. On that day, members of the Al-Qaeda terrorist network, bankrolled by Osama bin Laden, hijacked four commercial airliners. They flew three of the aircraft into, arguably, the most symbolic structures in America: the Pentagon in Washington, D.C.; and the World Trade Center’s (WTC) Twin Towers in New York City.

Forever seared into minds is the sight of planes being flown into the Twin Towers. Millions watched helplessly as the media


replayed the attack and the ensuing collapse of the structures that symbolized America’s economic preeminence. Shock, disbelief, and despair gripped the nation as many worried about the safety of friends and loved ones who either worked or lived in the New York metropolitan area. As the days after the attack dragged on, the focus shifted to those trapped in the rubble that once was the financial center of the nation if not the world. Later, the shock and the disbelief were somewhat displaced by the search for those responsible.

visited Apr. 13, 2003) (quoting mental health counselor regarding negative effects of “watching these indelible images over and over again on TV”); see also Kelly Patricia O’Meara, The Grief Police, INSIGHT ON NEWS, Jan. 28, 2002, at 10 (discussing the range of emotional reactions to the attacks); Carol Richards, Still Feeling Vulnerable? You’re Not Alone, NEWSDAY (N.Y.), Jan 13, 2002, at B08 (illustrating the psychological effects of the attacks).

8 See Searcey, supra note 7 (describing the psychological impact of viewing images of the attack); 9/11 One Year Later, NEWSDAY (N.Y.), Sept. 8, 2002, at D47 (describing the shocked reactions of people as they watched the September 11th attacks on television); see also Laura Berman, One Tragic Day Forever Shatters Our Safe and Secure World, DETROIT NEWS, Sept. 12, 2001, at 20A (illustrating the magnitude of the event as portrayed on television).

9 See Terry McDermott & Tim Rutten, Icons of the American Dream Crash Down: World Trade Center: Towers Held Thousands of People and Stood for the Height of Freedom, L.A. TIMES, Sept. 11, 2001, at S3 (stating that “The towers were the symbols upon which the preeminence of the American economy was built.”); see also Editorial, America Attacked, BOSTON GLOBE, Sept. 11, 2001, at A22, (positing that the World Trade Center and the Pentagon were attacked precisely because they were the symbols of America’s military and financial power); Muslim Anger Toward U.S. Intensiﬁes in Post-9/11 Era, CHI. TRIB., Sept. 13, 2002, at 16 (portraying the terrorists’ targets as “symbols of American economic and military might”).


11 See Antonio Olivo, One Twin Sister is Missing, the Other Anxiously Waits for News, BLOOMBERG NEWS, Sept 12, 2001 (describing the tension and worry as people searched for their friends and loved ones); Lisa Priest, Aftermath: The Rescue Efforts, GLOBE & MAIL (Toronto), Sept. 15, 2001 (describing people searching for missing persons after attacks); Dionne Searcey, Terrorist Attacks: A Quiet Wait by Two Friends’ Families, NEWSDAY (N.Y.), Sept. 15, 2001, at W23 (explaining the tension of uncertainty as people waited for news regarding their family members).


13 See Charles M. Sennott, Attack on America: The Suspects, BOSTON GLOBE, Sept 12, at A8 (explaining that United States had narrowed its search to Osama bin Laden); Peg Tyre, What Next?: While Rescuers Search for Survivors, Law Enforcement Agencies
The ramifications upon the insurance industry did not enter the thoughts of the nation and the world, and well it should not have during those first days and weeks following the tragedy. Eventually however, the insurance aspects arose and the country could rest assured that all was well – the losses would be covered. The insurance industry would honor existing policies.

Initially, worries arose because of the possibility that the insurance companies would utilize exclusions in all policies that disallowed recovery for losses caused by acts of war. The industry went to great lengths to calm the nation’s worries by unequivocally stating that it would stand behind all policies written. The industry would not reach for the war exclusions to avoid paying the exorbitant costs incurred by the attack.

are Gathering Their Forces to Hunt Down the Culprits, Sept. 11, 2001, NEWSWEEK WEB EXCLUSIVE, available at 2001 WL 24138866 (describing investigators’ efforts to find out who was responsible for the attack); see also David Morris, Bush Prays for Victims, Says U.S. Must Rid the World of Evil, BLOOMBERG NEWS, Sept. 14, 2001 (discussing President Bush’s proposition of war against those responsible for the attack).

14 See Business Insurance Claims Consultant for World Trade Center Coverage, INTERNET WIRE, Sept. 25, 2001, available at 2001 WL 23403955 (stating that the change in emphasis from rescue to recovery brought focus onto the insurance industry). But cf: David Ress, Disaster Will Cost Insurers ‘Billions and Billions’, STAR-LEDGER (Newark, N.J.), Sept. 12, 2001, at 22 (noting that the insurance industry will suffer a tremendous financial drain due to attacks); Floyd Norris and Jonathan Fuerbringer, A Day of Terror: The Markets, N.Y. TIMES, Sept. 12, 2001, at C1 (describing a decline in insurance company stock because of investors’ expectation of large claims).

15 See Finance: Insurance Group Says No Assistance Needed For Now, CONGRESS DAILY AM, Sept. 19, 2001, available at 2001 WL 27552264 (stating that no insurance company was looking to utilize exclusions in order to avoid coverage); see also Armond D. Budish, Tragedy Survivors To Test Insurance, COLUMBUS DISPATCH, Sept. 28, 2001, at 2F (noting insurance companies’ intention not to deny benefits under the act-of-war exclusion); Kathleen Pender, Good Time To Update Insurance, S.F. CHRON., Oct. 21, 2001, at E1 (reporting “insurance companies are expected to pay all claims related to the disaster”).

16 See Arthur M. Louis, Most Big Insurance To Pay Claims; Some May Invoke Act-of-War Clauses in Their Policies, S.F. CHRON., Sept. 18, 2001, at C1 (stating “several insurance companies have indicated they may invoke the act of war clause”); James Moore, How Lloyd’s is Coping with the World’s Biggest Claim, TIMES (London), Sept. 29, 2001 (noting difficulty in predicting whether or how war exclusions would be applied). But see Finance: Insurance Group Says No Assistance Needed For Now, supra note 15 (stating that no insurance company planned to invoke the act-of-war exclusion to deny coverage).

17 See Chet Bridger, Workers’ Comp to be Hit With Attack-Related Claims: High Cost of Premiums Expected to Increase for Businesses in New York State, BUFFALO NEWS, Sept. 19, 2001, at B4 (reporting that insurance companies immediately claimed they would not consider invoking coverage escape clauses); Budish, supra note 15 (stating insurance companies did not intend to deny coverage under the war exclusion); Robert E. Vagley, Unprecedented Risk, DAILY DEAL, Nov. 8, 2001, at www.TheDeal.com (stating that the insurance industry did not attempt to shirk the responsibilities it owed to its insureds).

18 See supra note 17 and accompanying text.
The industry has estimated its losses at between $35 billion and $70 billion dollars. This projection will increase as time marches on and intangible losses become known. The upper level is likely to move higher as business interruption losses are determined.

The insurance industry is a healthy and robust industry. It has assets valued in excess of $3 trillion dollars. The industry is fully capable of handling the losses incurred due to the

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19 See U.S. Securities and Insurance Industries: Keeping the Promise, Hearing of the House Fin. Serv. Comm., 107th Cong. 11 (2001) [hereinafter Hearing] (Rep. Paul E. Kanjorski (R-PA) stating that the range of loss was estimated to be between $20 billion and $70 billion); see also David Pilla, WTC Loss Estimates Drop on Clearer Claims Information, BESTWIRE, Jan. 17, 2002 (stating that New York State's Insurance Commissioner estimated losses would total $35 billion); Joseph B. Treaster & Milt Freudenheim, A Nation Challenged: The Insurance, N.Y. TIMES, Sept. 20, 2001, at C4 (noting "total insurance claims are expected to be as high as $40 billion").

20 See Pilla, supra note 19 (stating that "miscellaneous liability claims" could reach $10 billion); see also Jeff Harrington, Insurers Tally Magnitude and Number of Claims, ST. PETERSBURG TIMES, Nov. 30, 2001, at 1E (noting "it may take years to determine final cost to insurance"); Joseph B. Teaster, After Providing Lift To City Economy, Insurance Payments for 9/11 Losses Slow Down, N.Y. TIMES, Nov. 5, 2002, at B7 (commenting that losses may take years to be fully known).

21 See generally Hazel Glenn Beh, Physical Losses in Cyberspace, 8 CONN. INS. L.J. 55, 67 (2001) (commenting that "traditional business interruption coverage requires that the insureds suffer a 'distinct suspension of operations,' not merely a lesser event such as a slowdown or a smaller disruption of operations"); William M. Shernoff & Douglas M. Carasso, Insuring Businesses Interrupted By Terrorist Acts, 226 N.Y.L.J., Sept. 24, 2001, at 1 (stating "[business interruption coverage is designed to protect a company's future and continued earnings when it is unable to pursue normal operations because of physical loss or damage to the company's real or personal property."); David Pilla, Business Interruption to Corner 25% of Sept. 11 Claims, BESTWIRE, Feb. 20, 2002 (noting that premiums for business interruption coverage have risen 30% to 200% due to large losses).

22 See Shernoff & Carasso, supra note 21, at 1 (stating that courts must determine whether businesses not in the World Trade Center area but which suffered business losses due to attack are covered under business interruption policies); see also Pilla, supra note 21 (commenting that business interruption claims are the most difficult to assess); Teaster, supra note 20, at B7 (noting that a certain amount of estimating and subjectivity is required in determining business interruption losses because such coverage is calculated based upon lost income).

23 See Hearing, supra note 19, at 11 (Rep. Paul E. Kanjorski (R-PA) describing the insurance marketplace as "large and dynamic"); Stephen Labaton & Joseph Treaster, A Nation Challenged: The Subsidies, N.Y. TIMES, Sept. 21, 2001, at B1 (reporting that the insurance industry is a relatively healthy industry); Stuart Silverstein, After the Attack: Markets, L.A. TIMES, Sept. 18, 2001, at 3 (noting that "big insurers are considered financially healthy enough to absorb the cost of pending claims without suffering severe blows").

24 See Hearing, supra note 19, at 61 (quoting a release from the National Association of Insurance Commissioners stating that the industry "is an $850 billion industry with assets of over $3 trillion"); see also Christine Dugas & Julie Appleby, Industry Can Bear Burden, USA TODAY, Sept. 14, 2001, at 4B (reporting "U.S. insurance industry has assets of $3 trillion"); Jackie Spinner, Life Insurers Want Study of Future Terrorism's Cost, WASH. POST, Oct. 19, 2001, at A9 (noting "life insurance industry has $3.2 trillion in assets").
destruction of the World Trade Center. It may very well be able to withstand several such attacks. However, the industry has finite resources and the damages caused by such terrorist attacks are infinite. As such, the losses involved have caused reinsurance companies to refuse to write policies that would cover losses due to terrorist acts. The reinsurance companies are those to whom the primary insurance carriers go to in order to insure their policies and thereby spread the risk of the few with the many.

The vast majority of reinsurance agreements come due every

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25 See supra note 24 and accompanying text.
26 See Dugas & Appleby, supra note 24, at 4B (noting “industry is sufficiently capitalized to handle the losses while continuing to fund its growth”); see also US Attack Will not Cripple The Insurance Industry, INS. DAY, Sept. 18, 2001, at 3 (reporting that the “insurance industry is strongly capitalized and can withstand an enormous financial hit without threat to the stability of the system overall”). But see Hearing, supra note 19, at 65 (Kathleen Sebelius, Commissioner, Kansas Department of Insurance, stating that “industry cannot withstand multiple events in short period of time”).
29 See Hearing, supra note 19, at PP (Dean O'Hare, Chairman & CEO Chubb Corp., stating that his insurance firm could not obtain reinsurance for terrorism coverage for property in New York City); see also Jackie Spinner, Putting a Price on “What Ifs:” Actuaries Lack Figures to Fix Premiums for Terrorism Insurance, WASH. POST, Oct. 24, 2001, at E01 (noting that many insurance companies will stop providing terrorism coverage as of Jan. 1, 2003); Jackie Spinner, Senate Gets Ready to Debate Terrorism Insurance Measure, WASH. POST, June 13, 2002, at E03 (stating that reinsurers will stop providing back-up terrorism coverage to insurance companies).
30 See Premium Rates – Reinsurers Are Taking on Less Risk, at a Higher Price, ECONOMIST, Feb. 9, 2002, available at 2002 WL 7245119 (stating that reinsurers insure insurers and that they face stiffer competition when the insurance market hardens and rates rise); E. Scott Reckard, A Year After Insurance Prices, Restrictions Are Up Coverage: The Industry's Response to Terrorism Has Led to 30% Rate Increases for Commercial Properties, L.A. TIMES, Sept. 16, 2002, at 1 (noting that reinsurers also dropped terrorism coverage for the insurance companies they insure); Jackie Spinner, Terrorism Insurance Still Rare: Industry Waits for Congress to Back Coverage for Attacks, WASH. POST, Sept. 11, 2002, at E03 (explaining that reinsurers, who provide back up insurance for insurance companies, also suffered huge losses following the September 11th attacks).
January 1 and approximately 70% of all reinsurance treaties are up for renewal at the New Year. The reinsurers are using this as the time to write in exclusions for terrorism that were not seen before in the United States. Before September 11, terrorism was included in each policy while war damages were regularly excluded. Now it appears that the terrorism exclusion will join the war damages exclusion as standard, boilerplate language in every reinsurance treaty. True, there is and will continue to be some private insurers willing to write a policy inclusive of terror; however, the cost will be astronomical as actuaries

31 See Panel III Hearing, supra note 28, at PP (explaining that most reinsurance agreements are due for renewal at the 1st of the year); see also Congress Needs to Act Fast to Avert Insurance Crisis, NEWSDAY (N.Y.), Dec. 5, 2001, at A40 (stating that “70% of reinsurance contracts expire at month’s end and reinsurers are threatening not to renew.”); Jackie Spinner, Senate Gets Ready to Debate Terrorism Insurance Measure, WASH. POST, June 13, 2002, at E03 (noting that as of January 1st of this year, most reinsurers stopped providing terrorism coverage to insurance companies).

32 See Legal Review: U.S. Courts Set Precedent, REINSURANCE MAG., Dec. 20, 2001, at 17 (stating that reinsurers plan to raise premiums and to exclude terrorism coverage); Scott E. Harrington, Insuring Against Terror, NRO FIN., Nov. 5, 2001, at www.nationalreview.com/nrof_comment/comment-millerprint110501.html (last visited Apr. 13, 2003) (stating that reinsurers are refusing to offer terror coverage when contract renewal time arrives). But see Industry Welcomes Terror Bill Approval, INS. DAY, Nov. 18, 2002 (claiming that the proposed terrorism legislation will help insurance companies write policies for all risks, including catastrophic ones).

33 See Hearing on Insurance and Terrorism Before Subcomm. On Capital Mkts, Ins. and Gov’t Sponsored Enter.of House Fin. Serv. Comm., 107th Cong., PP (2001) (hereinafter Hillman testimony) (noting the statements of Richard Hillman, Director, Financial Markets and Community Investment); see also Jonathan Riskind, House OKs Terror Insurance Bill, COLUMBUS DISP., Nov. 30, 2001, at 01F (explaining that although most policies do not exclude terrorism from their coverage, they do not specifically include such coverage either); Jackie Spinner, Senate Gets Ready to Debate Terrorism Insurance Measure, WASH. POST, June 13, 2002, at E03 (noting that most insurance policies included terrorism coverage prior to September 11, 2001).

34 See Pender, supra note 15, at E1 (explaining that most policies exclude from coverage any damage resulting from an act of war); David Ress, Policies Should Pay Out Claims for Terrorism – Legal Experts Don’t See Insurance Loopholes, STAR-LEDGER (Newark, N.J.), Sept. 15, 2001, at 10 (positing that damages incurred due to the terrorist attacks would not lie within the standard war exclusions). See generally Dee DePass, Insurer Expects to Pay $700 Million: About 2% of Total Caused by Attacks, STAR TRIB., Sept. 20, 2001, at 3D (announcing that most insurance companies will not invoke the “act-of-war” language in their policies in order to exclude September 11th-related losses from coverage).

35 See Best Insurance Policy: Backup Fund Like State, PALM BEACH POST, Oct. 28, 2001, at 2E (explaining that the terrorism exclusion clause will become a standard provision in most insurance contracts). But see Christine Dugas, House OKs Bill on Terror Insurance, USA TODAY, Nov. 15, 2002, at 1B (commenting that terrorism coverage, in its present form, is either unavailable or unaffordable for most commercial property holders); Christian Murray, Weak Foundation: Lack of Insurance Against Terrorism Hinders Existing Commercial Buildings and Future Construction, NEWSDAY (N.Y.), Sept. 16, 2002, at A27 (noting that because of the attacks of September 11, most insurers have dropped terrorism coverage from their “all-risk” policies).

36 See AON Unveils Its Terrorism and Sabotage Solution, INS. DAY, Oct. 31, 2001
attempt to configure some method to determine the correct premium for such coverage. 37

This note will outline the basic premises of insurance law as it pertains to the area of the industry known as reinsurance. Part I will define and lay out the primary definitions and aspects of the reinsurance area. Part II will be split into two subparts: that dealing with the United States Federal Government acting as insurer or reinsurer and dealing with foreign jurisdictions that have chosen to have the government enter the reinsurance arena to allow the continued vitality of the economy due to the industry's refusal to underwrite policies that would cover loss due to terror. Part III will outline plans presented to Congress by various legislators and industry representatives that place the Federal Government in the position as the insurer of last resort. Part IV will look at the bills in the House of Representatives and the Senate, respectively.

**BASIC INSURANCE LAW**

Man's search to reduce risk has occurred since time immemorial. 38 The foremost reason behind attempts to reduce risk is the maximization of profit. 39 Because of this attempt to

available at LEXIS, News Library (describing the establishment of a risk-management committee on terrorism and sabotage designed to produce better products for their AON clients); see also Pool Re and Lloyd's Rivals will Continue to Operate Side-by-Side, INS. DAY, May 8, 2001, at 10 (stating that alternatives to Pool Reinsurance Company exist in the terror coverage market). But see Tom Bawden & Chaitali Chakravarty, Need to Know: The Essential Daily Guide to the Sectors, TIMES (London), Jan. 4, 2003, at 55 (noting that British homeowners will be without coverage for chemical, biological and nuclear attacks by the end of 2003 because British insurance carriers are writing policies that exclude terrorism coverage).

