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WHAT CAN BROWN DO FOR YOU?™
In the aftermath of the terrorist attacks of last September 11, this nation’s legal profession confronted some of the most complex legal questions it has ever faced. The Los Angeles Lawyer Editorial Board has set aside this special edition, addressing some of these issues, as a fitting way of commemorating those tragic events.
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Los Angeles Lawyer deeply mourns the loss of its Editorial Board Chair, Abilio Tavares Jr., who passed away suddenly on July 15. Bil joined the Editorial Board in July 1996 and, along with his other contributions to the magazine, served as a coordinating editor of the magazine's Entertainment Law Issue from 1997 through 2002. During 2001-02 he served as the Editorial Board's Articles Coordinator, and on July 1, 2002, assumed the title of Editorial Board Chair.

Bil was a gifted editor who was responsible for many of the best and most valued articles that have appeared in these pages over the past six years. His wisdom, patience, and generosity will be missed by the magazine's readers, contributors, Editorial Board, and staff. During this year, we dedicate the magazine to his memory and will retain his name where it so richly deserves to be—atop the magazine's masthead as its Editorial Board Chair.

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Is A Malpractice Insurance Crisis Looming In Your Horizon?

Are You Ready?

11 carriers have withdrawn from the California market. Will your carrier be next? The changes in the marketplace are troubling. It is an unknown future. Non-renewals are commonplace. Some carriers can’t secure sufficient reinsurance to operate their professional liability programs. A major carrier was recently declared insolvent. Other carriers have been downgraded by A.M. Best. Severe underwriting restrictions are now being imposed. Dramatic rate increases are certain.

It’s all very unsettling.


CHECKLIST

You owe it to yourself to find the answers to these critical questions!

- Will your carrier still be writing professional liability policies in California at your next renewal?
- Will your carrier impose a substantial rate increase at your next renewal due to unstable market conditions?
- Will your carrier continue to insure “your type” of practice at your next renewal?
- Will your carrier leave the marketplace because they can’t secure sufficient reinsurance for their professional liability program?
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In the wake of the September 11 attacks, publications throughout the country grappled with the previously unimaginable evil inflicted upon the World Trade Center, the Pentagon, the four doomed jetliners, and the entirety of the civilized world. In the struggle to articulate our national experience of shock and anguish, the words “a day that will live in infamy” appeared in countless publications. But ultimately the date itself emerged as the reference to the horrors of that day, underscoring the absence of any parallel. “Pearl Harbor,” “Oklahoma City,” and the “Titanic” are tragedies that at least have names. The scope and scale of the events of September 11, however, are a challenge to our very language; hence, simply “9/11” or “the events of 9/11.”

Gradually, as advertising returned to newspapers and regular programming to TV, we learned that the events of September 11 demand new ways of looking at—and managing—our changed world. The events of September 11 present enormous challenges not only to our leaders and policy makers but also to historians, economists, educators, and even molecular biologists.

We also now know that what happened on September 11—and what could happen again—has engendered extraordinary legal questions. The days immediately following the attacks saw multipronged modifications of U.S. immigration policies and customs inspection procedures. Within weeks of the attacks, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, more commonly known by its shorter-winded acronym, the USA PATRIOT Act. This year, a federal district court in Los Angeles dismissed a suit seeking release of al Qaeda suspects detained at Guantanamo Bay.

The legal questions generated by September 11, however, are by no means limited to the realms of criminal procedure and international policy. As we go to press, the owners of the Condé Nast building in New York have secured an injunction preventing LaSalle Bank, the mortgage holder, from seizing the $3.2 million required to purchase a terrorism insurance policy that LaSalle contends is needed to cure an act of default triggered by the lack of such coverage. In a similar vein, Moody’s is revisiting the bond ratings on $5 billion worth of loans on high-profile buildings throughout the country. Buildings lacking “adequate” terrorism insurance risk a downgrade in their mortgage bond rating—triggering ripple effects not only in the lending industry but also in pension funds requiring a threshold grade for bond investments.

Thousands of miles from ground zero, hotels in Louisiana and Hawaii have sought recovery under their coverage for business interruption. Another insurance issue concerns whether there were one or two “occurrences” involving the hijacked planes and the World Trade Center—a question that sounds more like an ontological puzzle from Philosophy 101 than the serious legal inquiry it has become. Many of the legal issues to emerge from September 11 defy categorization. Indeed, the USA PATRIOT Act itself imposes broad-ranging obligations upon the banking industry while granting law enforcement the tools reflected in its name.

In devoting an issue to legal topics arising from September 11, we know full well that it is impossible to address them all. We anticipate that Los Angeles Lawyer will continue to publish articles on legal issues generated by 9/11 for years to come. We also know that a legal publication cannot even begin to register our moral, spiritual, and emotional response to 9/11. In full recognition of this fact, we modestly dedicate this issue to the memory of all who perished on that fateful day.
What can an attorney learn from a fish?

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Funding the Future of Los Angeles County Since 1915
The Barristers Section Continues Its Work

The personal and professional achievements of our volunteers inspire their successors

As this year’s president of the Barristers Section of the Los Angeles County Bar Association, I want to welcome you to the oldest association for new and young lawyers in the country. Our purpose is to further the personal and professional development of our members, to promote public service projects, to improve the availability of legal services to the public, and to provide a forum for addressing legal and social issues of importance to our profession and community. If you are a member of the Association and are 36 years of age or younger or have practiced for 10 years or less, you are a member of the Barristers.