37 See Need for Federal Terrorism Insurance Assistance: Terrorism Insurance Rising Uninsured Exposure to Attacks Heightens Potential Economic Vulnerabilities: Hearing on H.R. 3210 Before House Subcomm. on Oversight Investigations, Comm. on Fin. Servs., 107th Cong., PP (2002) (Richard Hillman testimony, Director, Financial. Markets and Commodity Investment, describing the need for federal terrorism insurance assistance); Landmark Decision, WASH. POST, Apr. 28, 2002, at B08 (stating that actuaries do not know how to calculate the premiums on insurance policies in order to include terrorism coverage); see also Spinner, supra note 29, at E01 (discussing the problems arising from calculating terrorism attacks into premiums for insurance coverage).


39 See History of Insurance, supra note 38 (detailing the practices that enabled
maximize profit, insurance has infused itself throughout mankind's economies, ancient and modern. Insurance has been defined as a "contract by which one party promises to make a certain payment of money upon the destruction or injury of something in which one party has an interest." The contract for insurance is necessarily between two parties, the insured and the insurer, with the insurer being the person with the property or life in being that is covered by the policy. The ingredient that differentiates the insurance contract from other contracts is the agreement of the insurer to "assume the risk of loss and to indemnify the insured for such loss when and if it occurs." For the insurer's promise to reimburse the insured for losses incurred under the policy, the insured pays the insurer premiums; whether these premiums are paid on an annual, semi-annual, or other basis is determined by the contract itself. The primary insurer will often seek to reduce its risk by purchasing insurance of its own; referred to as reinsurance.
Reinsurance is defined as the "ceding by one insurance company to another of all or a portion of its risks for a stipulated portion of the premium, in which the liability of the reinsurer is solely to the reinsured, which is the ceding company, and in which contract the ceding company retains all contact with the original insured, [and] handles all matters prior to and subsequent to loss." Such insurance is necessary as a primary insurer cannot expose itself to the entire amount of risk for an insured and continue to underwrite policies for others; to do so would expose the insurer to a level of risk that could cause the company to become insolvent.

The insurer will use actuarial tables to ascertain the level of risk that is concurrent with the premium charged to the insured. These tables are based upon the frequency of insured losses and the concomitant amount of such losses. For example, tropical storms are determined to be worth a certain premium.

due to their frequency of occurrence and the damage that particular storms cause.\footnote{See Insurance, Risk Management & GIS Consulting, at www.georisk.com (last visited Apr. 13, 2003) (discussing the probability and regularity of storms); see also Ryan A. Earhart, \textit{Lifting the Iron Curtain of Automobile Insurance Regulation}, 49 S.C. L. Rev. 1193, 1201 (1998) (stating insurance companies use various factors to determine risk); Katherine Swartz, \textit{Justifying Government as the Backstop on Health Insurance Markets}, 2 YALE J. HEALTH POLY L. ETHICS 89, 104 n.18 (2001) (discussing the effect of actuarial variables on insurance premiums).} Additionally, insurers use such tables to determine the life expectancy of individuals who purchase life insurance.\footnote{See generally Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 148 (4th Cir. 1993) (asserting \textquotedblleft[a]ctuarial tables are the life's blood of the life insurance industry"); RUSS, \textit{supra} note 38, at § 4:3 (noting that pension plans reflect the greater actuarial life expectancy of women by requiring women to make greater contributions); Actuarial Tables at \url{http://immediateannuity.com/content_pages/actuarial.htm} (last visited Apr. 13, 2003) (providing actuarial tables for males and females as well as a unisex table).}

There are two basic types of insurance policies: all-risk and specified-risk policies.\footnote{See \textit{Holmes \\& Rhodes, supra} note 40, at § 1.6 (explaining operation of enumerated perils policies); Donna Ferrara, \textit{Insurance Issues in Corporate Transactions}, 629 P.L.I., 363, 366 (2000) (stating specific risk insurance covers only enumerated perils); M. Elizabeth Medaglia et al., \textit{The \"Concurrent Cause\" Theory: Inapplicable to Environmental Liability Coverage Disputes}, 30 TORT \\& INS. L.J. 823, 833 (1995) (explaining that coverage under specific risk policies is limited to named perils).} The all-risk policy is very much like it sounds – the policy will cover all losses incurred to that which is insured except for those specifically excluded in the insurance contract.\footnote{See generally Pan Am. World Airways, Inc. v. Aetna Casualty \\& Sur. Co., 505 F.2d 989, 994 (2d Cir. 1974) (holding that war risk exclusions on aviation all risk policy did not apply to loss of plaintiff's aircraft); see also RUSS, \textit{supra} note 38, at § 110:18 (discussing the various exclusions found on automobile policies); Robert A. Whitney, \textit{Environmental Contamination and the Application of the Owned Property Exclusion to Insurance Coverage Claims: Can the Threat of Harm to the Property of Others Ever Get Real?}, 27 N. KY. L. Rev. 505, 507 (2000) (denoting the purpose of the owned property exclusion as discharging liability in commercial general liability policies).} The specified-risk policy is the opposite of the all-risk policy; covering only those injuries set forth specifically within the insurance contract.\footnote{See \textit{Holmes \\& Rhodes, supra} note 40, at § 1.6 (explaining risks devised under all-risk policies); see also Atlantic Lines Ltd. v. Am. Motorists Ins. Co., 547 F.2d 11, 12 (2d Cir. 1976) (indicating that standard for recovery under all-risk policy is merely \textquoteleft{fortuitous loss\textquoteright}); John P. Gorman, \textit{All Risks of Loss v. All Loss: An Examination of Broad Form Insurance Coverages}, 34 NOTRE DAME L. REV. 346, 347 (1958-59) (explaining that all fortuitous losses that are not excluded under an all risk policy are covered).} Insurance companies use exclusions to limit the amount of risk that they face in a certain policy.\footnote{See \textit{Holmes \\& Rhodes, supra} note 40, at § 1.6 (dividing coverage for risk into two categories: all-risk and specified-risk); see also 70 N.Y. JUR. 2D INSURANCE § 1584 (2002) (distinguishing all-risk insurance from specialty insurance); Richard A. Fierce, \textit{Insurance Law—Concurrent Causation: Examination of Alternative Approaches}, 1985 S. Ill. U.L.J. 527, 528 (1985) (explaining that insurance policies are divided into two categories - all-risk and enumerated perils policies).} The
exclusions presently in the media are the terrorist and war damage exclusions. Until recently, terrorism cover was included in an all-risk policy. Insurance companies have continuously excluded war damage from coverage. The ability to obtain such coverage was dictated by the amount of money the insured was willing to pay for the coverage as there are specialty insurers for most every risk known to man.

Meanwhile, until recently, acts of terror were included in policies. The beginning of the end for such inclusiveness was the Irish Republican Army's (IRA) reign of terror in England during the period before 1993. The final incident was the

57 See supra note 35 and accompanying text; see also Bernard Simon, Shake-up in the Shipping Industry, N.Y. TIMES, Oct. 10, 2001, at W1 (noting that shipping lines and insurance companies are engaged in fierce negotiations over war risk surcharges); Andrew Bolger et al., Dispute Over Airline Insurance Subsidies, FIN. TIMES (London), Nov. 1, 2002, at Eur. 10 (exploring war risk insurance for airlines).

58 See GRAYDON S. STARING, LAW OF REINSURANCE § 23:3 (1993) (indicating that terrorism is generally within cover under all-risk policies, and that exclusions usually need to be explicitly enumerated); see also Pan Am., 505 F.2d at 989 (holding insurers liable for losses incurred during airplane hijacking on theory that loss did not fall within the war exclusions); Michael C. Mulitz et al., Current Issues in Aircraft Operating Leases, C828 A.I.I. - A.B.A., 383, 418 (1993) (indicating that standard aircraft leases require the lessee to maintain insurance covering war risk and hijacking, including acts of terrorism).

59 See RUSS, supra note 38, at § 152:1 (stating that despite the significant possibility of losses occurring as a result of war, insurers have been reluctant to provide protection against such losses because of the difficulty in effectively estimating the risk); see also Queen Ins. Co. of Am. v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487, 490 (1924) (indicating that separate coverage was acquired under a war risk policy to cover excluded risks on the all-risk policy). See generally Jason B. Libby, Comment, War Risk Aviation Exclusions, 60 J. AIR L. & COM. 609, 622 (1994-95) (examining the origins of war risk exclusions during the early development of aviation).

60 See generally Andrew L. Yarrow, A Lucrative Crime Grows into a Costly Epidemic, N.Y. TIMES, Mar. 20, 1990 at C20 (exploring art insurance held by both galleries and private individuals); News, Tips, Bargains, Insuring Against a Rainy Day (Or Two), L.A. TIMES, Jan. 11, 1998 at L3 (reporting that insurance can be purchased against bad weather for vacations); Christopher Adams, Insurance on World Cup To Be Scrutinized, FIN. TIMES (London), June 8, 1998 at 1 (discussing the issues surrounding FIFA's insurance of the World Cup Soccer Tournament).

61 See Hearing on Terrorism Insurance: Rising Uninsured Exposure to Attacks Heightens Potential Economic Vulnerabilities Before House Subcomm. on Oversight Investigations, 107th Cong., PP (2002) (Richard Hillman testimony, Director, Financial Markets and Commodity Investments, stating that insurance companies thought the risk from acts of terror were so low that it was unnecessary to price such risks into policies); STARING, supra note 58, at § 23:3 (indicating that coverage for losses occurring as a result of terrorist acts is generally included under all-risk policies); see also Mulitz et al., supra note 58, at 418 (explaining aircraft leases require lessees to maintain separate insurance for terrorism).

bombing at Harrod's in London. Following this, reinsurers removed themselves from insuring against terror. This caused primary insurers to refuse to write policies with such coverage because of their inability to spread the risk. Thus began the use of the terror exclusion making it nearly impossible to obtain cover against damage. Such an exclusion is here in America due to the events of September 11.


See Terrorism in the UK, supra note 62 (stating that following the bombing of Harrod's, the British government “agreed to become insurer of Last Resort for terrorism losses”); see also Bomb Wounds 4 in London: Exploded Outside of Harrods, N.Y. Times, Jan. 29, 1993, at A5 (accounting for day's events at Harrods); Stephen Cook, Blast Revives Memories of Harrods Fatal Bombing, THE GUARDIAN, Jan. 29, 1993 at 3 (recounting events, and implicating IRA involvement).

See William B. Bice, Comment, British Government and Acts of Terrorism: The Problems of Pool Re, 15 U. Pa. J. INT'L BUS. L. 441, 446-47 (1994) (stating that because the IRA stepped-up bombing efforts in the United Kingdom, reinsurers withdrew from the market by refusing to include terror coverage in their reinsurance treaties); see also Jeffrey W. Stempel, The Insurance Aftermath of September 11: Myriad Claims, Multiple Lines, Arguments Over Occurrence Counting, War Risk Exclusions, the Future of Terrorism Coverage, and New Issues of Government Role, 37 TORT & INS. L.J. 817, 874 (2002) (analogizing the situations that led to the creation of Pool Re with the situations following September 11th). See generally Andrew Bolger, Rocketing Premiums Make It Harder To Do Business, FIN. TIMES (London), Aug. 8, 2002 at Com. Ins. Crisis 3 (discussing the refusal by reinsurers to cover terror following 1993 IRA bombings).

See Bice, supra note 64, at 447 (stating that direct insurers were writing terrorism exclusions into their policies as a reaction to reinsurers' refusal to provide terrorism coverage); see also Kendall, supra note 50, at 572 (stating insurance is of value to purchaser because risk is shared across “a pool of other similarly situated but widely distributed purchasers, guaranteeing for each purchaser protection against substantial but uncertain losses in exchange of the payment of premiums both certain and manageable”); Stempel, supra note 64, at 843 (stating “[I]nsurers... make their money by distributing risk. The very reason for having insurance is to spread risk.”).

See Gregg J. Loubier & Jason B. Aro, Practice Tips: Insuring the Risks of Terror, 25 L.A. LAWYER 18, 18 (stating soon after September 11th, insurers began excluding coverage for losses due to acts of terrorism from new property insurance policies), see also Kendall, supra note 50, at 581 (explaining eventuality of future disasters similar in nature to that of September 11th caused breakdown of market mechanisms for providing terrorism-risk insurance, leading to important changes in insurance and reinsurance policies); Carl J. Pernicone and James T. H. Deaver, Insurance Implications of the World Trade Center Disaster, A.B.A. BRIEF 23, 24 (Spring 2002) (stating prominent insurance company executives have testified before House Committee on Financial Services that industry would need assistance in order to provide coverage for possible violence in future).

See Best Insurance Policy: Backup Fund Like State, supra note 35 (stating that following the September 11th attacks, a terrorism exclusion clause will join the war exclusion clause in United States insurance policies); see also John Hillman, Florida Still Reviewing Terrorism Exclusions, BESTWIRE, Feb. 6, 2002 (stating California is only state to formally reject terror exclusions); James G. Rizzo, Tragedy's Aftermath: The Impact of
Alternatively, companies may set up their own insurance companies so to have more control over the cost of insurance. For example, captives are insurance subsidiaries set up by companies solely to share in the risk of the parent company. This is one type of alternative presently available to companies unable to obtain insurance due to the lack of reinsurance and/or terror coverage in their primary coverage.

Another type of insurance alternative is the catastrophe (CAT) bond. The CAT bond allows the purchaser a certain rate of return for the purchase of the bond. The purchaser would

9/11 on the Insurance Industry, 46 B.B. Ass’n. J. 10, 13 (stating most insurers are searching for ways to avoid paying for terrorist attacks in the future due to billions of dollars of losses incurred following September 11th).

See Russ Banham, Surviving Soaring Insurance Costs, 5-02 J. Acct. 69 (2002) (observing that the September 11th terrorist attacks led to soaring insurance premiums, and in response, organizations have begun to form their own insurance companies to reduce premiums and obtain affordable reinsurance); Lorraine Gorski, A Captive Solution: Steep Hikes in Property/Casualty Premiums Have a Variety of Companies Looking to Form a Captive Insurance Company, 103:5 Best’s Rev., available at 2002 WL 10441573, (Sept. 1, 2002) (explaining that the creation of an insurance company allows companies to spread and reduce risks, as well as lower costs); Dutch Firms Set up Own Insurance to Cut Costs, Dow Jones Int’l News, Dec. 30, 2002 (explaining that dozens of Dutch firms have created their own insurance companies in an effort to counter the dramatic rise in insurance costs).

See RUSS, supra note 38, at § 39:1; see also N.Y. Ins. Law § 7003(a)(1) (McKinney’s 2002) (requiring pure captive insurance company to insure, on primary basis, only risks of parent and affiliated companies); Kevin M. Quinley, Risk Management: Do Captives Still Make Sense?, Claims Magazine, Nov. 2001, available at www.claimg.com/Issues/Nov01/riskmanagement.asp (last visited Apr. 13, 2003) (stating that captives are “hybrids between strict retention and full insurance” as well as being either “single- or multi-parent organizations”).

See Quinley, supra note 69 (declaring that captives spring up in times of “hard markets, consisting of high prices and limited capacity”); see also Banham, supra note 68 (explaining “leased captives,” another alternative, whereby “several businesses lease risk transfer capacity from an existing captive”); Ronald D. White, More Firms Carrying Health Costs Benefits: Rising Premiums are Forcing Smaller and Smaller Employers to Dump Insurers and Assume Workers’ Medical Expenses Themselves, L.A. Times, Feb. 15, 2002, § 3, at 1 (stating that approximately two-thirds of the largest employers in United States have some form of self-insurance).


See Lundqvist, supra note 71, at 805 (stating that the return on invested assets is provided by a swap counterparty); see also Todd V. McMillan, Securitization and the Catastrophe Bond: A Transactional Integration of Industries Through a Capacity-Enhancing Product of Risk Management, 8 Conn. Ins. L. J. 131, 140 (2001/2002) (explaining that catastrophe bond transactions are structured over a specified risk period); Viva Hammer & Ann Singer, Insurance Derivatives: A Tax Angle, 518 PLI/TAX
realize the return as long as the catastrophe in question (hurricane, tornado, or typhoon) does not occur. If the incident does occur, the purchaser loses the principal.

**GOVERNMENT AS INSURER**

The idea of the government acting as an insurer is not novel. The government is in the best position to act as an insurer due to the vastness of its resources and its superior credit rating in the national economy. The basis of both of these points is the power to tax. This power enables the government to pass the risk throughout society. It is the ultimate sharing of risk.

951, 967 (2001) (explaining that the varying rates of return were designed to attract investors with different levels of risk tolerance).

73 See Lundqvist, supra note 71, at 805 (explaining that “if no catastrophe occurs prior to maturity, investors receive the full principal plus all interest payments”); see also McMillan, supra note 72, at 141 (explaining that if a catastrophe does not occur, the bondholder receives principal and interest earned over course of risk period); Benjamin J. Richardson, Mandating Environmental Liability Insurance, 12 DUKE ENV. L. & POL’Y F. 293, 306 (2002) (explaining that if a disaster does not occur during the bond period, the bondholder receives return of principal, as well as interest payments).

74 See Lundqvist, supra note 71, at 805 (stating that in event of a catastrophe, investors risk losing all or a portion of principal); see also Richardson, supra note 73, at 306 (stating if a disaster occurs, the insurer pays claims with catastrophe bond funds that would otherwise have gone to bondholders); McMillan, supra note 72, at 141 (explaining that the prospect of loss is contained within the designated risk period).

75 See Testimony before the U.S. Senate Comm. on Commerce, Science and Transp., Oct. 30, 2001, available at http://commerce.senate.gov/hearings/103001moss.PDF (last visited Jan. 8, 2003) [hereinafter Moss testimony] (listing several examples of the federal government acting as an insurer, including federal deposit insurance, workers' compensation and unemployment insurance); see also RUSS, supra note 38, at § 152-7 (noting that during World War II, the government created the War Damage Corporation, which “provided insurance against damage or loss of property as result of enemy attack or action of U.S. armed forces in reaction to an attack”). See generally 147 CONG. REC. D. 1067 (daily ed. Oct. 30, 2001) (stating that Moss spoke at hearing on future of providing insurance for terrorist attacks).