Those are the facts, but a better way to learn about the Barristers is with a story. One of our committees is the Children’s Rights Committee, and one of its projects is the Kid’s Court program. Kid’s Court brings child witnesses of violent or sexual crimes to the courthouse on a Saturday before they have to testify and educates them in a comforting manner. The Children’s Rights Committee recruits judges, district attorneys, victims’ assistance advocates, and interpreters to volunteer, along with the members of the committee, to run these Saturday programs.

One recent Saturday a four-year-old girl arrived with her older siblings and her caregiver at the Clara Shortridge Foltz Criminal Courts Building. I will call her Alice, although that is not her real name. Alice was scheduled to testify soon as an eyewitness at a murder trial, but on that day she was there for Kid’s Court. Alice followed the balloon-lined path to the entrance. Cutout footprints and colorful posters showed her where to go. After receiving packets of crayons and coloring books about court and testifying, she was brought to a courtroom much like the one that she would be testifying in, except this courtroom was lined with teddy bears (courtesy of Comfort for Court Kids, Inc.) and there was a big stuffed gorilla in the center of the jury box (courtesy of the volunteer judge).

The district attorney and victim’s assistance volunteers spoke to the children about the legal system, their role in it, and some simple ways to relieve their anxiety about testifying. (Nothing about the children’s individual cases, however, was to be discussed.) All the judges who have volunteered for the program have been fabulous, but this judge had a particular gift for setting the children at ease. He spoke to them about court, then each child got a chance to sit in the witness box, be sworn in, and answer a few questions asked by the district attorney about the color of their hair or their best friend.

And then it was Alice’s turn. She had watched her siblings go to the stand before her, and she had smiled and laughed. When she came to the stand, she had warmed up enough to respond to the simple questions about her favorite color and food. The judge talked to her light-heartedly, and it was clear that she was much more at ease.

This was an amazing accomplishment. The volunteers did not know that Alice had a crucial role to play in the trial in which she would testify. The murder victim was Alice’s mother. Only Alice had witnessed the murder. She had identified the alleged killer, but she had been unable to talk about the incident in any detail. After Kid’s Court, she was finally able to talk about what she had seen.

Although improving a child’s ability to be able to testify is part of the purpose of Kid’s Court, it is not the main reason that the Children’s Rights Committee started the Kid’s Court program. The driving force for Kid’s Court came from a young attorney volunteer from a Downtown law firm. This volunteer was a child when she watched as a close relative of hers, also a very young child, had to testify in a high-profile case. That close relative suffered because of the lack of care given to child witnesses at that time.

Making a Difference

This story about Kid’s Court shows what one determined volunteer can do when her efforts are combined with those of other volunteers and the Barristers. The presiding judge of criminal court, the district attorney’s office, and our many volunteers saw the value of the program and threw their wholehearted support behind it. But it was only through the efforts of new and young attorneys with initiative, combined with the resources of the Association, that Kid’s Court came to exist. I want to thank this past year’s committee leadership—Barbara Bacon, Anna Strasburg, and Susan Skelding—for their efforts in continuing and building on Kid’s Court.

There are many reasons to be involved in the Barristers, including opportunities for new and young lawyers to develop a professional reputation beyond their firm or agency. The Barristers provides a network of other new and young lawyers to learn about other job opportunities—and, in fact, many Barristers I know have found their next job through the contacts they made with other Barristers. The Barristers creates opportunities for new and young lawyers to develop leadership skills, to interact with judges, and to serve the community.

Kid’s Court is just one project of one committee of the Barristers. This past year, Gillian Friedman led our Continuing Legal Education Committee in organizing three workshops on basic litigation skills. One associate from a major Downtown...
law firm who attended all three programs told us that the workshops had “completely changed” the way he felt about being an associate at a big firm, and he felt “indispensable” because of his new knowledge.

More to Come

This year we plan to implement many new projects. We are working with the Association to bring the Nuts and Bolts of Litigation back, beginning in the late fall. This series of training programs gives new lawyers the opportunity to learn from “masters of the art of lawyering,” as Judge Lee Smalley Edmon put it when she inaugurated this program in her year as the Association’s president.

Our Community Outreach Committee also is expanding its efforts. In conjunction with the Association’s 125th anniversary, Community Law Day in May will be expanding to serve more community members with more Ask-A-Lawyer events. Further, in conjunction with Public Counsel, the Barristers is reinstituting our Homeless Outreach Project, in which volunteer lawyers will assist homeless persons who are seeking a fresh start in life at the PATH Homeless facility in Hollywood. Also in partnership with Public Counsel, we are recruiting and holding trainings for Barristers to be guardians ad litem for youth in foster care. Guardians ad litem are greatly needed in order to make decisions for foster children in suits that have been brought on their behalf, because these children do not have parents who are able to do so.

In the coming year we plan to refocus our efforts on networking and professional development events to better serve our members. In addition to assisting with the Association’s career development seminars, we plan to sponsor networking events. We are reaching out to our many affiliates to cosponsor more programs together. There are many strong affiliates, and by doing programs together we believe we will serve new and young lawyers while improving the diversity of the Association. (If you are a leader of one of the Association’s affiliates, please contact me if you have a program that you believe would be worthwhile to sponsor together.)

Please visit the Barristers page of the Association Web site at www.lacba.org and read more. Barristers who provide their e-mail addresses to the Association will receive our e-newsletter, featuring a schedule of our activities and committee meetings. You may also contact me at emcalciano@aol.com or use our online guide to receive more information. Feel free to tell me how we can be more responsive to new and young lawyers, and let me know if there is a program in which you believe the Barristers should be involved.
The Choice between the Victim Compensation Fund and Litigation

By Noah H. Kushlefsky

September 11 families must thoroughly evaluate their situation

On September 11, 2001, nearly 3,000 people were killed in the worst terrorist attack this country has ever seen. The victims left behind families that are suffering monumental personal and pecuniary losses. Traditionally, the legal system has been the avenue of compensation for families suffering the loss of a loved one. In response to the tragedy, however, federal legislation was quickly passed to aid the victims of September 11 with an alternative source of compensation—the September 11 Victim Compensation Fund of 2001. As a practical and a political necessity Congress created the fund as part of a broader effort to protect the financial viability of the nation’s airlines. Families of victims must now choose between civil litigation and this fund. Both options carry risks that must be carefully considered. Within days of the hijackings of two American Airlines flights, lobbyists for the airlines were on Capitol Hill seeking financial aid and financial protection. The lobbying efforts resulted in a statute that provided both. The Air Transportation Safety and System Stabilization Act authorized $5 billion in direct aid to the airlines and another $10 billion in loans. It also limited the liability of American and United for claims resulting from the attacks to their insurance coverage. Each aircraft carried approximately $1.5 billion in liability insurance. Later legislation limited the liability of other potential civil defendants.

Given the number of victims killed and injured in the terrorist attack on the World Trade Center and the potential for massive property and business claims, many believed that limiting claims to insurance coverage was tantamount to denying the rights of victims to sue the airlines for damages. To answer this criticism, the September 11 Fund was designed not to replace civil litigation but rather to be an attractive alternative. In that respect, it is a rare piece of legislation. Generally, when states and the federal government have legislated away the right to sue, they have replaced it with a mandatory administrative resolution system. For example, the workers’ compensation laws of states provide workers with an alternative compensation method for workplace injuries. For the most part these laws prohibit lawsuits against the employer, making workers’ compensation the exclusive available remedy. In contrast, the victims of September 11 have a choice between the fund and civil litigation. Families of victims cannot choose both, however; in order to enter the fund, a family must give up its right to sue. The exception is filing a civil lawsuit against the terrorists and coconspirators, which is expressly preserved.

The decision whether to accept payment from the fund or to pursue civil litigation is difficult in some cases and quite easy in others. Numerous factors must be considered, and those factors vary dramatically from case to case and from family to family. For those who consider litigation, the liability of domestic defendants is uncertain, and there are limited insurance funds to satisfy judgments. Also, lawsuits could take 10 years or more to resolve. On the other hand, the fund is new, untested, and unproven. No one knows whether it will be fair and reasonable to the victims’ families. The statute and regulations that control the fund give unlimited discretion to the special master, who is appointed by the Justice Department, and there is no right to appeal any perceived abuse of that discretion.

Families should decide which path to take only after gaining an understanding of the risks and uncertainties of both options. For those who were injured in the attacks, the requirements are 1) that they were at the crash sites and were treated by a medical professional within 24 hours of injury or rescue—or for those who did not realize the extent of their injury, within 72 hours of injury, and 2) that the injury required at least 24 hours of hospitalization or was a cause of a temporary or permanent partial disability, incapacity, or disfigurement.
The fund statute permits victims to recover economic and noneconomic losses. The language of the statute is as generous as any state’s law permitting these types of damages. Economic loss is defined as any pecuniary loss recoverable under the applicable state law. The definition of noneconomic loss is broad: “non-economic losses’ means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium…hedonic damages…and all other nonpecuniary losses of any kind or nature.” For many of the victims’ families, noneconomic damages under the fund seem to go beyond what would be recoverable in wrongful death litigation.

For example, all four hijacked flights were bound for California, and dozens of California residents were killed in the attacks. Under California law, noneconomic damages are recoverable for loss of companionship and loss of society, but compensation for the grief or the emotional distress of the survivors is disallowed. Under a strict reading of the fund statute, however, damages for these losses should be recoverable. The majority of the victims of the September 11 attacks resided in New York and New Jersey. In both states, wrongful death damages are limited to pecuniary loss to survivors, and there is no recovery for noneconomic losses at all.

Another attraction of the fund is that it is required to be quick. The special master has only 120 days to issue a written decision after a claim is fully submitted. During that 120-day period, the claimant has a right to a hearing and to present evidence and documents. Finally, the statute does not place any limitations on the amounts that can be awarded under the fund, and there are no damages caps in an individual case. No specific amount of money has been set aside to compensate the victims.

Why then, with all these apparent benefits, did less than 10 percent of the families of victims choose the fund in the first several months that it was accepting applications? The answer is likely to involve two factors. First, the fund is a brand new creation with no track record, and families are uncertain how their cases will be treated. So much discretion rests with the special master that families are loath to waive their rights to litigate when they do not know what entry into the fund really implies. Second, awards under the fund will be offset by a number of collateral payments to victims’ families—including life insurance, which is not an offset in civil litigation. These and other presumptive restrictions on noneconomic loss contribute to a general skepticism among families and the lawyers representing them.

The fund requires that “all collateral sources, including life insurance, pension funds, death benefit programs, and payments made by Federal, State, or local governments” be deducted from any award. The parameters for these offsets are described in interim final rules and final rules, which have been published by the Justice Department and the special master. The interim final rules and the final rules must be read together because they supplement each other. The rules not only set out the regulations but also contain narrative interpretations of the statute that will be used in setting awards.