76 See Moss testimony, supra note 75 (stating “unlike private entities, the federal government is well positioned to absorb even massive losses because it enjoys the power to tax as well as a near-perfect credit rating.”); see also Thomas W. Merrill, Public Contracts, Private Contracts, and the Transformation of the Constitutional Order, 37 CASE W. RES. 597, 618 (1987) (explaining that like most institutional borrowers, the government’s actions are closely monitored by credit rating agencies, and poor credit ratings lead to elevated borrowing costs); Theodore P. Seto, Drafting a Federal Balanced Budget Amendment That Does What It Is Supposed to Do (And No More), 106 YALE L. J. 1449, 1489 (commenting that the United States is able to credibly print money because its credit rating is so high).

77 See Moss testimony, supra note 75 (explaining that if the premiums collected were not sufficient to cover losses, the federal government could collect funds from general tax revenues); see also Wells M. Engledow, Cleaning up the Pigsty: Approaching a Consensus on Exemption Laws, 74 AM. BANKR. L.J. 215, 306 (2000) (noting that the federal government is in a good position to spread risk); Regina T. Jefferson, Privatization: Not the Answer for Social Security Reform, 58 WASH & LEE L. REV. 1287, n.172 (citing the Social Security Program as an example of the federal government's power to tax being
American Governmental Involvement

The Federal Government is involved in several areas as insurer of risk. The general idea is that the government is to step in when a catastrophe strikes. The government is accustomed to insuring man-made risk as only one program deals with natural disasters. This further bolsters the premise of the federal government acting as the insurer of last resort in situations dealing with terror.

Price-Anderson Act

The Price-Anderson Act (the “Act”) passed in 1957. The Act indemnifies operators of nuclear power plants for damages resulting from accidents. In so indemnifying the operators of

utilized to spread risk across a broader population).

78 See Moss testimony, supra note 75 (listing examples such as federal bankruptcy law, product liability law, state insurance funds, foreign investment insurance, disaster relief, unemployment insurance, and old-age insurance); Jill Brenner et al., Financial Institutions Fraud, 39 AM. CRIM. L. REV. 631, 633, (2002) (highlighting the federal government’s role in insuring against financial fraud); Arthur B. LaFrance, The Changing Face of Law and Medicine in the New Millennium: Tobacco Litigation: Smoke, Mirrors and Public Policy, 26 AM. J. L. & MED. 187, 201 (2000) (discussing the implications of the federal government’s involvement in health care insurance).

79 See Michele L. Landis, Fate, Responsibility and “Natural” Disaster Relief: Narrating the American Welfare State, 33 LAW & SOC’Y REV. 257, 260 (1999) (recognizing that government intervention in the area of unemployment is necessary when catastrophe strikes the poverty level); Michele L. Landis, “Let Me Next Time Be Tried By Fire”: Disaster Relief and the Origins of the American Welfare State 1789-1874, 92 NW. U.L. REV. 967, 1028 (1998) (recalling President Roosevelt’s efforts to direct the Federal Government to recognize the Great Depression as a catastrophe, so that it may intervene as such). See generally Jan Gorrie, Property Insurance in Florida: The 1997 Legislative Reform Package, 25 FLA. ST. U.L. REV. 351 (1998) (explaining that state government intervention is necessary in area of property insurance when catastrophe strikes in Florida).


82 See 42 U.S.C. § 2210 (1994) (providing the content of the Price-Anderson Act); Gross, supra note 81, at 144 (noting that Price-Anderson Act indemnifies private actors who are exposed to liability from a nuclear accident); Kuntz, supra note 81, at 105 (noting that under the Price-Anderson Act, all public liability claims arising from nuclear
the nuclear power plants, the Act limits the overall liability of the individual reactors for each accident.\(^8\) The statute binds the government to furnish $500 million for damages per nuclear incident within the United States.\(^8\) The Act further specifies a $100 million dollar limit for damages incurred outside the country.\(^8\) The nuclear plant operator must obtain insurance up to the limit available in the private marketplace.\(^8\) Currently, the amount of private insurance available to operators is approximately $200 million.\(^8\)

If an accident occurs which exceeds the private insurance level, the operators of all reactors must pay into a secondary insurance fund.\(^8\) The amount paid is not to exceed $10 million per year per operator.\(^8\) The nuclear industry is presently responsible for claims up to $9.5 billion before the government's involvement kicks in.\(^\) The government is not required to support the incidents that are above the amount of required public insurance will be indemnified by the federal government).

\(^8\) See Gross, supra note 81, at 144 (explaining that the Price-Anderson Act limits the aggregate liability that can be imposed on private entities licensed by the federal government to engage in nuclear activities); Kuntz, supra note 81, at 105 (stating that the Act placed a ceiling on the aggregate liability that could be imposed upon those entities which engaged in nuclear activities under contract with, or licensed by the federal government); John Burritt McArthur, Cost Responsibility or Regulatory Indulgence for Electricity's Strained Cost?, 47 AM. U.L. REV. 775, 864 n.16 (1998) (noting that the Price-Anderson Act limited utility liability for any single nuclear plant disaster).

\(^8\) See 42 U.S.C. § 2210(c) (1994) (stating that the "aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500 million.").

\(^\) See 42 U.S.C. § 2210(d)(5) (1994) (stating that in the case of nuclear accidents occurring outside of the United States, the amount of indemnity provided for under the Act "shall not exceed $100,000,000").

\(^8\) See U.S.C. § 2210(b)(1) (1994) (stating that the amount of primary financial protection required by the Nuclear Energy Commission "shall be the amount of liability insurance available from private sources").

\(^8\) See Hillman testimony, supra note 33 (noting that this is the maximum amount per reactor, per accident); see also 42 U.S.C. § 2210(b)(1) (1994) (stating that the Nuclear Regulatory Commission may establish a lesser amount); Cheryl Kessler Clark, State Liability Under CERCLA for Low-Level Radioactive Waste Disposal: Preparing for the Inevitable, 11 PACE ENVTL. L. REV. 587, 655 n.201 (1994) (noting that the liability insurance must be the maximum amount of coverage available at a reasonable cost on the private market).

\(^8\) See Hillman testimony, supra note 33 (stating that these contributions could reach as high as $88.1 million per reactor, per accident); see also 42 U.S.C. § 2210(b)(1) (1994) (postulating that the charges are deferred, at least in part, until it appears likely that the liability will exceed the primary financial protection of the licensee involved in the incident); Clark, supra note 88 at 646 (explaining that the second layer of coverage does not apply until the operator's insurance funds are exhausted).

\(^8\) See 42 U.S.C. § 2210(b)(1) (1994) (providing that the maximum amount charged to a facility following a nuclear incident is $10 million).

\(^8\) See 42 U.S.C. § 2210(b)(1) (1994) (providing that the maximum amount charged to a facility following a nuclear incident is $10 million); Hillman testimony, supra note 33
operators if the damages exceed the secondary insurance fund.\textsuperscript{91}
In such a situation, Congress would investigate an incident and the legislators would make the final determination upon the funds needed to rectify the situation.\textsuperscript{92}

This statute has been in existence for close to a half-century and the government has not been called upon to fund excessive losses.\textsuperscript{93} The continuation of this system was before Congress recently.\textsuperscript{94} Given the present state of affairs, it is likely that the government will extend the Price Anderson Act to cover the nuclear industry in cases of an incident.\textsuperscript{95}

(calculating that the 106 reactors each pay $10 million for nine years). Cf. Clark, supra note 87, at 655 n.202 (stating that the total limit of liability per reactor incident is approximately $7.5 billion).

\textsuperscript{91} See Hillman testimony, supra note 33 (stating “[i]n the event of an accident that involves damages that exceed the amount in the secondary insurance fund the government is not explicitly required to fund the balance”); Dan M. Berkovitz, Price-Anderson Act: Model Compensation Legislation?—The Sixty-Three Million Dollar Question, 13 HARV. ENVTL. L. REV. 1, 7 (1989) (stating that maximum private insurance available is taken and any excess liability could be covered by the government); Chris Addicott, Note, Double Indemnity for Operators of Nuclear Facilities? In Re Hanford Nuclear Reservation Litigation, The Price-Anderson Act, and the Government Contractor Defense, 72 WASH. L. REV. 505, 510-11 (1997) (stating that primary liability insurance plus retrospective secondary insurance caps operators liability at 8.4 billion in 1997).

\textsuperscript{92} See Hillman testimony, supra note 33 (stating “Price-Anderson commits the Congress to investigate the accident and to take whatever action it deems necessary”); Joseph H. Sommer, Note, Transformative Torts, 97 YALE L. J. 646, 648 (1988) (stating that in case of nuclear incident Congress will review incident and take action necessary to protect public). See generally Priest, Does Tort Reform Threaten Judicial Independence? Roundtable, 31 SETON HALL L. REV. 694, 695 n.3 (2001) (stating that Price-Anderson Act contains an explicit congressional commitment to take further action to aid victims of a nuclear accident in the event that the $ 560 million ceiling on liability is exceeded).

\textsuperscript{93} See Hillman testimony, supra note 33 (stating “no nuclear accidents have occurred since Price-Anderson was enacted that cost more than was provided by the ... private insurance”). See generally John F. McNett, Nuclear Indemnity for Government Contractors Under The Price-Anderson Act: 1988 Amendments, 19 PUB. CONT. L. J. 1, 11 (1989) (suggesting that in the event of a catastrophic nuclear event, compensation plans would be submitted by the President within ninety days of a determination by a court that public liability may exceed aggregate liability limits); Karen Goxem, Comment, Emergency Offsite Planning For Nuclear Power Plants: Federal Versus State and Local Control, 37 AM. U. L. REV. 417, 426 n.62 (1988) (stating that Federal government would intervene only in event that award exceeded amount of indemnification).


\textsuperscript{95} See Struglinski, supra note 94 (suggesting that 108th Congress is likely to pursue re-authorization of the Price-Anderson Act); Late News In Brief, NUCLEAR NEWS, Dec., 2002, at 18 (stating that representatives of the nuclear industry, nuclear insurers, railroads, and contractors, urged Congress to renew the Price-Anderson Act by the end of 2002); Elaine Hiruo, Abraham Urges Congress To Pass Comprehensive Energy Legislation, NUCLEONICS WEEK, Sept. 26, 2002, at 7 (stating that approved resolutions thus far include the extension of the Price-Anderson Act for another 15 years).
Political Risk Insurance

The federal government has installed a plan to cover investments lost due to action by foreign sovereigns.\(^{96}\) An agency operates the program and finances itself.\(^ {97}\) The agency operates under the auspices of the State Department.\(^ {98}\) The official agency name is the Overseas Private Investment Corporation (the "Agency").\(^ {99}\) The program covers investments lost due to "war, revolution, insurrection, civil strife, or confiscation."\(^ {100}\)

The insurance offered by the agency is far broader for liabilities covered as compared to private insurance of the same type.\(^ {101}\) The agency uses premiums to finance the program.\(^ {102}\) Before underwriting a policy, the agency will submit the proposal


\(^{97}\) See 22 U.S.C. § 2191 (1994) (creating an agency to "mobilize and facilitate the participation of United States private capital and skills" in less developed and transitional areas and countries); Hillman testimony, supra note 33, at 4. See generally Vneshtorgbank Signs Agreement with OPIC, ROSBUSINESSCONSULTING DATABASE, July 5, 2002 (stating that OPIC is a U.S. independent self-financing federal agency that finances various projects, insures capital investments and provides other services to U.S. investors abroad); Zambia: US Government Offers $500m For Viable Projects, AFR. NEWS, Mar. 14, 2001 (noting that OPIC, which is a U.S. government self-financing agency, is the investment arm of the U.S. government in Africa and other places).


\(^{101}\) See Hillman testimony, supra note 33, at 4 (stating "the coverage offered by OPIC is more comprehensive both in scope and duration than the coverage currently available from private sector insurers."). See generally Joseph R. Biden, Jr., The Environment and World Trade, 23 ENVT. L. 687, 693 (1992) (stating that OPIC offers coverage at an appropriate premium). But see Thomas Ellinidis, Foreign Direct Investment In Developing And Newly Liberalized Nations, 4 D.C.L. J. INT'L L. & PRAC. 299, 326 (1995) (stating that premium varies depending on nature of risk and coverage).

\(^{102}\) See 22 U.S.C. §2194; see also Mark R. Yzaguirre, Project Finance and Privatization: The Bolivian Example, 20 HOUS. J. INT'L L. 597, 617 (1998) (stating that OPIC is self-sustaining and earns income through charging premiums). See generally Bice, supra note 64, at 466 (stating that OPIC works like ordinary insurance company and uses premiums to create reserve for paying claims).
to the Foreign Relations Committees in both houses of Congress.\textsuperscript{103} It will supply the Committees with the necessary information to establish the safety of the policy issued.\textsuperscript{104} The manner in which the corporation establishes reserves and premiums is based on expert opinion and less on standardized actuarial models.\textsuperscript{105} The main reason the Agency uses this method is that it is extremely difficult to ascertain the actions of foreign governments, as it is difficult to ascertain the actions of terrorist organizations.\textsuperscript{106} This would appear to be an example of where the federal government is needed to insure risks that are either uninsurable or, due to the lack of standard actuarial methodologies, exorbitantly expensive to the point that it would inhibit economic development and the expansion of American economic interests.\textsuperscript{107}


\textsuperscript{104} See 22 U.S.C. §2194(a)(4) (1994) (stating the report to Congress will include “a thorough analysis of the risks covered, anticipated losses, and proposed rates and reserves.”), see also U.S. Representative Henry Hyde (R-IL) Holds Hearing On The Administration’s National Export Strategy, FDCH POLITICAL TRANSCRIPTS, May 15, 2002 (statements of Ross Connelly, Executive Vice President of OPIC) (illustrating presentation by OPIC before House International Relations Committee). See generally Perez-Lopez, supra note 103 (illustrating how OPIC conducted annual reviews of the relevant issues and notified Congress of their findings to help Congress make a decision).

\textsuperscript{105} See Hillman testimony, supra note 33 (stating that the methods used to set premium rates rely heavily upon expert judgment and not upon standard actuarial models); Bice, supra note 64, at 444 (noting an economically efficient premium cannot be calculated because of a lack of perfect information). See generally Melinda L. Reynolds, Landowner Liability for Terrorist Acts, 47 CASE W. RES. L. Rev. 155, 202-03 (1996) (stating premiums charged are based on many different factors).


\textsuperscript{107} See Bishop et al., supra note 105, at 685 (stating OPIC insurance enhances the likelihood that the insured will collect if there is a catastrophe). See generally David Blumenthal, Sources of Funds and Risk Management for International Energy Projects, 16 BERKELEY J. INT’L L. 267, 284 (1998) (stating products eligible for insurance must have positive effects on U.S. unemployment, be financially sound, and bring significant economic and social benefit to host company); Ruth Rosauer, Emerging Market Debt
Riot Insurance

During the late 1960's, urban areas of the United States erupted in violence. The private insurance industry declined insuring inner city neighborhoods, citing fear of continued violence causing significant losses. The refusal to insure these areas was to put an end to the development of the urban regions. The federal government responded with the establishment of the National Insurance Development Program.

This program was to enable the reinstatement of private insurance for urban areas with the federal government acting as reinsurer. The plan stressed the cooperation of insurers with Instruments Play Siren Song for Pension Plans, 7 MINN. J. GLOBAL TRADE 211, 222 n.95 (1998) (mentioning OPIC insures currency risk, expropriations, and political violence).


109 See Hillman testimony, supra note 33 (stating insurers became reluctant to underwrite property insurance in communities considered to be at risk for such events); see also Bryan Ford, The Uncertain Case for Market Pricing of Health Insurance, 74 B.U.L. REV. 109, 118 n.44 (1994) (mentioning the crisis of property insurance availability after the 1967 riots in United States because insurers could not calculate probability of future riot losses); Leah Wortham, Insurance Classification: Too Important to be Left to the Actuaries, 19 U. MICH. J. L. REV. 349, 396 (1986) (mentioning the Urban Property Protection and Riot Reinsurance Act of 1968 provided insurance to those denied by private market).


112 See 12 U.S.C. § 1749bbb-4 (1994) (designed to assure fair access to insurance requirements); see also Hillman testimony, supra note 33 (stating the program provided a
The director of the plan, with input from state authorities, was to determine the need to form a pool of insurers so to provide the necessary insurance needed in the area. The federal reinsurance was made available to insurers on a voluntary basis. The primary focus of the plan was to allow the insurers to enter into the Fair Access to Insurance Requirements Plan (the "Plan"), and in so entering, the insurer would make available property insurance to consumers in urban areas. By offering the insurance to consumers in high profile areas, the insurers would cede the majority of the risk to the Plan. When a claim was made an insurer's retained portion of risk would be paid before the voluntary federal program of reinsurance; Gugin, supra note 111, at 848 n.175 (mentioning Act protects victims of urban rioting from property loss).

See 12 U.S.C. § 1749bbb-3(a) (1994) (stating "[E]ach insurer reinsured under this title shall cooperate with the state reinsurance authority"); 12 U.S.C. §1749bbb-5 (stating all insurers shall file a statement pledging its full participation and cooperation); see also Hillman testimony, supra note 33 (mentioning the requirement that states share in losses with federal government).


See generally 12 U.S.C. § 1749bbb-5 (1994) (stating each state must file a statement with appropriate authority to be a participant in plan); 12 U.S.C. § 1749bbb-6 (1994) (stating each state insurance authority must submit to Director any proposed or adopted plan); 12 U.S.C. § 1749bbb-6a (1994) (stating Director shall review each plan and methods used to carry it out).

See Hillman testimony, supra note 33 (stating the National Insurance Development Program provided a federal program of reinsurance for urban property owner's offering relief from abnormally high rates in private markets); see also John Hugh Gilmore, Insurance Redlining & The Fair Housing Act: The Lost Opportunity of Mackey v. Nationwide Insurance Companies, 34 Cath. U. L. Rev. 563, 579 (1985) (stating the government guarantee would allow insurance companies to continue to provide basic property insurance in urban areas). See generally William E. Murray, Homeowners Insurance Redlining: The Inadequacy of Federal Remedies and the Future of the Property Insurance War, 4 Conn. Ins. L. J. 735, 740 (1998) (stating the only solution to insurance redlining is enactment of a federal law specifically defining and prohibiting the practice).

See Hillman testimony, supra note 33 (revealing that insurers were required to assume liability for a limited amount of the risk); see also Gilmore, supra note 117, at 578-80 (highlighting government guarantee backing insurance issued under this program). See generally Jill Gaulding, Race, Sex, and Genetic Discrimination in Insurance: What's Fair?, 80 Cornell L. Rev. 1646, 1660 (1995) (noting the availability of reinsurance to insurers who offered coverage in high risk areas).
government’s.\textsuperscript{119} To further spread the risk, states were required to share in the program’s losses.\textsuperscript{120} The government terminated the riot insurance program in 1984, stating that inadequate involvement by insurers was the basic reason.\textsuperscript{121}

War Risk Insurance

Insurance companies routinely exclude coverage for losses incurred because of war or similar circumstances.\textsuperscript{122} They have done so because the damages are virtually limitless and the probability of such damage occurring is relatively unpredictable.\textsuperscript{123} Furthermore, it is conceivably the duty of the government to protect its citizens from the aggressions of foreign sovereigns and the losses incurred by such actions.\textsuperscript{124}

\textsuperscript{119} See Hillman testimony, supra note 33 (stating that “Insurers could transfer most of the remaining risk by making a premium payment to the federal government, which then assumed the remaining liability. This liability ranged from 90 to 98 percent . . .”). See generally Gaulding, supra note 118, at 1660 n. 92 (presenting the general history of such reinsurance programs); Gilmore, supra note 117, at 578-80 (describing the government’s insurance solution to riot protection in late 1960’s).

\textsuperscript{120} See 12 U.S.C.§ 1749bbb-9(a)(1) (1994) (requiring each state to adopt legislation reimbursing the federal government for any reinsured loss occurring within the state); Hillman testimony, supra note 33 (declaring that the program mandated states to divide losses with federal government). See generally Gilmore, supra note 117, at 578-80 (analyzing federal response to problems raised in insurance industry following 1960’s riots).

\textsuperscript{121} See 12 U.S.C. § 1749bbb(b)(1) (1994) (terminating the authority of the Director on November 30, 1985); Hillman testimony, supra note 33 (identifying lack of participation as the chief reason for discontinuing program); see also Gilmore, supra note 117, at 579 n.120 (explaining that the decision to terminate program occurred late in November, 1983).


\textsuperscript{124} See Dennis Kelly, Insurers at NAIC Fret Over Terror Reinsurance Bill, at http://www3.ambest.com/FrameServer.asp?Site=news&Tab=1&altsrc=18&RefNum=46371 (last visited Apr. 13, 2003) (indicating that “Scott Gilliam, secretary for Cincinnati Insurance Companies said . . . the federal government should share in the terrorism risk because it is a societal problem caused by government politics.”); Thomas
Currently, Congress has stepped into the insurance market, at least temporarily, to ensure the airline industry’s ability to procure insurance after the incidents of September 11. Similarly, in years past, the federal government has become involved in securing insurance for various parts of the economy when an event made it nearly impossible for the retention of insurance in the private market. The statutes passed before World War II enabled the maritime industry to get the needed insurance despite private insurers refusal to write war coverage.

Flood Insurance

Natural disasters occur semi-regularly in the United States. It may be a tornado, hurricane or earthquake. The vastness of the nation make it prone to damage caused by Mother Nature. For this very reason, insurers became leery of underwriting policies concerning flood damage.


129 See Hillman testimony, supra note 33, at 6 (stating that “increasing losses from floods because of floodplain encroachment” was one factor used by the insurance
The government's response was the formation of the National Flood Insurance Fund. The National Flood Insurance Act of 1968 established the program. The Secretary of Housing and Urban Development (HUD) initially supervised the program. Eventually, the responsibility was transferred to the Director of the Federal Emergency Management Agency (FEMA). The program allows persons residing in flood zones to purchase federal flood insurance. The program also encourages the participation of private insurers in furnishing such insurance to property owners. It is solely a voluntary program. Primarily,
premiums and fees from policyholders in addition to appropriations from Congress finance the National Flood Insurance Fund.137 This financing method is not sound as the long-term expenditures on flood damage far outstrip the receipts from premiums and fees.138 Such financing forces Congress to fund the program rather than it surviving on its own.139

Foreign Jurisdictions’ Dealings with Insurance against Terror

United Kingdom

Terror squarely confronted the British government during the late 1980’s and throughout the 1990’s.140 The Irish Republican Army (“IRA”) was trying to oust the British from Northern Ireland for decades.141 In 1992, the IRA began a brutal wave of bombings that lead to losses in life and property.142 During this


138 See Hillman testimony, supra note 33 (explaining that financing of National Flood Insurance Program does not result in income sufficient to build reserves and meet long-term expenditures on flood losses); see also In 10 Years, Government Liabilities More Than Triple, U.S. NEWS & WORLD REPORT, May 4, 1981, at 60 (citing various government liabilities); Margaret Kriz, Shoring Up Flood Insurance, NAT’L J., Sept. 4, 1993, at 2128 (discussing the financing problems of NFIP).

139 See Hillman testimony, supra note 33 (noting that Congress has had to appropriate funds from time to time to finance the National Flood Insurance Program); see also The Flood Insurance Administration: Has Begun Collecting a $25 Surcharge on Flood Insurance Policies, INS. REV., Sept. 1991, at 14 (discussing Congressional financing of the fund); Peter Lavigne, Reforming National Flood Insurance, USA TODAY, July 1994, at 43 (noting the serious problems in NFIP’s financial management).

140 See Terrorism in the UK, supra note 62 (listing the numerous acts of terrorism that occurred in Great Britain during the late 1980s and the 1990s); see also Blair’s Deal with Libya’s Gadhafi, DEF. & FOREIGN AFFS. STRATEGIC POL’Y, Aug. 2002, at 3 (citing terrorist IRA operations in UK); Andrew Johnson, Terror’s Tangled Web, LEGAL WEEK, May 16, 2002 (discussing IRA terrorist acts).


142 See Bice, supra note 64, at 446 (describing the IRA bombings of Britain in the early 1990s); see also Terrorism in the UK, supra note 62 (listing the numerous IRA bombings that occurred in Britain and providing the death tolls from these attacks);
period, the IRA either claimed responsibility or was suspected of involvement in multiple bombing incidents.\textsuperscript{143} The response of insurers, especially reinsurers, was to exclude coverage for losses due to terrorist actions.\textsuperscript{144} Without reinsurance, primary insurers could not underwrite policies covering terrorism because the risk was too high that an incident would bankrupt the insurer.\textsuperscript{145}

The British Government joined the fray in February 1993.\textsuperscript{146} The government system established the Pool Reinsurance Company ("Pool Re").\textsuperscript{147} It was a mutual insurance company formed by the government solely for the coverage of losses due to terrorism.\textsuperscript{148} The government acts as the reinsurer of Pool Re
and responds in such manner only when the company is unable to meet its liabilities. Pool Re contracts solely with the insurance companies themselves. It is a voluntary program. An insurer may continue to seek and obtain coverage in the private market.

One hundred eighty-one insurance companies compose Pool Re. Member insurers continue to offer terror coverage up to a certain limit. That limit has been set at £100,000 pounds

Nations, supra note 146, at 23 (describing perils insured under the Pool Re system). But see Terrorism in the UK, supra note 62 (noting that in 1999 some were calling for an extension of Pool Re to cover potential Y2K losses).

See United Nations, supra note 146, at 24 (explaining that Pool Re acts as a reinsurer to primary insurers while the government provides reinsurance to reinsurers); see also Bice, supra note 64, at 453 (describing the ultimate liability of the British government when Pool Re is exhausted); Terrorism in the UK, supra note 62 (stating that the British government will indemnify Pool Re should claims exceed the total remitted premiums available).

See United Nations, supra note 146, at 24 (stating that insurers who wish to reinsure with Pool Re must apply and enter into an agreement with Pool Re); see also Terrorism in the UK, supra note 62 (indicating that the government has no locus in the relationship between insurers and Pool Re). But see Richard Lapper, Row Over Premiums Threatens Insurance Cover for Terrorism, FIN. TIMES (London), June 11, 1993, at 1 (quoting industry members alleging that the history of Pool Re indicates a lack of willingness to cooperate with insurance companies).

See United Nations, supra note 146, at 24 (explaining that membership in Pool Re is not obligatory); see also Terrorism in the UK, supra note 62 (noting that membership in Pool Re is not mandatory for insurers operating in Great Britain). Cf Bice, supra note 64, at 450-51 (specifying that while insurers have the option of electing additional coverage through Pool Re, they must purchase coverage for all property as opposed to only for high-risk property).

See United Nations, supra note 146, at 24 (noting that insurers are free to seek terrorism reinsurance from private reinsurers); see also Terrorism in the UK, supra note 62 (clarifying that insurers may receive terrorism insurance from elsewhere if they want). But see Bice, supra note 64, at 456 (arguing that once the British government stepped in, it effectively barred the entry of private companies that may otherwise have considered underwriting terrorism reinsurance).

See Pool Re and Terrorism Insurance in Great Britain, Tillinghast-Towers Perrin Update, at http://www.tillinghast.com/tillinghast/publications/publications/till_update_uk/UK_Pool_Re_and_Terrorism/200205211.pdf (Oct. 2001) (last visited Jan. 31, 2003) (indicating that Pool Re is composed of 104 insurance companies incorporated in the UK and 77 insurance companies incorporated in other countries around the world); see also Terrorism in the UK, supra note 62 (providing membership statistics when Pool Re came into being in 1993 [129 insurance companies and 88 Lloyd’s syndicates] and as of October 1997 [184 insurance companies plus 64 Lloyd’s syndicates]). Cf Bice, supra note 64, at 450 (providing 1994 membership totals of 115 insurance companies and 120 Lloyd’s syndicates).

See United Nations, supra note 146, at 25 (stating that original insurers provide coverage to policy holders up to the minimum level of £100,00; see also Bice, supra note 64, at 450 (noting that direct insurers are exclusively responsible for all coverage up to this specified limit without reinsurance); Changes to the Pool Re Scheme at http://www.hm-treasury.gov.uk/mediastore/othefiles/ACF1DOD.pdf (last visited Apr. 13, 2003) [hereinafter Changes] (stating Pool Re operates a retention under which insurers bear the first amount of any claims).
sterling for each line of insurance written by the company. The portion is the full responsibility of the insurance companies and is not subject to reimbursement by Pool Re. The ability to seek reimbursement from Pool Re commences when the amount of damages exceed the £100,000 limit. Pool Re will reimburse insurers for amounts beyond the limit as long as the fund is solvent. If the fund is lacking resources, Pool Re will make a "call" of an additional ten percent of premiums. All insurance companies in the Pool are responsible for providing the fund with this "call." If the fund is insolvent, unable to meet its liabilities despite the ten percent call, then the British Government will step forward as the reinsurer of the reinsurer.

155 See Changes, supra note 154 (stating retention is generally £100,000); see also Terrorism in the UK, supra note 62 (explaining that member insurers are required to cede all additional premium for cover above £100,000 to Pool Re); United Nations, supra note 146, at 25 (indicating that the lower limit of indemnity is established at £100,00 for each section of the policy).

156 See Bice, supra note 64, at 450 (explaining that claims that fall below the minimum limit will be borne entirely by the direct insurer with no reimbursement from Pool Re); see also Terrorism in the UK, supra note 62 (indicating that most insurers restrict the amount of coverage available to £100,000); United Nations, supra note 146, at 25 (stating original insurers are responsible for first £100,00 of each section of the policy).

157 See United Nations, supra note 146, at 25 (placing the responsibility for paying the first £100,000 on original insurers); see also Ralph Atkins, CU Focuses on Overseas Expansion, Fin. Times (London), Feb. 22, 1996, at 24 (informing that Pool Re covers claims of more than £100,000). See generally Christopher Elliott & Angela Mackay, Bankers Defy Government to Seek City "Ring of Steel", The Times (London), June 7, 1993 (stating "terrorism claims of more than £100,00 will be paid by Pool Re").


159 See Bice, supra note 64, at 453 (stating "[i]f the premiums paid to Pool Re do not cover the losses caused by a terrorist attack, then an additional ten percent "call" is levied on the member insurers in the pool"); see also Lenore Taylor, UK Offers Insurance Model, Austl. Fin. Rev., July 16, 2002, at 5 (noting that if Pool Re's "resources are exhausted, the member companies are required to contribute another 10 per cent"). See generally United Nations, supra note 146, at 25 (examining the lower and upper limits of indemnity).

160 See Bice, supra note 64, at 453 (noting "[a]ll member insurers are liable for the call"); see also Taylor, supra note 159 (recognizing that members of Pool Re are required to contribute an additional 10 per cent). See generally Libby Bruch, Terror Coverage Prompts Concerns: Although Some Commercial Insurers Are Responding To The Need For Terrorism Coverage, Much About The Risk Remains Unknown, 13 Risk & Ins. 36 (2002) (reporting that Pool Re members pay claims over £100,000 sterling).

161 Terrorism in the UK, supra note 62 (stating any claims beyond the premiums collected by Pool Re and the 10% call would be met by the Government as the "ultimate insurer."); see also Siow Li Sen, GIA Terrorism Insurance Study Almost Ready, Bus. Times (Singapore), Oct. 21, 2002, (commenting that the British government "is the insurer of last resort"). See generally Lee Barnes, A Closer Look At Britain's Pool Re, 49 Risk Mgmt., May 1, 2002, at 18 (stating "the U.K. government indemnifies Pool Re for
This entire system is to ensure that the British economy does not suffer for lack of insurance. Without reinsurance, primary insurers would not write policies and banks would not lend money because of the possible catastrophic losses. If the banks did lend money, the rate would be significantly higher than it presently is because they would have to factor in the possible loss of their capital due to terror.

Spain

The Spanish Government has established the Consorcio de Compensacion de Seguros ("Consorcio"), an independent entity with separate legal status. Its role is to cover losses due to natural catastrophes, army and police interventions in peacetime, terrorism and other extraordinary events. The Consorcio operates through the collection of premiums for the services offered. All policies written by an insurer must contain qualifying claims that exhaust Pool Re's resources.

162 See Jackie Spinner, Terrorism-Insurance Battle Looms, WASH. POST, June 14, 2002, at E02 (claiming primary insurers purchase reinsurance as a protection against cataclysmic losses); see also Diane Levick & Micheal Renez, State Insists On Terror Coverage, HARTFORD COURANT, Dec. 15, 2001, at E1 (noting that banks will not lend money if businesses do not have terrorism insurance). See generally Morais, supra note 45, at 76 (explaining that insuring insurance companies is the business of reinsurance).

163 See generally How Much Are Americans At Risk Until Congress Passes Terrorism Insurance Protection?: Before the House Subcommittee on Oversight & Investigations, Committee on Financial Services, 107th Cong., 50-54 (2002) available at http://commdocs.house.gov/committees/bank/bba78186.000/bba78186_0.HTM (last visited Jan. 31, 2003) (Deborah B. Beck, Executive Vice President of the Real Estate Board of New York, stating that lenders demand terrorism coverage before making or renewing large scale loans); Spinner, supra note 162 at E02 (noting that without terrorism insurance, banks will be reluctant to lend); Russ Banham, Terrorism Insurance: Pray as You Go, available at http://www.cfo.com/printarticle/0,5317,6633%7CA,00.html (Feb. 4, 2002) (last visited Apr. 13, 2003) (discussing how without government assistance, companies are left with little coverage against terrorism).

164 See Terrorism in the UK, supra note 62, (stating Consorcio de Compensacion de Seguros is distinct from the state); see also Carolyn Aldred & Mark A. Hofmann, Much Discussion but Few Public/Private Deals so Far Government Role Seen in Terrorism Risk Pools, BUS. INS., Mar. 25, 2002, at 3 (noting that Consorcio de Compensacion de Seguros is Spain's state-backed insurance pool). See generally United Nations, supra note 146, at 5 (profiling Spain's catastrophe insurance scheme).


166 See United Nations, supra note 146, at 5 ("[T]he Consorcio is empowered to decide its own rates, which must then be incorporated into the premium charged for every
an Extraordinary Event Cover.167

An event that is not covered under a policy, or, even if covered, is unable to be paid because of an insurer's financial difficulties triggers the fund into action.168 The fund only covers tangible losses.169 Other losses, such as business interruption, lost profits, are termed the insured's responsibility to obtain specific coverage.170 The loss itself does not have to be of a certain amount; rather, it merely must have the possibility of a large loss.171 The Consorcio is financed by the collection of premiums for the services offered.172 Therefore, there is no minimum

insurance policy . . . .")

167 See Terrorism in the UK, supra note 62, at 14; United Nations, supra note 146, at 5.

168 See United Nations, supra note 146, at 6 (positing "[t]he perils insured are chosen on the basis of their enormous loss potential[.]"); see also Graham Buck, Europe's Pendulum of Risk: The Single European Currency is Now a Reality in 12 Countries, But Insurance and Risk Managers Remain Preoccupied with the Terrorism Issue, 13 RISK & INS., Feb. 1, 2002, at 1 (noting: "[T]he Consorcio de Compensacion de Seguros, was set up more than 40 years ago to provide property damage cover for a full range of catastrophic risks."); David Hartzell & Pablo Weslowski, Post-WTC Solution Spain Provides Model That Has Worked, INS. DAY, Nov. 1, 2001, at Law (stating: "SICF is only required to provide compensation when the extraordinary loss is not specifically covered under an insurance policy; or when . . . the relevant insurance company cannot meet its obligations because it is insolvent, or has suspended payments, or been declared bankrupt or put into compulsory liquidation.").

169 See United Nations, supra note 146, at 6 (stating "the indemnity covers solely material losses"); Hartzell & Weslowski, supra note 168, at Law (explaining policies covering property damage incorporate SICF coverage); see also Buck, supra note 168, at 1 (stating the purpose of the Consorcio de Compensacion de Seguros was to provide property damage for catastrophes); see also Aldred, supra note 165, at 35 (stating coverage is limited to material damage); Buck, supra note 168, at 1 (explaining coverage by SICF "does not extend to business interruption, third party liability, or construction risks").

170 See United Nations, supra note 146, at 6 (explaining "loss of profits and other indirect losses are deemed to be a matter for voluntary coverage, which should always be extended by the free market."); see also Aldred, supra note 165, at 35 (stating coverage is limited to material damage); Buck, supra note 168, at 1 (explaining coverage by SICF "does not extend to business interruption, third party liability, or construction risks").

171 See United Nations, supra note 146, at 6 (explaining the event need not be termed a "catastrophe" in order for the fund to become involved in an incident); see also, Hartzell & Weslowski, supra note 168, at Law (stating "SICF's main function is to indemnify . . . losses caused by extraordinary events). See generally, Robert C. Meder, Global Solutions to Terrorism Coverage, RISK MGMT., May 1, 2002, at 10 (describing types of extraordinary or catastrophic losses covered).