The rules provide guidance on how the collateral source provision will be implemented. For example, in the interim final rules it is determined that charitable donations received by a family would not be considered an offset to a fund award. Most of the victims in the World Trade Center were killed in the course and scope of their employment, and their families are eligible for workers’ compensation benefits. Both workers’ compensation and Social Security benefits will be a deduction under the fund, but the final rules make it clear that “contingent” benefits will not be an offset. Benefits to widows are contingent, for example, because under both workers’ compensation and Social Security rules, if a widow

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1 Brink’s Ltd. v. South African Airways, 93 F. 3d 1022, 1030 (2d Cir. 1996).
3 Brink’s, 93 F. 3d at 1031 (quoting Cooney v. Osgood Machinery, Inc., 81 N.Y. 2d at 72, 595 N.Y.S. 2d 919, 612 N.E. 2d 277 (1993)).
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remarries the benefits stop. The final rules recognize that contingent benefits are not capable of calculation and cannot be an offset. To the extent that benefits have already been paid, they will be a deduction. Benefits to children, which continue until they reach 18, will be an offset because they are calculable.

Pension programs are also a collateral source offset under the fund. This is particularly onerous for the families of the hundreds of New York City Fire Department and Police Department personnel killed in the collapse of the buildings, because the families are eligible for substantial line-of-duty death pensions that could greatly diminish their compensation under the fund. The final rules do make the allowance that to the extent that a pension is self-funded, it will not be an offset. Life insurance is the collateral offset that will send the most families into courtrooms. For families with life insurance, it can have a devastating effect on recovery from the fund. Depending on the economic loss claim and the amount of life insurance, when combined with other collateral sources, the fund may in some cases provide no benefit at all.

Another disadvantage of the fund lies in its treatment of noneconomic loss. What the statute gave, the Justice Department took away. New York and New Jersey do not recognize noneconomic losses in wrongful death cases, but even so, the fund offers families in those states only an illusory advantage over litigation. New York and New Jersey both provide for survival causes of action, which are separate from wrongful death claims. Under the survival statutes, personal injury claims that a decedent had before death survive the death. Both states recognize claims for physical and emotional pain and suffering and fear of impending death. For the victims in the hijacked aircraft and in the World Trade Center, the claims for pain and suffering and fear of death are substantial. Take, for example, the World Trade Center occupants on floors above where the airplanes hit. After the planes hit, North Tower occupants were trapped for an hour and a half, and South Tower occupants for over an hour before the towers collapsed. The survival claims for pain and suffering are staggering—likewise for the airplane passengers who witnessed the murders of crew members and experienced the hijackings. But the fund lumps these survival claims together with the noneconomic loss claims and then sets the standard for recovery at only $250,000, a fraction of what could be awarded in litigation.

Perhaps the most troubling aspect of the fund is the special master’s unfettered discretion. Families that accept the fund waive their right to a jury trial, and there is no right to appeal the special master’s determination. The statute, the interim rules, and the final rules place unlimited authority in the special master in setting awards and arguably allow the official to disregard every other provision of the statute and the regulations. Section 405 of the statute states that the special master shall review a claim and make an award “based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.” This statutory provision was translated into a needs test when the rules were published. The interim and the final rules state that simply calculating economic loss and noneconomic loss will be insufficient relative to the needs of the families of some victims and excessive relative to the needs of others. The special master has the unbridled power to reduce or erase an award under the fund, and the claimant has no ability to challenge that decision. The master has the authority to determine that a family has no need and that there should be no award. The special master’s power trumps all other provisions of the victim compensation fund and creates a risk that does not exist in civil litigation. This is not to say that civil litigation does not present substantial risks of their own. The risks of litigation must be weighed against the risks of the fund before making a choice between the two.

The Litigation Option

Families who choose to litigate face myriad potential problems, which can be placed into two categories: proving liability and collecting the damages. There are numerous potential defendants, but almost all with deep pockets have been protected by federal legislation. Potential defendants that have not been protected have limited insurance and scant assets. The class of wrongful death and personal injury claimants eligible to recover in litigation is boundless. Beyond the nearly 3,000 people killed in the terrorist attacks, tens of thousands of personal injury claims can be brought, ranging from injured occupants of the towers and people on the streets to residents of lower Manhattan. The fund is only available to personal injury claimants who sought immediate medical care, so thousands of injured victims do not have the fund as an option. In addition to people, hundreds of businesses in the vicinity of the towers lost substantial business and property. The fund is also unavailable to them. In short, there could be tens of billions of dollars in claims, and only a fraction of that amount may be available to claimants.

The original Airline Stabilization Act limited the exposure of the airlines to liability. A later amendment greatly expanded the protection to the manufacturers of the aircraft, owners and operators of the airports involved, and any entity or person with a property interest in the World Trade Center. The city of New York, which is self-insured, had its liability capped at $350 million. The statute specifically excludes the private companies that provided security at the airports.

It seems clear that no one victimized in the World Trade Center tragedy will collect full damages in litigation. Once all the claims in litigation are evaluated and valued, the limited funds that are available will likely be awarded on a proportional basis. It is impossible to predict what percent of the actual damages in each case will be awarded. This is not so for the victims of the Pentagon and Pennsylvania crashes. The insurance coverage for those crashes likely will be sufficient to satisfy all successful claims.