172 See Consorcio de Compensacion de Seguros, The Extraordinary Risk Coverage, MINISTRY ECONOMY, Spain, § 10 Financing the Cover of the Consorcio, (2000) available at http://www.consorseguros.es/publicaciones/friesgextra.htm (last visited Apr. 13, 2003) (explaining surcharges are its main source of funds); United Nations, supra note 146, at 5 (stating "[T]he Consorcio is empowered to decide its own rates, which must then be incorporated into the premium charged for every insurance policy."); see also Aldred, supra note 165, at 35 (explaining how reserves are funded by surcharges on premiums); Hartzell & Weslowski, supra note 168, at Law (outlining how premiums are collected by SICF).
amount to trigger the fund making a payment to the policyholder. All policies written by an insurer must contain an Extraordinary Event Cover.

The Consorcio premiums are mandatory. The fee is termed a tariff and must be collected by the insurance companies regardless of whether the coverage purchased includes the specified risks of the fund. Insurers remit the Consorcio rates directly to the fund on a monthly basis. The fund may accumulate a catastrophe reserve with its assets usable for any contingency regardless of when the fees in the reserve were received. If the Consorcios’s funds prove inadequate to meet

173 The fund does not make payments to the insurer as a reinsurer, rather the Fund makes a payment directly to the insured suffering the loss. Therefore, the program does not act as a subsidy for the insurance industry but it is another layer of insurance for the individual policyholder. There is a deductible for property damage that is generally 10% of the amount of the loss; for larger losses, the deductible can rise to 15%. See United Nations, supra note 146, at 6. Further, different types of losses carry with them variant deductibles. See Hartzell & Weslowski, supra note 168, at Law. For a comparison of the different approaches taken by the European community to the problem of insurance coverage for terrorism catastrophes see generally Meder, supra note 171, at 10.

174 See Terrorism in the UK, supra note 62, at 14 (listing types of insurance required to enclose an Extraordinary Event Cover); see also, Hartzell & Weslowski, supra note 168, at Law (explaining that in Spain, insurance for extraordinary risks is automatically extended by SICF to a policy holder when he takes out certain classes of insurance). See generally United Nations, supra note 146, at 5 (highlighting Spain’s catastrophe insurance scheme).

175 See United Nations, supra note 146, at 8 (describing surcharge as “obligatory”); see also Consorcio De Compensacion De Seguros, Informative Note, MINISTRY ECONOMY, Spain available at http://www.consorseguros.es/notainfo/notainfo_ing.htm (last visited Apr. 13, 2003) (stating "From the moment when [insurance companies] begin activity in Spain, insurance Entities are thus required to collect the surcharges and settle them with the Consortium."). See generally Aldred, supra note 165, at 35 (calling the coverage “compulsory” for certain types of insurance).

176 See United Nations, supra note 146, at 8 (explaining the tariff is incorporated into premiums “irrespective of whether the original policy provides for the risk”); Consorcio de Compensacion de Seguros, The Extraordinary Risk Coverage, supra note 172, at § 9 (explaining how mandatory surcharges irrespective of policy coverage allow coverage for extraordinary risk that would otherwise be impossible); see also Hartzell & Weslowski, supra note 168, at Law (stating that “[t]he insurer is required to include the charges irrespective of whether the risk is covered, or excluded, from the original policy”).


178 See United Nations, supra note 146, at 8 (describing how “surpluses from years when premiums exceed claims are transferred,” forming a catastrophe reserve); Consorcio de Compensacion de Seguros The Extraordinary Risk Coverage, supra note 172, at § 10 (explaining how “accumulation of resources and on broad compensation in time . . . [taking the form] of a Stabilization Reserve” allows Spain to cover intense risks); Hartzell & Weslowski, supra note 168, at Law (describing “a special accumulative technical
the liabilities caused by the above-mentioned situation, the Spanish Government guarantees the funds liquidity. In that half century, the need to step in has not presented itself to the government.

South Africa

The South Africa Special Risks Insurance Association (SASRIA) was set up to deal with local riots, insurrection, and terrorism in South Africa. Established in 1976, the Association is considered the forbearer of Pool Re in the United Kingdom.

provision to which all surpluses from years where premiums exceed claims are transferred.

179 See Consorcio de Compensacion de Seguros, The Extraordinary risk Coverage, supra note 172, at § 10 (stating "the Consorcio is backed by the government guarantee in order to meet any indemnity obligations that overrun its financial capacity"); see also United Nations, supra note 146, at 8 (noting that claims are guaranteed by Spain if funds were insufficient); Hartzell & Weslowski, supra note 168, at Law (indicating that fund is guaranteed by Spain).

180 See Consorcio de Compensacion de Seguros, The Extraordinary Risk Coverage, supra note 172, at § 2 (detailing the history of the Consorcio De Seguros); Hartzell & Weslowski, supra note 168, at Law (mentioning the fund has more than fifty years of experience). See generally United Nations, supra note 146, at 8 (discussing the Consorcio).

181 See Consorcio de Compensacion de Seguros, The Extraordinary Risk Coverage, supra note 172, at § 2 (boasting "the adequate reserves collection and the strict financial management have enabled the Consorcio to meet its indemnity liabilities, even in the worst cases of claims that have occurred for more than fifty years . . ."); United Nations, supra note 146, at 8 (restating that the Consorcio has never needed to avail itself of the state guarantee); see also Hartzell & Weslowski, supra note 168, at Law (indicating funds have never been insufficient).

182 See United Nations, supra note 146, 18 (stating SASRIA was established on April 1, 1979 as a tax-exempt non-profit insurance company with the government acting as the Association's reinsurer); SASRIA, SASRIA Overview at www.sasria.co.za/about.html (last visited Apr. 13, 2003) (noting SASRIA celebrated its 20th year as a special risks insurer in Feb. 1999); see also Sapa, Plan to privatize Risk Insurance Body,Dispatch Online, Nov. 7, 1998 at http://www.dispatch.co.za/1998/11/07/southafrica/INSURANC.HTM (last visited Apr. 13, 2003) (discussing the privatization of SASRIA).


184 See Terrorism in the UK, supra note 62 (noting that Pool Re was basically modeled upon the structure of the SASRIA system); see also Melinda L. Reynolds, Note, Landowner Liability for Terrorist Acts, 47 CASE W. RES. 155, 202 (1996) (suggesting that "[t]he British Government essentially agreed to become the 'reinsurer of last resort' for losses caused by terrorist acts"). See generally Bice, supra note 64, at 441-45 (analyzing the Pool Re system and the role of reinsurance).
The insurance covers both politically and non-politically motivated damages.\textsuperscript{185}

The insured purchases the coverage from the primary insurer.\textsuperscript{186} The insurer does not retain the risk for the listed damages,\textsuperscript{187} rather, SASRIA accepts the full risk for the specified situations from the primary insurer.\textsuperscript{188} The insurance companies act as de facto agents of the Association; they collect the fees, write the policies, and administer the claims presented by the insured.\textsuperscript{189} The insurance companies themselves do not provide the coverage for the insured,\textsuperscript{190} yet they do consult with the

\textsuperscript{185} See Terrorism in the U.K., supra note 62 (explaining “the South African Government agreed to become reinsurer of last resort against politically-motivated riot . . . and non-political riot, strike and public disorder”); see also United Nations, supra note 146, at 18 (stating “The insured perils are riot strike, politically motivated malicious damage . . . .”). See generally SASRIA, History of SASRIA, at http://www.sasria.co.za/history.html (last visited Apr. 13, 2003) (noting “SASRIA’s perils were extended to cover damage caused by non-political riot and public disorder, which includes labour disturbance, civil commotion, strike and lockout.”).

\textsuperscript{186} See Terrorism in the U.K., supra note 62 (noting “the policy holder purchases cover from the insurer who handles the administration and claims but retain none of the risk”); see also Bennetton, supra note 183 (discussing potential problems with the South African Insurance Industry’s new terrorism exclusion clause). See generally SASRIA, History of SASRIA, supra note 185 (discussing the establishment of SASRIA).

\textsuperscript{187} See Terrorism in the U.K., supra note 62 (noting “the insurer . . . retain[s] none of the risk); see also United Nations, supra note 146, at 19 (stating that “private insurers did not want to provide cover for politically-motivated terrorism”). See generally Bice, supra note 64, at 442-43 (defining and discussing reinsurance).

\textsuperscript{188} See Terrorism in the U.K., supra note 62, at 15 (stating “all events covered by SASRIA are specifically excluded from the underlying insurance policies of all insurance companies in South Africa by the standard SAIA exclusion clauses”). See generally Sapa, supra note 186 (noting SASRIA’s obligations to its policy holders); SASRIA, History of SASRIA, supra note 185 (describing SASRIA’s coverage).


\textsuperscript{190} See United Nations, supra note 146, at 20 (explaining that SASRIA is managed and administered by SAIA, and until 1992 the insurance companies had been involved in supplying some of the reinsurance but since December 31, 1992 the companies are no longer that involved); see also Ruwantaissa Abeyratne, Crisis Management Toward Restoring Confidence in Air Transport – Legal and Commercial Issues, 67 J. AIR L. & COM. 595, 606 (2002) (explaining “[Pool Re] insurers collect premiums for terrorism insurance and the government promises to chip in if claims exceed the pool’s premiums plus reserves”); Reynolds, supra note 188, at 202 (noting five layers of terrorism coverage must be exhausted before the British Government becomes liable in the Pool Re system).
Association to set rates at commercially viable levels.\textsuperscript{191} SASRIA is the ultimate payor of claims presented to the insurers by policyholders. It does not act as re-insurer of the primary policy carriers.\textsuperscript{192} The Association compensates the insurance companies for their efforts by allowing them to retain a percentage of the premium charged the consumer.\textsuperscript{193} SASRIA behaves as a private insurance company in that it also seeks to insure its covered policies via the international reinsurance market.\textsuperscript{194}

However, SASRIA's lack of adequate resources to cover claims allows the South African government to play a role in the insurance scheme.\textsuperscript{195} The government does not charge SASRIA premiums for the ultimate reinsurance coverage.\textsuperscript{196} The

\textsuperscript{191} \textit{See United Nations, supra note 146, at 21}(explaining how SASRIA's rates are set); \textit{see also SASRIA, Schedule of Rates, at http://www.sasria.co.za/product.html} (last visited Apr. 13, 2003) (listing SASRIA's rates for various coverage types). \textit{See generally Conversion of SASRIA Act, supra note 188} (explaining rates and disbursements of funds).

\textsuperscript{192} \textit{See Terrorism in the U.K., supra note 62, at 20} (noting "the [SASRIA] fund has to arrange commercially acceptable reinsurance cover"); \textit{see also SASRIA, History of SASRIA, supra note 185} (explaining SASRIA's history as a reinsurer of the short term insurance industry). \textit{See generally Reynolds, supra note 188, at 202} (explaining that in Pool Re system, the government is the last resort payor of claims).

\textsuperscript{193} \textit{Id. See Terrorism in the U.K., supra note 62, at 20} (positing that the retention amount allowed is 15\% while no more than 5\% of that may be paid to any agent or broker). \textit{See generally Sapa, supra note 186} (discussing privatization of SASRIA); SASRIA, History of SASRIA, supra note 185 (explaining how SASRIA's policies were implemented).

\textsuperscript{194} \textit{See Terrorism in the UK, supra note 62, at 19} (explaining claims are met by the first year's premiums and reserves, after which commercial reinsurance comes in); \textit{see also Benneton, supra note 183} (noting difficulties involved with access to terrorism insurance and reinsurance after the September 11th attack). \textit{See generally Bice, supra note 64, at 443-46} (discussing the purpose and importance of reinsurance).

\textsuperscript{195} \textit{See id. at 21} (indicating that the Soweto riots in 1976 and the subsequent insurance withdrawal as necessitating government involvement in insuring against such risks); \textit{see also Business as Usual?, REACTIONS, Apr. 1986} (indicating that the government is responsible for any losses over the coverage provided by the SASRIA); Government Terrorism Schemes: With a Little Help from Their Enemies, REACTIONS, June 15, 2002 (providing SASRIA as a form in which the government assists private insurers to bear the burden of terrorism claims).

\textsuperscript{196} The government does not charge SASRIA a premium because to do so would reduce the reserve it possesses to fund its liabilities. The rationale is that to reduce the reserve for the payment of a premium would expose the government to involvement at an earlier date than if it did not charge such a fee. The fee would cause the government to enter the fray before it had to, something the government desires to understandably avoid. \textit{See Terrorism in the UK, supra note 62, at 21}. The problem is that the premiums being collected are hardly enough to cover "current attritional losses, let alone catastrophes." \textit{See Emerging Markets; In Search of a Pot of Gold, REINSURANCE MAG., Oct. 1, 1999, at 31}. However, SASRIA works hand-in-hand with the South African government to insure against riots. \textit{See generally Linda Ensor, SASRIA Agrees to Government Appropriation of Billions From Its Reserves, BUS. DAY, Nov. 4, 1998, at News 1}. 
government acts as the insurer of last resort to stabilize the economy and to allow it to survive as best as it can in the face of possible terrorist activities within the South African nation. The fund has made payments on claims. In 1993, claims reached approximately 200 million Rand. The premiums were approximately R450 million per year and the reserve had amassed to approximately R4 billion.

Israel

The State of Israel has a bifurcated system for dealing with losses due to terror. The first level is the Property Tax and Compensation Fund. The second is the Law for the Victims of the Enemy Action. Each level deals with a different part of the insurance system. The Israeli government supports the two

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197 See Terrorism in the UK, supra note 62, at 18 (indicating that the government wished to keep the industry involved in the scheme as much as possible to take advantage of its expertise in the area of insurance); see also Dee Rissik, Special Report on South Africa: Marginal Change Expected in Riot Cover, LLOYD'S LIST, May 30, 1994 (indicating the government as the reinsurer of last resort); Government May Pinch SASRIA Funds, WORLD INS. REP., Apr. 18, 1997 (noting that governments agreement to be reinsurer of last resort under the South African regime).

198 See Terrorism in the UK, supra note 62, at 15 (providing that in 1993, SASRIA generated 450 million Rand in premiums); see also Rob Rose, SASRIA Under Fire for 20% Premium Hike, BUS. DAY, Dec. 6, 2002, at 11 (indicating that in 2001, SASRIA made more than 400 million Rand); Government May Pinch SASRIA Funds, supra note 197 (indicating that SASRIA possessed 8.5 billion Rand in assets 1997).

199 See Hillman testimony, supra note 33, at 8 (noting Israel's bifurcated insurance system to deal with terrorism); see also James G. Rizzo, Tragedy's Aftermath: The Impact of 9/11 on the Insurance Industry, 46 B.B. ASS'N J. 10, 13 (2002) (indicating that Israel has two government-backed insurance systems); Howard Kunreuther, The Role of Insurance in Managing Extreme Events: Implications for Terrorism Coverage, BUS. ECON., Apr. 1, 2002, at 6 (providing that Israel provides two governmental insurance programs to deal with terrorism).

200 See Terrorism in the UK, supra note 62, at 15 (indicating Property Tax and Compensation Fund as the first of two prongs in the system); UNITED NATIONS, SECURITY COUNCIL COMPENSATION COMMISSION, REPORT AND RECOMMENDATION MADE BY THE PANEL OF COMMISSIONS CONCERNING THE FIFTH INSTALLMENT OF “F1” CLAIMS, U.N. Doc. S/AC.26/2001/15 available at www.unog.ch/uncc/reports/r01-15.pdf at 21 (2001) (hereinafter “Security Council”) (the law "passed in 1961 to provide a fund for the payment of real and personal property damage arising from, inter alia, war damage."); see also Andrew Bolger, Terrorism: Outside the US, FIN. TIMES, May 24, 2002, at 2 (indicating the Property Tax and Compensation fund as one of the means the Israeli government offers insurance against terrorism and war-like acts); Rizzo, supra note 199, at 13 (indicating Property Tax and Compensation Fund as the first type of government-backed insurance for acts of payment).

201 See Hillman testimony, supra note 33, at 8 (indicating this as the second prong of Israel's terrorism insurance system); see also Meder, supra note 171, at 10 (indicating that Israel also offers insurance under Victims of Enemy Action); Rizzo, supra note 204, at 13 (indicating Law for the Victims of Enemy Action as the second type of government-backed insurance for acts of terrorism).

202 See Hillman testimony, supra note 33, at 8 (differentiating the two types of
systems in their entirety.\textsuperscript{203}

Property and casualty insurance is the realm of the Property Tax and Compensation Fund.\textsuperscript{204} Readily apparent because of its title is the manner in which the government supports this fund—taxes. A national property tax finances the fund.\textsuperscript{205} A special commission is in charge of the fund and its sole mission is the determination of claims concerning hostile terrorist actions.\textsuperscript{206} The program only covers direct property damage.\textsuperscript{207} Agency regulations determine the extent of the state coverage.\textsuperscript{208}

The Fund has made payments on claims during the existence of the program.\textsuperscript{209} For example, during the Gulf War the fund coverage that the Israeli government provides; see also Meder, supra note 171, at 10 (describing types of coverage under both schemes); Rizzo, supra note 204, at 13 (indicating Property Tax and Compensation Fund provides property and casualty insurance, and the Law for the Victims of Enemy Action covers life and health and insurance).

\textsuperscript{203} See Hillman testimony, supra note 33, at 8 (providing that the Israeli government pays for both types of insurance); see also Peter Carayannopoulos & Mary Kelly, Insuring "Terror." A Canadian Perspective, CAN. INS. June 1, 2002, at 8 (noting that Israel assumes all responsibility for insurance); Rizzo, supra note 199, at 13 (indicating that the Israeli government administers and funds both insurance programs).

\textsuperscript{204} See Security Council, supra note 200, at 21 (providing that Property Tax and Compensation Fund is responsible for damage to both real and personal property); see also Bolger, supra note 200, at 2 (providing that property loss due to war-like activities, including terrorism, are covered by the fund); Rizzo, supra note 204, at 13 (indicating Property Tax and Compensation Fund provides property and casualty insurance).

\textsuperscript{205} See Hillman testimony, supra note 33, at 8 (indicating that funds are generated from a property tax levied primarily against businesses); Security Council, supra note 200, at 21-22 (designating tax on landowners in Israel is the source of funding). See generally Rizzo, supra note 204, at 13 (indicating Property Tax and Compensation Fund is funded through a national property tax on local businesses).

\textsuperscript{206} See Hillman testimony, supra note 33, at 8 (elucidating the means in which the fund investigates claims and administers damages); see also Rizzo, supra note 204, at 13 (indicating Property Tax Commission is responsible for administering the claims arising as the direct result of hostile terrorist acts). See generally Kunreuther, supra note 199, at 6 (noting that the Property Tax Commission is responsible for paying for property damages).

\textsuperscript{207} See Hillman testimony, supra note 33, at 8 (indicating any indirect losses are to be covered by private supplemental insurance, which is available to make up for the difference, if any, between the amount of coverage the state provides and the cost of replacing the property lost.); see also Rizzo, supra note 204, at 13 (positing Property Tax Commission only pays claims arising as the direct result of hostile terrorist acts). See generally Kunreuther, supra note 199, at 6 (stating that the fund will only compensate for direct damages).

\textsuperscript{208} See Hillman testimony, supra note 33, at 8 (describing the agency regulations regarding compensation); see also Evelyn Gordon, Scuds Send New Accounts Brink's Way, JERUSALEM POST, Jan. 30, 1991, at 7 (stating that the fund often pays claimants less than real value of destroyed property); Tal Muscal, Insurance Won't Cover Missile Attack, JERUSALEM POST, Oct. 9, 2002, at 9 (noting the limitations of coverage under the current system).

\textsuperscript{209} See Security Council, supra note 200, at 22 (detailing payments as a result of Scud missile attacks); see also Muscal, supra note 208, at 9 (indicating that the Commission generously compensated citizens after the 1991 Scud attacks); Alisa Odenheimer, Compensation in Full for Missile-Hit Homes, JERUSALEM POST, Feb. 11,
made more than 15,000 payments for damages incurred by Israeli citizens as a result of the Iraqi Scud Missile attacks.\textsuperscript{210} The Israeli government then subrogated those claims against the Iraqi government in the United Nations.\textsuperscript{211} It sought, and was awarded, a recommended compensation amount in excess of $2 million U.S. dollars ("USD").\textsuperscript{212} This was necessary as the Gulf War proved to be a great strain on the fund. In 1991, the fund had to take a loan from the Israeli Treasury as it did not have the requisite moneys to pay the claims pouring in due to the conflict.\textsuperscript{213}

The state also operates the other fund, the Compensation of Victims of Enemy Action.\textsuperscript{214} The National Insurance Institute supervises the operation of this fund that covers life and health insurance.\textsuperscript{215} This too is financed by tax dollars, and extends
to tourists and visitors to Israel as well as to citizens.\textsuperscript{217}

The two funds are deeply enmeshed in the culture of the State of Israel. However, this is because of the ever-present state of siege that surrounds the small nation. As seen by the above outline, the largest drain has come from direct warlike activities, which have been ongoing since the establishment of the state in 1948.\textsuperscript{218} Because of these conditions, Israel has been the only country that needed to resort to a bail out of its reinsurance system by the national government.\textsuperscript{219}

**PLANS PRESENTED TO CONGRESS**

After the tragedies of September 11, many agreed that the government had to become involved in some manner to stabilize the insurance sector.\textsuperscript{220} This stabilization involved enabling the insurance consumer to purchase insurance coverage necessary to continue businesses that needed such coverage. The plans began to sprout from all the usual suspects – the White House, the House of Representatives, the Senate, the industry itself, as well
as consumer groups and taxpayer groups. All groups presented plans with different levels of governmental participation.221 The one item all agreed upon was that there had to be one mutually understood definition of terrorism itself.222 Also, agreed upon was the need for one agency or person to make the determination of whether in incident would be a labeled a terrorist attack.223

The White House Plan

The plan developed by President George W. Bush's administration was designed to give the insurance industry some breathing room for the years directly following the September 11 attacks. The plan was not meant to be a continuing subsidy for the industry, as it had a four-year shelf life.224 The plan was unveiled on October 15, 2001.225

The Administration's plan was to begin on January 1, 2002 and

221 See An Insurance Market Overview: In the Wake of Disaster, supra note 220 (stating “All proposed structures recognize the terrorism exposure as a public policy issue and differ more in the details of how the U.S. government pool concept would interface with private insurance capacity than in the basic concept of government-back catastrophic protection.”) (emphasis added); see also Walsh, supra note 218, at A01 (noting the different House versions that were discussed). See generally Curl, supra note 218, at A03 (discussing the fact that many lobbyists were against the bill).

222 See Curl, supra note 218, at A03 (noting that the insurance sector's reluctance to insure million dollar building projects led to delays in construction and was a detriment to the economy, which forced many companies to lobby the government to pass a comprehensive plan to deal with the problem); see also Walsh, supra note 218, at A01 (stating that there was "considerable debate over the need for the government to intervene in the insurance market"). See generally Special Bulletin, Bush Administration Proposes Public-Private Partnership for Terrorism Insurance, Stroock & Stroock & Lavan, LLP Oct. 15, 2001 (hereinafter “Stroock”) (outlining definition of terrorism in the Bush Administration's proposed plan for terrorism insurance).

223 See Walsh, supra note 218, at A01 (quoting Representative Michael G. Oxley, House Financial Services Committee Chairman, as stating: "This bill is absolutely necessary to the well-being of the American economy"); see also Curl, supra note 218, at A03 (noting that the bill was passed with overwhelming bipartisan support). See generally Stroock, supra note 222 (explaining who would make the determination of whether an act would be deemed an act of terrorism for purposes of the insurance plan).

224 See Stroock, supra note 227 (explaining the machinations of the proposed plan); see also Curl, supra note 218, at A03 (indicating that the Terrorism Risk Insurance Act is limited to a "three year aftermath of an attack"); Walsh, supra note 218, at A01 (noting that the plan is capped at $100 million over three years).

sunset on December 31, 2005. The Bush plan gave the Secretary of the Treasury the power to determine whether an incident was termed a terrorist action. The plan’s cornerstone is the belief that the private industry would inevitably be able to accurately and efficiently price terror coverage so that government involvement would be unnecessary.

The plan itself gradually decreases the amount of governmental involvement during its lifetime. The first year contemplates extensive government involvement with the private sector responsible for 20% of the first $20 billion in losses. In the second year, government responsibility is reduced as the thought is that the industry will become more adept at pricing such policies, and that it will be financially stronger to withstand a significant blow. In the second year private insurers would

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227 See Steven Brostoff, Insurers Work with Bush on Terrorism Coverage Plan, NAT'L UNDERWRITER, Oct. 22, 2001, at 5 (explaining that under the plan, the Treasury Secretary would certify whether a terrorist event had occurred); see also Dennis Kelly, Latest Fed Proposal has Industry Paying first $10 Billion of Future Terror Claims, BESTWIRE, Oct. 29, 2001 (noting the Treasury Department’s involvement in the White House Plan); Richard W. Stevenson, White House Asks Congress to Accelerate a Tax Cut, N.Y. TIMES, Mar. 17, 2001, at A8 (showing the Treasury Department’s proposals referring to the White House Plan and its implementation).

228 See An Insurance Market Overview: In the Wake of Disaster, 3d Update, THE AON CORP., Dec. 10, 2001, at 13 (proving that currently, the private market has begun to make available such insurance from specialty insurers but at a most prohibitive price); see also Stephen Labaton & Joseph B. Treaster, The Lobbying: Insurers Push for Cap on Future Payouts, N. Y. TIMES, at B7 (quoting Mr. Buffet, an insurance executive, stating that only the government has the resources to aid the terrorism insurance industry); Jean-Louis Poirier et al., PA Consulting Group’s Analysis of the Bush National Energy Policy Plan Predicts Positive Outcome for the U.S. Utility Industry, PR NEWSWIRE, May 29, 2001, at Washington Dateline (finding that the Bush plans do include significant government intervention). See generally Karen Masterson, Focus Shifts to Homeland: Congress Given Blueprint for New Department, HOUS. CHRON., June 19, 2002, at A4 (questioning whether the new plan will result in an added cost to taxpayers).

229 Stroock, supra note 222, at 1 (outlining the intended coverage of the plan); see also Brostoff, supra note 227, at 5 (explaining the intended 80% first year coverage by the government in the first year); Kelly, supra note 227 (discussing the government’s split on insurance coverage in the first year, up to $100 billion, at 80%); Stephen Labaton & Joseph B. Treaster, Bush Details Plan to Help Insurers on Future Terror Claims, N.Y. TIMES, Oct. 16, 2001, at C1 (illustrating the government’s coverage under the plan to be 80% of the initial $20 billion and then 90% of the next $80 billion in the first year).

230 See Brostoff, supra note 227, at 5 (contrasting the specifications of the plan for the first and second year, from which one may infer that private insurers will be given more responsibility); Kelly, supra note 227 (comparing the percentages of government
be liable for 100% of the first $10 billion in losses. If losses exceeded that amount, the insurers would be responsible for 50% of losses over $10 billion up to $20 billion. If losses exceeded $20 billion in the second year, the industry would be liable for only 10% of that amount with the government picking up the balance.

The third year would leave even greater monetary liability with the industry. The insurers would be on the hook for the first $20 billion in losses in their entirety. If the losses exceeded $20 billion but were below $40 billion, the private sector would share the burden with the government in a 50-50 split. If damages were greater than $40 billion, the government would take over 90% of the liability and the insurers would be responsible for only 10%. In the entire three years of the program, the industry does not have to pay any premiums to the government for such services. The government's reasoning behind this is that any

coverage for 2002 and 2003); Labaton & Treaster, supra note 229, at C1 (setting forth the differences in the amount of insurance that private insurers would still be responsible for in the years to come).

See Brostoff, supra note 227, at 5 (indicating that private insurers would cover 100% of the first $10 billion); Kelly, supra note 227 (reiterating the private and government insurance loss coverage percentages for the first $10 billion); Labaton & Treaster, supra note 229, at C1 (restating again the applicable coverage percentages for private insurers and setting the liability cap at $23 billion in 2003).

See Brostoff, supra note 227, at 5 (explaining that private insurers would cover 50% of amounts over $10 billion and up to $20 billion); Kelly, supra note 227 (setting forth the private and government insurance loss coverage percentages for the range between losses of $10 billion and $20 billion); Labaton & Treaster, supra note 229, at C1 (stating the applicable 2003 coverage limit is $23 billion).

See Brostoff, supra note 227, at 5 (illustrating that the government would cover 90% of losses exceeding $20 billion); Kelly, supra note 227 (restating the private and government insurance loss coverage percentages after $20 billion in losses); Labaton & Treaster, supra note 229, at C1 (limiting the liability cap at $23 billion for 2003).

See Brostoff, supra note 227, at 5 (noting that private insurers would cover 100% of the first $20 billion); Kelly, supra note 227 (making clear the private and government insurance loss coverage percentages for the first $20 billion); Labaton & Treaster, supra note 229, at C1 (stating the government would not cover any of the first $20 billion in loss).

See Brostoff, supra note 227, at 5 (highlighting that the coverage after the first $20 billion and up to $40 billion would be split evenly between private insurers and the government); Kelly, supra note 227 (placing the coverage ratio at 50/50 for both the government and private insurers); Labaton & Treaster, supra note 229, at C1 (reiterating the applicable 2004 coverage limit is $36 billion).

See Brostoff, supra note 227, at 5 (commenting that the coverage exceeding $40 billion would be 10% by private insurers); Kelly, supra note 227 (clarifying that the government would be responsible for 90% of the losses); Labaton & Treaster, supra note 229, at C1 (extrapolating that the applicable 2004 coverage limit is $36 billion).

See Sue Kirchhoff, Aid for Insurers Proposed U.S. Would Assume Portion of Losses Tied to Terrorism, BOSTON GLOBE, Oct. 16, 2001, at D2 (discussing the insurance association's proposed plan, but concluding that the government would adopt its own
increase in premiums the insurers would be called on to pay would be passed to the insurance consumer. Inevitably, all persons would feel the governmental premiums, as businesses forced to pay the increased amounts would pass that on to their customers. It would cause an inflationary spiral. The motive for the government’s involvement is to thwart such rate increases and reduce the effect this tragedy has on the American economy and the world.

House of Representatives

The House plan was the Terrorism Risk Protection Act. As in the administration’s plan, the Secretary of the Treasury would be in charge of overseeing the House’s plan. The plan is to extend through January 1, 2003. The program can be

proposed plan, which simply included percentage coverage by private insurers and not premiums); see also David Pilla & Dennis Kelly, Terrorism Insurance Pool Planned: Proposed Tax Policy to Benefit Insurers, BEST’S REVIEW, Nov. 1, 2001, at 10 (reporting the “preliminary plan” which included no premiums for private insurers, but only percentage liabilities); Jackie Spinner, Insurers Say White House Plan Doesn’t Spread Risk, WASH. POST, Oct. 23, 2001, at A06 (setting forth the payment plan as proposed by the government, which includes only liability ratio for private insurers to government coverage).

See Ted Bunker, Insurance Fix is Threat to Taxpayer, BOSTON HERALD, Oct. 29, 2001, at 023 (positing the concept that Congress should act to prevent consumers from being forced to pay higher property insurance); see also Amon Cohen, To Fly or not to Fly?: After Last Week’s Attacks on New York and Washington, Travelers Face a Mix of Fear and Frustration; Some May Decide to Stay at Home, FIN. TIMES (London), Sept. 18, 2001, at 16 (positing that consumers already do not like air fare hikes). See generally Labaton & Treaster, supra note 229, at 1 (explaining that the funding at some level must come from the consumers, and that consumers and the industry want affordable coverage).

See Daniel Aronowitz, Special to the National Law Journal, NAT'L L.J., Apr. 29, 2002, at A13 (discussing the gathering of top business leaders in the White House and certain capital projects that have been stalled due to the lack of available insurance against terrorism); Deirdre Davidson, Leaders Gave Insurers’ Fight for Coverage Stronger Focus, LEGAL INTELLIGENCER, Nov. 27, 2002, at 4 (discussing the role business leaders and President Bush took in getting insurance legislation passed to help the economy); see also Joseph G. Finnerty & Eric S. Connuck, Sept. 11th: What is the Impact on the Insurers?, N.Y.L.J., Nov. 27, 2001, at 1 (noting the tightening insurance market and how some insurers will decrease their coverage or increase their premiums).


See id. at § 3 (stating “the Secretary of the Treasury shall be responsible for carrying out a program for financial assistance for commercial property and casualty insurers, as provided in this Act”); Anthony J. Sebok, Sneaky Tort Reform, NAT'L L.J., Jan. 14, 2002, at A21 (noting the Secretary of the Treasury will determine what is an “Act of Terrorism”); see also Karen J. Sibayan, Market Waits After Terror Bill is Passed, ASSET SECURITIZATION REPORT, Nov. 25, 2002 (discussing how the Secretary of State and the Attorney General will assist the Secretary of the Treasury in determining when an act of terrorism occurs).

H.R. 3210, supra note 240, at §20(a).
extended, however, Congress must be informed of that fact and the reasons for the extension. The plan called for the insurers to submit to the Secretary the amount of premiums they have written for the period the Secretary specifies. The plan also specified what event would trigger it into action. The determination that an act of terror has happened was to be made by the Secretary. Of utmost importance was the section that lays out the definition of terror. This was important as it gave

243 See id. at §20(b) (empowering the Secretary to extend the program for a period in excess of two years); Dennis Kelly, Federally Backed Reinsurance Loan Program Passes House Committee, BESTWIRE, Nov. 8, 2001 (noting Congress’ ability to extend Act); Dennis Madison, Terror Bill is Put Back Again, POST MAG., Nov. 8, 2001, at 13 (discussing extension clause in House version of the Terror Act).

244 See H.R. 3210, supra note 240, at §20(c) (stating “the Secretary may exercise the authority under subsection (a) to extend the applicability of this Act to 2003 or 2004 only if the Secretary submits a report to the Congress providing notice of and setting forth the reasons for such extension for such specific year); see also H.R. 3210, supra note 240, Amendment No. 1, (amendment offered by Mr. Bentsen), available at http://financialservices.house.gov/media/pdf/hr321011.pdf (Nov. 6, 2001) (highlighting amendment that requires a report to be sent to Congress for such extension year); Mortgage Bankers Association of America, House Financial Services Committee Passes Terrorism Insurance Legislation, available at http://www.mbaa.org/industry/news/01/1107a.html (last visited Apr. 13, 2003) (noting Mr. Bentsen’s Amendment requiring program administrator to report back to Congress for an extension).

245 See H.R. 3210, supra note 240, at § 4 (specifying that the net premium amount of coverage written by such insurer under each line of “commercial property and casualty insurance sold by such insurer during such period as the Secretary may provide”); see also Committee on Financial Services, H.R. Rep. No. 107-300, pt. 1, at 30 (2001) (recognizing the fact that some of this information is already available through state agencies, but giving the Secretary the independent power to require it directly from insurance companies). See generally House Passes Baker-Sponsored Terrorism Insurance Legislation, available at http://www.mbaa.org/industry/news/01/1107a.html (last visited Apr. 13, 2003) (noting insurer’s duty to submit claims information as a consumer protection).

246 See H.R. 3210, supra note 240, at § 5(a) (explaining the means in which it will be determined whether an act of terror has occurred in order to trigger the Act); see also H.R. 3210, supra note 240, at §5(b) (allowing the Secretary to consult with the Attorney General and the Secretary of State but unequivocally keeping the determination in the hands of the Treasury Secretary); Sebok, supra note 241, at A21 (noting the Secretary of the Treasury will determine what is an “act of terrorism”).

247 Requirements. An act meets the requirements of this subparagraph if the act –
(i) is unlawful;
(ii) Causes harm to a person, property, or entity, in the United States or in the case of a domestic United States air carrier or a United States flag vessel, in or outside the United States;
(iii) Is committed by a person or group of persons or association who are recognized, either before or after such act, by the Department of State or the Secretary as an international terrorist group or have conspired with such a group or the group’s agents or surrogates;
(iv) Has as its purpose to overthrow or destabilize the government of any country, or to influence the policy or affect the conduct of the government of the United States or any segment of the economy of the United States, by coercion; and
(v) Is not considered an act of war, except that this clause shall not apply with respect to any coverage for workers compensation.
all involved, insurers, insured and the government a mutual basis to begin to calculate the risks and the coverage needed.\textsuperscript{248}

The plan had two triggers, one for the entire industry and the other for individual insurers. If these triggers were met, the House plan went into action and made loans available to the insurers.\textsuperscript{249} The industry-wide trigger arose when losses exceed $1 billion.\textsuperscript{250} The individual insurer trigger occurred when losses exceeded $100 million and the insurer’s losses were greater than 10\% of its capital surplus and 10\% of its net premiums.\textsuperscript{251}

In the industry-wide situation, the assistance available to the industry was set within particular parameters. Assistance was available to each insurer in an amount equal to the difference between 90\% of insured losses and $5 million.\textsuperscript{252} In the individual insurer scenario, loans were made available in an amount equal to 90\% of insured losses and 10\% of net premiums written.\textsuperscript{253}
Congress capped the total amount available under the Act for all occurrences at $100 billion. If the situation called for funds in excess of that amount, the issue went to Congress for full review by that body.