The limited funds will likely also cause the civil case to drag on for years. Even if liability is not contested and some defendants or insurers decide to pay the policies into the court for later distribution rather than litigate, tens of thousands of claims will have to be evaluated before the funds can be allocated. This is in stark contrast to the required expediency of the fund.

If the defendants or their insurers choose to contest liability, the victims are in for a long and complicated fight. Potential defendants include American Airlines and United Airlines; the operators of Logan Airport, Newark Airport, and Dulles Airport; the companies that provided airline security for the flights; the domestic flight schools that trained the terrorist pilots; the owner and lessee of the World Trade Center; the architects, engineers, and material suppliers for the World Trade Center; and the city of New York. It is doubtful that World Trade Center occupants have viable theories of liability against the city of New York, but rescue workers sent to ground zero may.

The success of a suit against any of these potential defendants requires proof that they had a duty to the plaintiffs, that there was negligence (or a breach of the duty), and that the negligence was a proximate cause of the injury. Proximate cause includes an element of foreseeability. The fund does not present claimants with these hurdles because it does not address liability.

The elements of duty, proximate cause, and foreseeability greatly distinguish claims. For example, it is clear that the airlines had a duty to the passengers on the airplanes, but did they have a duty to the occupants of the WTC and the Pentagon or to the people on the street in New York killed by falling debris? What about business owners on the ground? An argument can be made that an airline has a duty to everyone on the ground, but it is by no means a certainty.
Likewise, while it was certainly foreseeable to the airlines that negligent passenger security could cause harm to passengers on the airplane, it is more of a challenge to prove that poor security on a flight from Boston to California could cause harm to occupants of the World Trade Center or others on the ground. The same analysis applies to the security companies and the operators of the airports. In short, while the $3 billion in aviation insurance may be the largest source of compensation available in litigation, it may not be available to anyone but the airline passengers.

The victims in the Twin Towers may look to Silverstein Properties and the Port Authority of New York and New Jersey, the lessor and owner of the buildings, on the theory that they provided no proper emergency evacuation route or plan. In fact, after the first hijacked airplane struck Tower One, occupants of Tower Two were told to remain in their offices, and many families of the victims in Tower Two are incensed by that instruction. Nonetheless, the decision by the building management to keep occupants in the building is probably protected by New York’s emergency doctrine.33 Building managers were faced with an emergency not of their making, and under that condition the emergency doctrine allows decision makers wide latitude to act reasonably under the circumstances.34 These defendants will likely argue that debris and bodies were falling to the street from Tower One, they had no information about a second hijacked airplane, and they reasoned that under the circumstances staying in the building was the safest course of action.

Another major risk of litigation is juror reaction to a lawsuit against American companies in response to an attack against this country. Tort litigation is always more complicated when a nonparty actor is the direct cause of the injuries because a defendant can point to the nonparty as the sole or primary cause. Plaintiffs’ attorneys, however, routinely deal with this issue. In the case arising out of the terrorist bombing of Pan American Flight 103 over Lockerbie, Scotland, a jury found that Pan Am was guilty of willful misconduct for inadequate security, despite the fact that terrorists, not Pan Am, destroyed the aircraft.35 Nevertheless, September 11 has galvanized the country, and how a jury will react to a civil lawsuit against U.S. companies is difficult to predict.

For some families the choice between the fund and litigation is a simple one, because certain cases are valued higher in the fund. Take, for example, the case of an unmarried adult victim who is survived only by parents. Under New York and New Jersey law this type of case may be valued well under $1 million, since the standard for wrongful death damages is economic loss, and the decedent was not supporting anyone. On the other hand, the fund presumes financial support in every case and simply increases the deduction for the victim’s personal consumption when there was no spouse or children to support. In some of these cases the fund may award well over $2 million, depending on the victim’s age and earnings at the time of death.36

The speed of the fund makes it a necessary choice among families facing economic hardship. For others, the decision is not as simple, and an analysis should be prepared. No decision can be made between litigation and the fund until the economic loss is meticulously analyzed and the claim is prepared. In the preparation of the claim, no distinction should be drawn between the fund and litigation. Once the claim is complete, the collateral offsets must be considered to determine how much they will affect the value of the claim in the fund. With the offsets reviewed, families should have a reasonable idea of what the fund would likely award and can compare this result with what may become available through litigation. Even then, families must still rely heavily on legal advice, because the litigation process will take years, and a decision between the fund and litigation must be made within the statute of limitations.37

For many, the decision will be based on an immediate need for money. For others, the decision will be based on an unwillingness to deal with years of litigation and uncertainty. Still others will balance the risks and potential rewards of each choice and make the decision they believe is best. Lawyers representing the families will have to help their clients make an informed choice between the uncertainty of the fund and the uncertainty of litigation—a choice affecting the rest of their lives.

2 Id. §101(a).
3 Id. §408(a).
7 “[The Special Master] shall not consider negligence or any other theory of liability.” Air Transportation Safety and System Stabilization Act §405(b)(2).
9 Air Transportation Safety and System Stabilization Act §405(c)(2).
10 28 C.F.R. §104.26(c)(1). At the discretion of the special master appointed to administer the fund, rescue personnel can seek compensation even if they do not meet these time requirements. See Final Rule, 28 C.F.R. pt. 104, CIV 104F, AG Order No. 2564-2002 at 11234 (2001).
11 Air Transportation Safety and System Stabilization Act §402(9).
12 Id. §402(7).
14 N.J. STAT. ANN. §2A:31; N.Y. EST. POWERS & TRUSTS.
15 Air Transportation Safety and System Stabilization Act §405(b)(3).
16 Id. §405(b)(4), (b)(5).
18 Air Transportation Safety and System Stabilization Act §402(4).
19 Id.
23 Id. at 11234.
26 28 C.F.R. §104.44.
27 Air Transportation Safety and System Stabilization Act §§405(b)(1)(B)(i), 405(b)(3).
28 Id. §405(b)(1)(B)(ii).
30 Air Transportation Safety and System Stabilization Act §201(2)(a) (1) and (3).
31 Id. §201(b)(2)(a) (5).
34 Id.
36 The final rule includes a chart of presumptive awards in various types of cases and includes the methodology employed by the fund for calculating the loss. The chart for cases involving adults survived by parents range from $300,000 for elderly victims to $2.5 million for younger victims with high earnings. 28 C.F.R. pt. 104, CIV 104F, AG Order No. 2564-2002, 1105-AA79 at 11233.
37 Families have two years from December 21, 2001, to file with the fund, and state statutes of limitations will apply in litigation.
The nation resolved soon after the terrorist attacks on September 11 to recover and rebuild. As the nation mourned, few could avoid wondering who would foot the bill. The stunning losses prompted an outpouring of governmental, corporate, and charitable relief to affected families. The federal government hastily enacted major aid and economic stimulus legislation. Property insurance companies and their reinsurers are expected to pay roughly half the total property damage losses—and currently these are estimated to be as high as $100 billion. Insurance industry officials announced soon after the attacks that insurers would honor claims under existing property insurance policies and that the industry’s capital reserves were adequate to pay the huge estimated losses. At the same time, however, most insurers began issuing their new property insurance policies with an exclusion from coverage for losses due to acts of terrorism. The resulting uncertainty over the availability of insurance coverage for acts of terrorism has affected to some degree every insured real estate asset and mortgage loan in the United States and prompted legislation to provide federal terrorism insurance.

Some observers have suggested that the insurance industry should have anticipated and reserved against the risks of terrorism in the United States because the risks already were apparent before September 11. Investor Warren Buffet has been widely quoted as saying that after the Oklahoma City bombing and the 1993 attack on the World Trade Center, the insurance industry failed to appreciate the risks of terrorism. Another commentator has suggested, however, that no quantitative models for the evaluation of risk could have predicted the attacks because catastrophes like the one that occurred on September 11 are unpredictable. Yet, the insurance industry has been forced to develop ways to predict the heretofore unpredictable in order to offer terrorism insurance again. Owners of real estate, their lenders, and their counsel have worked to understand, reduce, and insure against the risks of terror in ways that balance the interests and demands of the parties involved.

Some of the developing models for determining terrorism risk and magnitude of potential loss from a terrorist act assume that the degree of risk is proportional to the relative prominence of the real estate asset. While the logic of such an assumption is undeniable, currently the nation may be overly inclined to view acts of terrorism only as major catastrophes like the events of September 11. The experience of other nations suggests that a terrorist act is just as likely to occur in a suburban pizza parlor or crowded office plaza as it is at a national landmark. Therefore, every place is at risk to some degree and should be examined to determine whether exposure to risk should be reduced by prevention, effective emergency response, and insurance.

Typical all-risk property insurance policies in existence on September 11 for real estate assets in the United States covered losses resulting from acts of terrorism, irrespective of the type, size, or value of the real estate asset insured. All-risk property insurance policies actually contain numerous exclusions and do not cover losses resulting from, for example, flood, earthquake, boiler explosion, acts of war, and nuclear damage. How-
ever, on September 11, coverage for acts of terrorism was not excluded from most standard coverage.

After that day, the insurance industry and policyholders focused on the war risk exclusion in existing property insurance policies. Many contemplated whether insurers would invoke that exclusion to avoid paying claims arising from the attacks, particularly after President Bush declared that the terrorist acts constituted an act of war.4 The war risk exclusion describes a “hostile or warlike action in time of peace or war...by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces...or...by an agent of any such government, power, authority or forces.”5 Despite the characterizations of events by governmental officials, the acts of terrorism on September 11 do not constitute acts of war for purposes of the war risk exclusion in a property insurance policy. The perpetrators were not agents of a sovereign government or a group with any incidence of sovereignty. Accordingly, insurers did not invoke the war risk exclusion.

The insurance industry acted swiftly, however, to limit or exclude coverage for acts of terrorism when writing new all-risk property insurance policies after September 11. By doing so, any insured that wants or needs to buy terrorism insurance now must obtain separate terrorism coverage if it is available. California property owners are familiar with the need to purchase separate earthquake insurance to obtain coverage for earthquake damage, which is otherwise excluded from the standard property insurance policy. And just as the availability of earthquake insurance all but evaporated after the 1994 Northridge earthquake, after September 11, terrorism insurance became largely unavailable almost overnight and, consistent with the law of supply and demand, any terrorism insurance available could be purchased only at prices uneconomic for most insureds.