The House further stipulated the amount of money to be repaid by the insurance companies if a triggering event occurred. The amount would be the lesser of $20 billion or the amount of financial assistance paid under the plan. The plan further makes allowances for delayed imposition of repayment when multiple triggering determinations occur.

If, after a triggering event occurred, and the Secretary determined that the amount of assistance exceeded $20 billion, the Secretary would weigh several factors before settling upon

(Identifying percentage of loans made available to individual insurers).

See H.R. 3210 at § 6(c)(1) (identifying Congress' cap available under the Act); see also Steve Davis, Risk of Terrorism Leaves Some Companies Uninsurable, PESTICIDE & TOXIC CHEMICAL NEWS, Feb. 25, 2002 at 19 (outlining features of Terrorism Risk Protection Act to note maximum amount to be available under Act); Martha Neil, Terrorism Insurance Bailout Stalls in Congress, 1 ABA J. EREPORT 17 (2002), at In The News (discussing House and Senate plans for insurance problems after 9/11 and noting limitation on federal spending under House's Terrorism Risk Protection Act).

See H.R. 3210 at § 6(c)(2) (declaring "it is the sense of Congress that acts of terrorism resulting in insured losses greater than $100,000,000,000 would necessitate further action by the Congress to address such additional losses"); see also Davis, supra note 254, at 19 (noting Congressional review for losses over $100 billion dollars); Shailagh Murray et al., Terror-Insurance Bill is Approved by House, WALL ST. J., Nov. 15, 2002, at A4 (noting when Congress will review claims).

See H.R. 3210 at § 7 (describing triggering events that would require insurance companies to pay out); see also Murray et al., supra note 255, at A4 (explaining payment plans set out for insurance companies); David Winston, Terrorism Risk Legislation, ADVISOR TODAY, Jan. 1, 2002, at 60 (discussing how insurance company liability would follow under House bill).

See H.R. 3210 at § 7(b) (announcing the amounts that would be paid by the insurance companies in the event of a triggering event). See generally Stephen Labaton, House Votes to Shield Insurers and Limit Suits by Future Terror Victims, N. Y. TIMES, Nov. 30, 2001, at B8 (discussing provisions regarding loan allocation); Christian Murray, Insurers Seek Protection from Terrorism Congress Crafts Bills to Help Industry, but Many Unsure if Laws Will Benefit Them, NEWSDAY, Nov. 4, 2001, at F02 (discussing what amounts insurers would receive in government loans).

See H.R. 3210 at § 7(c)(3) (discussing the ramifications of multiple triggering events). See generally Dennis Kelly, First Federal Reinsurance Plans Calls for Loans and Not a Pool, BEST'S INS. NEWS, Nov. 1, 2001 (discussing House plan); Murray et al., supra note 255, at A4 (outlining House plan).

The Factors under the paragraph are –

(A) the ultimate cost to taxpayers if a surcharge under this section is not established;

(B) the economic conditions of the commercial marketplace;

(C) the affordability of commercial insurance for small- and medium-sized business; and

(D) such other factors as the Secretary considers appropriate.

See H.R. 3210 at § 8(a)(2) Factors.
the amount of a policyholder premium needed to repay the amount of federal assistance. The amount and duration of the policyholder premium was at the discretion of the Secretary, subject to a limitation of 3% of the premium charged for the coverage. The plan also established the manner in which the assessment of repayment plans and any applicable surcharges are administered.

This plan was contrary to the administration’s plan in that there was a cost for the government’s involvement, though it was set at a very moderate level. The costs to which the industry is beholden is a modest $1 billion. As set forth previously, this was but a miniscule amount for a robust industry whose assets run into the trillions of dollars. However, the significance of the legislation was that it presented a comprehensive plan whereby the insurance industry was aware of the support and its finite time span. It gave the industry the needed stabilization after such a shocking event as September 11. It allowed the industry


See H.R. 3210 at § 8(a)(3) (noting the Secretary’s ability to enable repayment of the assistance); see also Dennis Kelly, House Passes Terrorism Reinsurance Bill: Senate Action Awaited, BESTWIRE, Nov. 30, 2001 (outlining details of Terrorism Risk Protection Act); Kelly, supra, note 259, (discussing Secretary’s role under Act).

See H.R. 3210 at § 8(b) (providing for Secretary’s discretion under the bill); Kelly, supra note 259 (discussing when Secretary may review claims under Terrorism Risk Protection Act); Labaton, supra note 257, at B8 (noting Secretary’s power to review amounts in excess of $20 billion in determining premiums).

See H.R. 3210 at § 8(c) (noting the 3% limitation); see also Hoffman & Zolkos, supra, note 251, at 1 (explaining 3% surcharge maximum applied to loans under House Bill); Hoffman & Ceniceros, supra note 252, at 3 (noting surcharge limitation as proposed in House bill).


See Winston, supra note 256, at 60 (comparing House and Senate insurance plans after 9/11). See generally Kelly, supra note 259 (highlighting industry wide maximum amount under the Terrorism Risk Protection Act). But see Aronowitz, supra note 249, at A19 (criticizing flaws in House bill for not protecting insurance companies and for not preventing insurance companies to “price terrorism based on risk”).
time to accurately set prices, while not leaving insurance consumers, especially business, without coverage.\textsuperscript{266}

\textit{Senate}

The Senate plan was the “National Terrorism Reinsurance Fund Act.”\textsuperscript{267} The focus of the Act was to temporarily support the private property and casualty insurance market until it was capable of adequately providing insurance to consumers.\textsuperscript{268} The Fund was to exist for three years.\textsuperscript{269} The administration of the Act was to fall within the jurisdiction of the Secretary of Commerce.\textsuperscript{270} The Secretary was to make the determination of whether an incident was an act of terrorism.\textsuperscript{271} The Act enunciated a set definition of terrorism.\textsuperscript{272} The Secretary was to
select an advisory committee consisting of ten persons from various interest groups.273

The Fund was to be established by the Secretary without monetary limitation imposed upon a yearly basis.274 The fund was to have a $5 million administration budget for each year of its existence.275 The Fund's financing arose from fees, premiums, interest on investments, and funds borrowed from the Treasury Department.276 In determining the correctness of terrorism rates part of an effort to coerce or intimidate the civilian population of the United States or to influence the policy or affect the conduct of the United States government. See S. 1743, supra note 267, at §14(8)(A). Nation-states do not commit acts of terrorism. See generally Tim Weiner, Terrorism's Worldwide Toll Was High in 1996, U.S. Report Says, N.Y. TIMES, May 1, 1997, at A9. The act of terrorism must itself be attributable to a person or party. See generally Leslie Maitland Werner, An Agency Steps Out of Obscurity, N.Y. TIMES, Jan. 27, 1985, at §4 pg. 22.

273 The advisory committee shall consist of 10 members, as follows:
(1) 3 representatives of the property and casualty insurance industry, appointed by the Secretary.
(2) A representative of property and casualty insurance agents, appointed by the Secretary.
(3) A representative of consumers of property-casualty insurance, appointed by the Secretary.
(4) A representative of a recognized national credit rating agency, appointed by the Secretary.
(5) A representative of the banking or real estate industry, appointed by the Secretary.
(6) 2 representatives of the National Association of Insurance Commissioners, designated by that organization.
(7) A representative of the Department of the Treasury, designated by the Secretary of the Treasury.

See S. 1743, supra note 267, at §4(b). The section further states that the purpose of the Advisory Committee is to provide advice and counsel to the Secretary of Commerce in administration of his/her reinsurance program. See S. 1743, supra note 267, at §4(b). The functions and structure of the Advisory Committee are intricate. See generally Summary: The National Terrorism Insurance Act, available at http://www.senat.gov/-commerce/legis/s1743sum.pdf.

274 See S. 1743, supra note 267, at §4(c)(2) (asserting the uses to which the Fund may be directed); see also S. 1743, supra note 267, at §4(c)(1)(B) (limiting the administrative expenses of operation of the Fund to $5,000,000 per the fiscal years 2002, 2003, and 2004); Player, supra note 269 (arguing that property loss must exceed $5 million before qualifying for potential aid from the Fund).

275 See S. 1743, supra note 267, at §4(c)(B) (placing an upper limit on administrative expenses at $5 million); see also S. 1743, supra note 267, at §5(c)(1) (noting that the Secretary of Commerce may borrow funds from the Treasury to satisfy the obligations of the Fund if the balance in the Fund is insufficient). But see Marla Misek, Hedging Against the Unthinkable – and Unknowable, LODGING MAG., available at http://www.lodgingnews.com/lodgingmag/2002_05/2002_05_07.asp (last visited Apr. 13, 2003) (suggesting different avenues of insurance coverage for terrorist attacks).

276 See S. 1743, supra note 267, at §4(c)(2) (listing the sources of capital that are deposited into the Fund); see also S. 1743, supra note 267, at §5(b)(1) (asserting that the Fund will have an initial capital of $2 billion which is borrowed from the Treasury). See generally Congress Passes Terrorism Reinsurance Act, supra note 269 (positing that the total aid available from the Fund will exceed $100 billion).
charged, the Commerce Secretary was to establish a special committee on rates\textsuperscript{277} as well as set minimum underwriting standards\textsuperscript{278} to ensure the policies issued were not taking unnecessary risks.\textsuperscript{279}

Participating insurers send their designated fund premiums quarterly.\textsuperscript{280} The actual fee amount was set as a minimum of "not less than 3 percent" of the total amount of premiums received for that particular year.\textsuperscript{281} The Fund's start-up capital was to come from the Treasury in the form of a loan.\textsuperscript{282} If the Fund's assets

\textsuperscript{277} See S. 1743, supra note 267, at §4(e)(1) (describing the make-up of the committee); see also S. 1743, supra note 267, at §4(e)(2) (discussing the three duties of the committee). See generally Christian Murray, Business Lads Insurance Bill; Terror Aid Seen as Economic Boost, NEWSDAY, Nov. 27, 2002, at A27 (arguing that insurance rates were rising before the terrorist attacks and will continue to do so).


\textsuperscript{280} See S. 1743, supra note 267, at §5(a)(1) (disclosing the participation requirements for insurers that wish to utilize the Fund); see also S. 1743, supra note 267, at §5(a)(2) (declaring that the Secretary may charge an additional credit risk premium based on the participant insurer's credit rating); S. 1743, supra note 267, at §5(b)(2) (insisting that the premiums received by the Secretary from the participant insurer will be used to repay the starting loan of the Fund).

\textsuperscript{281} See S. 1743, supra note 267, at §5(a)(1); see also Heidi A. Lawson, Insurance Regulation: The Effects of September 11th, 673 PLI/LIT 53, 68 (2002) (stating that insurance companies participating in the plan pay 3% of their gross direct premiums to fund the pool but may pass on the cost to policyholders); Jay L. Paxton, Insurance and Commercial Leases: Critical Provisions in Uncertain Times, 486 PLI/REAL 749, 756 (2002) (stating that under the House and Senate Bills, the Federal Government would indirectly collect a portion of premiums paid by insurers to reinsurance companies).

\textsuperscript{282} See S. 1743, supra note 267, at § 5(b) (discussing the means to start the Fund); see also Carl J. Pernicone & James T. H. Deaver, Insurance Implications of the World Trade Center Disaster, 31-SPG BRIEF 23, 24 (2002) (stating that the Senate plan enables the Secretary of Treasury to cover insurance costs that exceed the Fund's threshold limit). See generally S. Foster, American Inquiry into Contemporary Terrorist Accountability, 6 TEX. REV. L. & POL. 513, 524-25 (2002) (suggesting recourse for victims of September 11th by having the Treasury Department freeze foreign assets to pay judgments against
proved less than its current needs, the Act empowered the Commerce Secretary to borrow such funds from the Treasury as were necessary to meet its liabilities. The Act capped the amount of such loans at $50 billion over the Fund's assets.

The Fund provides coverage for terrorism losses covered by reinsurance treaties between members of the fund and the Fund itself. Insurers retain a specific amount of the risk involved with each policy. The amount is set at ten percent of the insurers' total premiums. The type of coverage provided by the Fund is reinsurance between the insurer and the Fund in the form of reimbursements for paid claims to insureds.

See S. 1743, supra note 267, at §5(c)(1) (discussing ways for the Fund to meet its liabilities); see also Lawson, supra note 281, at 68 (stating that the fund automatically expires in 2004). See generally Gregg J. Loubier & Jason B. Aro, Insuring the Risks of Terror: Questions of the Cost and Application of Terror Insurance Remain Open, 25-AUG L.A. LAW. 18, 21 (2002) (stating that a new Federal Reserve Board study has found that although terrorism coverage has had high costs, it has had "little or no" effect on the demand for loans financing large financial projects).

See S. 1743, supra note 267, at §5(c)(3) (discussing caps provided by the Act); see also Lawson, supra note 281, at 69 (stating that after the $50 billion mark had been reached, cost-sharing arrangements between insurers and the government would cover the next $50 billion); James G. Rizzo, Tragedy's Aftermath: The Impact of 9/11 on the Insurance Industry, 46-FEB B. B.J. 10, 15 (stating that in the case of another terrorist attack, under the House version of the Bill, the Treasury Department can determine how much assistance it will provide to the insurance industry).

See S. 1743, supra note 267, at §6(a) (explaining coverage of the Fund); see also Loubier & Aro, supra note 283, at 18 (stating that the insurance industry lobbied the federal government for assistance without which, insurance for real estate vulnerable to terrorism could never be covered affordably). See generally Pernicone & Deaver, supra note 283, at 18 (stating that it is impossible to quantify risk models for catastrophes like September 11th because they are entirely unpredictable). See generally Steve Bergsman, Drowning in Insurance Costs?, J. OF PROP. MGMT., Jan. 1, 2002, at 24 (stating that major problem with terrorism from an insurance perspective is that traditional risk mechanisms do not work).

See S. 1743, supra note 267, at §6(b) (discussing risk-retention of insurers); see also Loubier & Aro, supra note 283, at 18 (stating that it is impossible to quantify risk models for catastrophes like September 11th because they are entirely unpredictable). See generally Kendall, supra note 50, at 579-80 (stating that although the relationship between insurers and reinsurers functioned symbiotically prior to the attacks, September 11th has exposed the shortcomings of this arrangement, which has broken down the system because reinsurers have refused to cover acts of terrorism).
amount of the reimbursement varies from year-to-year depending upon the percentage of premiums that the insurers cede to the Fund.  

The Act called for the Secretary to measure the availability of private sector terror insurance on an annual basis. If the situation appears rectified whereby the fund is no longer necessary, the Secretary can dissolve it. The funds remaining are distributable to insurers in proportion to the premiums paid. Furthermore, the Act has a sunset provision written into

289 A percentage of its covered losses in calendar years beginning after year 2002 equal to –

(A) 90 percent if the insurer pays an assessment equal to 4 percent of the insurer’s average gross direct written premiums and policyholders’ surplus for the most recently ended calendar year;

(B) 80 percent if the insurer pays an assessment equal to 3 percent of the insurer’s average gross direct written premiums and policyholders’ surplus for the most recently ended calendar year; and

(C) 70 percent if the insurer pays an assessment equal to 2 percent of the insurer’s average gross direct written premiums and policyholders’ surplus for the most recently ended calendar year.

See S. 1743, supra note 267, §6(c)(2). Under the plan, government aid kicks in when losses from terrorism exceed the minimum levels of the insurer’s premiums. The threshold levels are 7% in the first year, 10% in the second and 15% in the third. See Edward Walsh, Two More Senate Victories for Bush: Terrorism Insurance Bill and Controversial Appellate Court Nominee Are Approved, WASH. POST, Nov. 20, 2002, at A05. Some Congressional conservatives feared that subsidizing for insurance companies would create an entitlement. See generally Politics & Policy of the Uninsured: WSJ Reports on New Push for Solutions, AM. HEALTH LINE Volume 6 No. 9, Oct. 26, 2001.

290 See S. 1743, supra note 267, at §13(c) (detailing the responsibilities of the Secretary); see also Stempel, supra note 64, at 867 n.183 (stating that under the Senate Bill, if losses exceed the $100 billion cap, then Congress may respond by determining a cost-sharing arrangement). See generally Rick Rothacker, Lawmakers Work on Terrorism-Related Assistance for Insurance Industry, CHARLOTTE OBSERVER, Oct. 31, 2001, (stating that a concern in deciding which federal plan to implement was making sure that the private sector insurance industry did not remain too reliant on government assistance).

291 See S. 1743, supra note 267, at §13(b) (outlining the means by which the Secretary may dissolve the Fund); see also On Terrorism Insurance, U.S. Senate Has Right Idea, NEWSDAY, June, 20, 2002, at A38 (stating that if losses are more than $100 billion, then the Secretary of the Treasury decides what further measures to take). See generally Jesse J. Holland, Terror Insurance Plan Nears Agreement, DESERET NEWS, Oct. 18, 2002, at A05 (stating that the plan would allow the secretary the discretion to require insurance companies to repay the government).