Definitions and Exclusions

The insurance industry is highly regulated, and the industry’s efforts to exclude terrorism coverage have occurred within its regulatory boundaries. The Insurance Services Office (ISO) is an organization that provides insurance industry advisory services and drafts standard forms of insurance policy provisions for hundreds of U.S. insurance companies. The ISO promulgated a terrorism risk exclusion that has been ratified by most state commissioners of insurance where insurers must file for approval of insurance forms.6 Essentially, the ISO exclusion for a commercial property policy defines “terrorism” as the use or threat of force or violence when the effect is to intimidate or coerce a government or population or to disrupt any segment of the economy, or when the intent is to intimidate or coerce a government or promote political, ideological, religious, social, or economic objectives or to promote or oppose a philosophy or ideology.7 The ISO exclusion also excludes coverage for any claim involving terrorism with nuclear materials or the dispersal or release of pathogenic or poisonous biological or chemical materials, regardless of the damage sustained. Claims caused by incidents of terrorism that exceed $25 million in total insured damage to property in the United States and Canada are also excluded.8 A single incident includes acts of terrorism that occur within a 72-hour period and appear to be carried out in concert. The ISO exclusion for a commercial general liability policy is similar to the standard commercial property policy exclusion except that the $25 million property damage threshold is not limited geographically, and the exclusion may be triggered if there is death or serious physical injury to at least 50 people.9

Notably, California, New York, Texas, Georgia, and Florida have witheld approval of the ISO terrorism exclusions.10 As an example of the concerns these states expressed, the California Department of Insurance stated:

- The $25 million countrywide damage threshold is unreasonably low.
- The 72-hour incident period may be arbitrary and/or unfair.
- The total exclusion for biological and chemical incidents may be overly broad and unreasonable.
- The 50-person death or injury requirement for liability exclusion may be unreasonably low and arbitrary.
- The exclusions as a whole may have anti-competitive effects.11

While California and other states debate the merits of the ISO exclusion, anecdotal evidence indicates that insurers operating from the nonratifying states are writing property insurance policies through affiliated companies that operate from other states that have approved a terrorism exclusion.12 To further complicate the insurance landscape, 30 states (including California) are Standard Fire Policy jurisdictions.13 SFP states require that property insurance cover direct fire damage no matter what caused the fire, even terrorism or nuclear events. Thus, terrorism exclusions in SFP states should not defeat claims for losses resulting from terrorism if the losses arise from an ensuing fire. SFP coverage may provide some comfort to property owners without terrorism coverage. Insurers writing policies in SFP states may be expected to review and possibly adjust premiums to reflect any terrorism risk judged to be embedded in the fire policy.

Impact on Financing

The limitation or exclusion of terrorism coverage in property insurance policies has broadly affected commercial real estate and mortgage finance. Most commercial real estate assets are financed, and therefore mortgage lenders determine to a certain extent how real property security for mortgage loans is insured. Virtually all mortgages existing before September 11 required that the real property security for the loan must be insured under an all-risk property insurance policy, but mortgage lenders seldom specifically required terrorism insurance. Most mortgage loan documents list in detail the specific types of insurance required and also generally obligate the borrower to provide “such other insurance as lender may reasonably require” (or a variation thereof).

Since September 11, mortgage lenders and loan servicers nationwide are reviewing these insurance provisions in existing mortgage loan documents against existing or renewal insurance policies to determine whether borrowers are providing the insurance coverage that is required by the documents and, if not, whether the lender can or should demand terrorism insurance coverage. Servicers of commercial mortgage loan portfolios have borne a heavy burden in time and expense undertaking this monumental review.14 In many cases, difficulties for the borrower ensue when a lender or servicer decides that the property must have terrorism insurance. Lenders and borrowers big and small have been caught in a rapidly changing environment in which few can agree upon the standard for quantifying terrorism risk. If a lender decides that terrorism insurance is necessary, the coverage may be unavailable or available only at confiscatory rates. Several noteworthy battles have erupted between lenders and borrowers after lenders demanded expensive terrorism coverage for such high-profile assets as the Mall of America in Minnesota, the Condé Nast Building in New York, and the Opryland Resort and Convention Center in Nashville.15 These disputes are inevitable when the demand for insurance and its supply at economic rates remain out of balance. By and large, however, lenders have not pushed loans into default when confronted with absent or inadequate terrorism insurance coverage.16 Anecdotal evidence suggests, however, that some lenders have obtained the coverage and charged the borrower for the cost.

By the end of the first quarter of 2002, a handful of large companies were offering ter-
terrorism coverage at premiums significantly lower than those quoted at the beginning of the quarter. The profit motive has reportedly attracted significant new capital to the terrorism insurance market, which should make terrorism coverage more available at increasingly competitive rates. Even so, available insurance amounts may be too low and deductibles too high, and policies may be canceled by the insurer on short notice. Few policies may be available where insurers act to limit geographic and concentration risk.

In addition, most terrorism coverage excludes protection for biological or chemical attacks.

Reinsurers and others continue to argue that terrorism risk is virtually impossible to quantify, making it uninsurable. As a result, insurers may remain unable to satisfy demand for terrorism insurance for the short term.

For new mortgage loans, many lenders are requiring terrorism coverage that is based on a selected standard. Generally, the new language may require terrorism coverage 1) outright, 2) if commercially available regardless of cost, or 3) if available at commercially reasonable rates. There are several variations on these basic standards. Depending on the evaluation of risk and the negotiating strength of the parties, terrorism insurance may be required under one standard or another, but only if prudent or institutional owners of similar properties are obtaining such insurance or if prudent or institutional lenders are requiring such coverage for similar properties. The parties may agree to cap the borrower’s annual premium expense to provide required coverage, which may be based on a multiple of the prevailing premium for such coverage at the time of loan origination. Alternatively, the amount of terrorism coverage may be limited to an amount less than the full replacement cost of the asset or higher deductibles may be permitted. To avoid gaps in coverage, counsel should make certain that the language of the terrorism coverage mirrors the terrorism exclusion in the all-risk property policy.