292 See S. 1743, supra note 267, at §13(d) (stating how the remaining funds would be distributed); see also Jay L. Paxton, Insurance and Commercial Leases: Critical Provisions in Uncertain Times, 486 PLI/REAL 749, 756 (2002) (stating that the government collects a portion of the insurance premium paid by the insurer to establish a reinsurance fund). See generally Annemarie Sedore, War Risk Exclusions in the 21st Century: Applying War Risk Exclusions to the Attacks of September 11th, 82 B.U. L. REV. 1041, 1060 (2002) (recognizing that insurance companies are raising their premiums to recoup losses in response to September 11th and may even earn more than if they paid all September 11th claims).
the legislation causing it to terminate on a set date in 2004.\textsuperscript{293}

This measure effectively makes the government the insurer of last resort as in the United Kingdom's Pool Re. The insurance companies would pay into the fund to establish the ability to draw upon it for losses in excess of the proscribed amounts.\textsuperscript{294}

The variation is that it is set-up for a finite time period. This along with the section on the return of unused funds to the insurance companies show that it is specifically a temporary solution.\textsuperscript{295} The drawback is that if the funds are unneeded then the give back of the unused funds to the industry would in effect be a subsidy to those companies who joined, as they surely passed such premiums onto the end consumer. It would, in effect, be a government bailout for the industry, contrary to what the industry and Congress has been calling for all along.\textsuperscript{296}

\textit{Insurance Industry Initiative}

The United Kingdom's Pool Re is the model for the industry plan.\textsuperscript{297} Privately operated and financed, the fund would be called

\textsuperscript{293} See S. 1743, supra note 267, at §13(b) (stating "the secretary shall suspend other operations of the Fund for new contract years on the close of business on December 31, 2004"); see also Lawson, supra note 285, at 68 (stating that the Senate plan would expire at the end of 2004). See generally Hoffmann & Zolkos, supra note 251, at 1 (stating that the House version would also end at the closing of 2004).

\textsuperscript{294} See Stempel, supra note 64, at 868 (stating that the Senate version copies the British approach taken in response to IRA bombings); see also Rizzo, supra note 288, at 13 (comparing the US plan to the Pool Re plan). See generally Bice, supra note 64, at 448-454 (discussing the structure of the British system).

\textsuperscript{295} See S. 1743, supra note 267, at §13(d) (proving that the Fund is only a temporary solution); see also Joseph B. Treaster, Threats and Responses: Liability; Senate Passes Bill Limiting Insurers' Liability After an Attack, N.Y. TIMES, Nov. 20, 2002, at A15 (noting that final passage allowed for three year government involvement); Joseph B. Treaster, Senate Takes Up Terrorism Insurance Again, N.Y. TIMES, Apr. 30, 2002, at C1 (reporting that Senate proposes a plan to last one year with an option to extend for another with Treasury Department approval).

\textsuperscript{296} See Joseph B. Treaster, A National Challenged: The Liability; Insurance Companies Favor a Plan to Limit Terrorism Losses, N.Y. TIMES, Nov. 6, 2002, at B5 (pointing out that Senate plan has gained insurer support since it set limits on their possible losses); see also Joseph B. Treaster, Insurance; Quick Passage of Terrorism Bill, N.Y. TIMES, Nov. 7, 2002, at C6 (reporting that passage of Senate-backed Bill would ensure government payment of most damages from terrorist attacks). See generally Treaster, supra note 299, at A15 (noting final passage of Bill requires government rather than insurers to pay the majority of losses due to terrorist attacks).

the Homeland Security Mutual Reinsurance Company or "Homeland" for short. The Homeland Security title was probably meant to resonate well with Americans and the Congress, in particular, due to the newly formed agency of the same name.

The plan was a non-profit mutual insurance company. Illinois would be the domicile of the company, and therefore the laws of that state would govern its operation. A Treasury Department representative would be on the company board. Further, the Treasury Secretary would appoint a CEO of the interim board.

The plan would define terror and the terms of its coverage. It would be separated along the normal divisions in the industry, namely personal lines and commercial lines. Insurer participation in the program would be completely voluntary.

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See generally Bice, supra note 64, at 441-45 (describing the formation of Pool Re).

298 See Steven Brostoff, Insurers Reach Consensus on Terrorism Reinsurance, NAT'L UNDERWRITER, PROP. & CASUALTY/RISK & BENEFITS MGMT. EDITION, at 5 (Oct. 15, 2001) (identifying the insurance industry proposal name); see also NAPSLO, supra note 297, at 3 (providing the name of insurance industry's proposal). See generally Heidi A. Lawson, Overview of Proposed Federal Initiatives For Terrorism Insurance, available at http://www.whitecase.com/article_terrorism_insurance_heidi_lawson_html (last visited Jan. 18, 2003) (stating the name of insurance industry proposal).

299 See Mark A. Hoffmann, Industry Unites on Pool Plan; But Groups Face Difficulty in Securing Federal Legislation, BUS. INS., at 1 (Oct. 15, 2001) (describing goals of Homeland, leaving absent profit motivations); see also NAPSLO, supra note 297, at 3 (specifying Homeland's not-for-profit status). See generally Lawson, supra note 298 (clarifying that Homeland is a not-for-profit insurance company).

300 See Brostoff, supra, note 298, at 5 (specifying that the industry proposed a state-chartered company); see also NAPSLO, supra note 297, at 3 (noting Homeland's state of domicile). See generally Lawson, supra note 298 (highlighting that Homeland is to be chartered in Illinois).

301 See Morgan Stanley, supra note 297, at 6 (explaining the oversight mechanism for the reinsurance pool); see also Lawson, supra note 298 (specifying Treasury Department roles with respect to Homeland). See generally Kendall, supra note 50, at 583 (noting that the insurance industry's proposed a federally-managed reinsurance pool).

302 See Morgan Stanley, supra note 297, at 6 (discussing board appointments for the reinsurance pool); see also Lawson, supra note 298 (noting further that the Treasury Secretary is required to assess the type of each loss). See generally Kendall, supra note 50, at 583 (highlighting that Homeland is to be federally managed).

303 See Brostoff, supra, note 298, at 5 (pointing out that Homeland would create a uniform definition of "terrorism" for all insurance polices within the U.S.); see also Morgan Stanley, supra note 297, at 6 (explaining the goals of the plan). See generally Lawson, supra note 298 (providing Homeland's definition of "act of terrorism").

304 See Brostoff, supra, note 298, at 5 (highlighting the way in which Homeland would provide reinsurance through two separate lines of commercial and personal risks); see also NAPSLO, supra note 297, at 3 (describing Homeland's segmentation). See generally Lawson, supra note 298 (noting that insurance industry proposal would operate through two financially separate divisions).

305 See Brostoff, supra, note 298, at 5 (stating that participation in Homeland is voluntary); see also Morgan Stanley, supra note 297, at 6 (discussing the voluntary
however, any participant would have to place all applicable lines with the company so as to avoid the companies picking and choosing what inherently risky policies it desired the pool to reinsure. See generally Lawson, supra note 298 (listing possible members of Homeland). The plan would sell terror reinsurance to the primary insurers, and negotiations between the parties would determine the amount of risk shared between the pool and the primary insurer. See generally Lawson, supra note 298 (noting that Homeland applies to both personal and commercial lines of risk).

The Treasury Secretary would establish regulations for the procurement of underwriting guidelines to cover the terms and value of such risk. See generally Lawson, supra note 298 (implying that member companies' would provide financing through risk retention).

The government's responsibility would arise when the pool's surplus nature of the plan). See generally Lawson, supra note 298 (listing possible members of Homeland).
funds slip below the amount reflecting 20% of the surplus that was in the pool’s possession the previous year.312 Furthermore, the Treasury Department would be the sole overseer of the pool.313 Moreover, in furtherance of the pool’s independence, its assets would not be taxed on either the federal or the state level.314 Nor would the pool pay premiums315 in the beginning, despite the fact that in the first two years of the six-year plan the government would be 100% liable for terrorism losses.316 The liabilities of the government under the industry plan are 100% whenever the reinsurance is payable, the insurers retain none of the risk.317

As it presently stands, the only way the industry plan would terminate is when the Treasury Secretary decides that terror is no longer a viable threat and the private sector is no longer in

312 See Morgan Stanley, supra note 297, at 6 (stating that it would be “activated any time that the Pool’s surplus is reduced to less than 20% of the surplus that existed at then end of the previous calendar year”) (emphasis added); see also Kendall, supra note 50, at 587 (showing that as a result of government responsibilities companies may begin to reenter the terrorism insurance market). See generally S. Foster, An American Inquiry into Contemporary Terrorist Accountability, 6 TEX. REV. L. & POL. 513, 517 (2002) (indicating a result of the WTC attacks could be the end of terrorism insurance).


315 See Morgan Stanley, supra note 297, at 7 (showing that the pool would not be held to pay premiums); see also NAPSLO, supra note 297, at 4 (explaining premiums will not be paid for retro-cessional reinsurance until a specific point). See generally William M. Gatesman, Note, Colonial American Life Insurance Co. v. Commissioner: Supreme Court Disregards Congressional Intent That Indemnity Reinsurance Ceding Commissions Be Deductible, 39 AM. U. L. REV. 1267, 1268-69 (1990) (explaining how premiums work).

316 See NAPSLO, supra note 297, at 4 (providing that the Treasury would provide for 100 percent of terrorism losses as retro-cessional reinsurance); see also Kendall, supra note 50, at 586 (explaining proposed plans to help the insurance industry in the event of terrorism). See generally Abeyratne, supra note 190, at 605-06 (describing Pool Re).

317 See NAPSLO, supra note 297, at 4 (explaining that the Treasury would be 100% responsible for the first year of “Homeland”). See generally Abeyratne, supra note 190, at 609-10 (showing a way government can reduce losses in the event of terrorism). But see Kendall, supra note 50, at 586 (indicating that the President is not in favor of 100% coverage).
need of the federal aid.\textsuperscript{318}

\textit{Terrorism Risk Insurance Act: Congressional Compromise}

Congress finally reached a conclusion in its attempts to help the bolster the insurance industry as it wrestled with how to offer cover for acts of terror and for how much. In the fall of 2002, Congress responded with the Terrorism Risk Insurance Act of 2002.\textsuperscript{319} Congress’ purpose behind the law was to “protect consumers” and support the market so that it could stabilize and find an industry wide method to price the risk of terror.\textsuperscript{320}

The period for the new law is January 1, 2003 to December 31, 2005.\textsuperscript{321} The law establishes the Secretary of the Treasury as the head of the temporary federal support program.\textsuperscript{322} The Secretary would act in conjunction with the Secretary of State and the Attorney General in determining whether a covered “act of terrorism” had occurred.\textsuperscript{323} Furthermore, the Terrorism Risk Insurance Act (“TRIA”) sets forth a definition of terrorism for the Secretary to use in determining whether an act of terror has happened.\textsuperscript{324} Of profound significance in the definitional area is

\begin{itemize}
  \item \textsuperscript{321} \textit{Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 102(11), 116 Stat. 2322 (Nov. 26, 2002)} (codified at 15 U.S.C. § 6701). The law does state that a “transitional” period would exist whereby insurers must offer terrorism coverage to policyholders within ninety days of the enactment of the statute. \textit{See id.} at § 103(b); Jackie Spinner, \textit{For Firms, an End to a Time of Turmoil. Costs of New Policies Still to be Worked Out}, \textit{Wash. Post}, Nov. 27, 2002 (declaring TRIA to ease strain for insurance executives somewhat, but details are enormous).
  \item \textsuperscript{323} \textit{See id.}
  \item \textsuperscript{324} \textit{See id.} “The term ‘act of terrorism’ means any act that is certified by the Secretary, in concurrence with the Secretary of State, and the Attorney General of the United States—
  \begin{enumerate}
    \item to be an act of terrorism;
    \item to be a violent act or an act that is dangerous to--
    \begin{enumerate}
      \item human life;
    \end{enumerate}
  \end{enumerate}
the declaration that TRIA will only apply to terrorist events that emanate from foreign sources. This appears to be of great interest as native-born terrorist, Timothy McVeigh, perpetrated a tremendous assault upon the American psyche in the not too distant past. The Federal Government was responsible for the losses in that instance because it was federal property, however, TRIA would not cover losses caused by acts similar to McVeigh's.

Additionally, TRIA keeps the insurance industry involved while it learns how to price terror. TRIA accomplishes this by giving the insurers deductibles that vary during the three years of the Act's existence. The deductible increases for each year of

(II) property; or
(III) infrastructure;
(iii) to have resulted in damage within the United States, or outside of the United States in the case of:
(I) an air carrier or vessel described in paragraph (5)(B); or
(II) the premises of a United States mission; and
(iv) to have been committed by an individual or individuals acting on behalf of any foreign person or foreign interest, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

Id.


327 See Bill Henson, Insurers Await a Flood of Disaster Loss Claims, COLUMBUS DISPATCH (Ohio), Apr. 23, 1995, at 11A, (stating all federal buildings are self-insured); see also Banks, supra note 326, at 94 (depicting terrorists as not needing modern technology to cause tremendous destruction as shown in attack on federal building in 1995); Kaye, supra note 326, at 926 n.27 (describing McVeigh's bombing of Murrah Federal Building).

328 See Terrorism Risk Insurance Act § 101(a)(1)-(5); see also Justice, supra note 320, at 814 (stating Congress agreed to "partially cover costs" incurred by acts of terror during the three-year period).

329 See Terrorism Risk Insurance Act § 102(7). Therein also included is a provision for newly formed insurers who have entered the terror field within the previous year. Id. at §
the program as it keeps with the purpose of the Act, which was to allow the insurance industry to respond to the crisis internally and develop a private market for terror coverage.\textsuperscript{330}

Acts of terror are to be determined exclusively by the Treasury Secretary after consultation with the Secretary of State and the U.S. Attorney General.\textsuperscript{331} In so acting, the Secretary may not give that task to another regardless if the person acts under his direct supervision.\textsuperscript{332} Additionally, the determination is not subject to attack in the courts.\textsuperscript{333} If litigation does arise regarding the damages incurred by a terrorist attack, TRIA establishes the ability for one federal district court to be chosen as sole body to hear such disputes.\textsuperscript{334} The law used in that district court is the law of the State where the terrorist attack took place.\textsuperscript{335} TRIA makes the acquisition of personal jurisdiction unproblematic for the parties before this selected tribunal by making that particular court "be deemed to sit in all judicial districts in the United States."\textsuperscript{336}

The amount of federal "skin" involved is ninety percent of the amount of insured loss that surpasses the deductible of the particular insurer.\textsuperscript{337} The industry has been given an aggregate amount of losses that it is expected to cover before the act comes into play.\textsuperscript{338} The industry’s retention level increases with each year of the program, which is once again reflective of TRIA’s overall purpose – to allow the insurance industry to develop a

\textsuperscript{330} See Terrorism Risk Insurance Act § 102(7); see also Vivian Schlesinger, Insurance Lifeline for Port Authorities: Terrorism Insurance Program Offers Coverage, But It’s Not a Panacea, J. COM., Dec. 16, 2002, at 1, available at LEXIS, News Library (detailing increased levels of industry exposure as program moved on in years); Plitt, \textit{supra} note 325, at 89 (interpreting TRIA as measure allowing insurance industry to respond to reinsurance crisis while maintaining current oversights).

\textsuperscript{331} See Terrorism Risk Insurance Act of 2002 § 102(1)(A).

\textsuperscript{332} See \textit{id.} at § 102(1)(D).

\textsuperscript{333} \textit{Id.} at § 102(1)(C). The statute clearly and unequivocally states that all determinations are final. It would appear to be a level of appeasement to republicans who were staunchly against the Act without any manner of tort reform within its pages, particularly a restriction on punitive damages.

\textsuperscript{334} \textit{Id.} at § 107(4).

\textsuperscript{335} \textit{Id.} at § 107(3).

\textsuperscript{336} Terrorism Risk Insurance Act § 107(4).


\textsuperscript{338} See Terrorism Risk Insurance Act § 103(e)(6).
private market for terrorism coverage. The program has a one hundred billion dollar cap on the amount of losses it covers and if an incident causes such magnitude occurs the Secretary will notify Congress.

Lastly, TRIA allows the government to recoup some of the money it may have to expend during the Act’s three-year lifespan. Insurers will have to collect a terror premium from their insureds upon the direction of the Secretary if the government must pay out on claims.

CONCLUSION

The idea of the Federal Government as the insurer of last resort has finally come to be reality in the realm of terrorism insurance. Terror coverage, was once taken for granted, is now viewed as the proverbial seven hundred pound gorilla upon the back of the industry and its consumers. It is difficult to price and exorbitant in its final costs. The only way to allow the economy to go on with any sense of normalcy is for the government to intervene. The question to this point had been: How?

Of the two bills from which sprang TRIA, the more reasonable system was that elaborated in the Senate calling for a proportional involvement by the government with the greater amount of reimbursement emanating from the premiums in the pool, which had been ceded to the government. There were no fees passed onto the consumer in the House bill; however, it failed to keep the industry involved by having them put some “skin” on the line. Ultimately, the industry has to be involved

339 See id. at § 103(e)(6)(A) – (C). The level of retention is $10 billion in the first year, $12.5 billion in the second, and $15 billion in the third and final year; see also Justice, supra note 320, at 814.

340 See id. at § 103(e)(2) & (3). This would appear very commonsensical since an attack that caused losses in excess of $100 billion one would think Congress to be very involved and that it would be necessary for the Federal Government to step in for a loss that would be twenty times greater than that incurred in Manhattan on September 11; see also Schlesinger, supra note 330, at 1.

341 See Terrorism Risk Insurance Act § 103(e)(7).

342 See id. at § 103(8)(B).

so to be able to take advantage of its expertise, while allowing them to cede some, if not all, of the risk involved with terrorism coverage. TRIA accomplished this by having deductibles apply to both the individual insurers as well as the industry as a whole. Industry capital must be at stake so that the program does not become another bailout for a thriving industry that does not need such all-encompassing help.

As has been shown above the solution lies in a partnership between the government and the insurance industry. The private sector cannot and will not bear the risk unto itself; however, the industry is resilient and given time will adequately develop pricing mechanisms to satisfy the demand without inflicting harm on the economies of the world. How long before it efficiently prices such occurrences is still questionable. The duration of TRIA is set to facilitate the short term, but considering the temporal manner in which terror occurs it is unlikely that its three-year period is adequate. It took eight years between attacks on the World Trade Center and now that the world is put on alert by the occurrences of September 11, it is likely that another attempt of that magnitude will take as long if not longer to occur. Such a long-term threat may lead to the establishment of pools along the lines of Pool Re in England or Consorcio in Spain. These pools may have some governmental involvement, but most likely, they will spring from the private sector.

Lastly, TRIA appears to be a workable yet imperfect compromise between the competing interests that barraged Congress. However, it appears that consumer/taxpayers are still on the hook no matter what proportion of risk is taken on by

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either the government or the insurance industry. The consumer will be hit twice – once for rate hikes in their base premiums and again, as taxpayer, if the program has to swing into action because of an attack on American soil. Insurance is the spreading of risk for the few among the many and that appears to be very true in TRIA, the few are the insurance companies and the many are the insurance consumers clothed as taxpayers. Whether it pans out to be corporate welfare or economic necessity is yet to be seen.