Evaluating the Risk

A perceived need in the mortgage capital markets has fostered the development of a model for evaluating the risk of terrorism. This model has been applied to commercial mortgage-backed securities (CMBS), through which a significant portion of the nation’s commercial mortgage debt has been securitized. (In fact, the mortgage encumbering the World Trade Center was securitized less than 60 days before September 11.) Investors in CMBS receive a return on their investment from the income stream generated by the mortgages backing the securities, which are usually bonds. Investors purchase CMBS in reliance on the ratings assigned to the bonds by one of the major credit rating agencies. The ratings assigned to CMBS derive in part from the availability of insurance against the risks posed by events that might interrupt payments to the bondholders.

Moody’s Investors Service, one of the leading rating agencies, has developed a framework that calculates the effect on CMBS ratings of the relative likelihood that a real estate asset will be targeted by terrorists. Moody’s work has contributed substantially to the debate over the need for terrorism insurance on CMBS loans and has informed the review of servicers of the insurance requirements that affect existing CMBS mortgage loans. Moody’s framework assumes that, given the nature of terrorism, the more prominent an asset the more likely it will be a target of an act of terrorism. The framework consists of a matrix in which the risk decreases as the number of loans in a CMBS loan pool increases (i.e., the risk is spread over a large pool of loans secured by a diverse range of real estate assets) and as the relative prominence of the real estate assets securing the loans in the pool diminishes. Conversely, the risk increases as the pool size diminishes and as the prominence of the real assets securing the loans in the pool increases. Thus, the rating of CMBS issued to investors in a so-called single-asset securitization of a mortgage loan secured by a lien on a high-profile asset such as the Sears Tower in Chicago could be affected significantly by terrorism risk considerations, while the rating of CMBS backed by a large and diverse pool of loans secured by low-profile assets would be less affected.

The risks of terror also directly affect property owners and their tenants. Counsel for owners of commercial real estate should be aware of ways to reduce the risk of attack and minimize loss of life and damage to property if an attack occurs. Since September 11, those working in and visiting downtown Los Angeles and other areas must comply with new security measures and participate in evacuation drills. One view suggests that all businesses operate under a higher standard of care after September 11, with a duty to reduce potential exposure to claims for personal injury, property damage, and other direct and indirect losses that could result from terrorist acts.

A study prepared by RAND for the Building Owners and Managers Association of Greater Los Angeles evaluates the threat of terrorism to downtown Los Angeles and recommends ways to reduce and manage the risks to safeguard the health and safety of the downtown community.

Proposed Legislative Solutions

The events of September 11 occurred in the midst of an economic downturn in which real estate remained a bright spot in an otherwise slow economy. Industry groups lobbied heavily for federal terrorism insurance, and proposed legislation gained momentum...
once the president and Congress determined that uncertainties over terrorism insurance could adversely affect jobs and economic growth. Industry groups have argued that federal terrorism insurance is essential because the insurance industry may never write affordable coverage for large, expensive, and highly vulnerable real estate, or for the biological, nuclear, or chemical attacks that are a growing concern. On the other hand, many have questioned the wisdom of creating a potentially huge new federal burden through what has been characterized as a bailout of the insurance industry.

The House of Representatives and the Senate passed terrorism insurance bills that will not likely become law before the current session of Congress ends. The House bill would provide a one-year risk program whereby the federal government would make loans available to pay 90 percent of claims between $1 billion and $20 billion. The Senate plan would pay 80 percent of losses resulting from a terrorist attack up to $10 billion after insurers have absorbed certain losses based on their market share. The government would pay 90 percent of losses thereafter. Republicans have favored restrictions on lawsuits by victims of terrorism against both the government and businesses. Democrats favor limiting suits against the government but argue that limiting suits against businesses diminishes the incentive to prevent attacks.

Even as the momentum toward final federal legislation has increased, a recent Federal Reserve Board study reported that the high cost of terrorism coverage has had “little or no” effect on the demand for loans to finance high-profile projects, and many banks do not require terrorism coverage at all. Such reports indicate that a consensus has yet to develop as to whether the economy will suffer any long-term adverse impact from the terrorism insurance turmoil caused by September 11 and whether the federal government should legislate a solution.

1 Terrorism Insurance Roundtable 2002, 4 CMBS WORLD 1, 46 (Spring 2002).
3 Terrorism Insurance Roundtable 2002, 4 CMBS WORLD 45 (Spring 2002). One report quoted an insurance industry analyst who believes the insurance industry’s increased exposure to a catastrophe such as the September 11 attacks results from the soft insurance market over the last decade, which induced many insurers to write broad insurance coverage. Moody’s Investors Service, The Credit Impact of September 11, 2001, on the Insurance Industry, in MOODY’S SPECIAL REPORT 3 (Oct. 2001).
4 Mark Adelson, How the Events of September 11 Affect Thinking about Risk, 4 CMBS WORLD 2, 54 (Summer 2002).
Terrorism Insurance Roundtable 2002, 4 CMBS World 46 (Spring 2002).


The war risk exclusion commonly reads:

The war risk exclusion commonly reads: (a) The effect is to intimidate or coerce a government or the civilian population or any segment thereof, or to disrupt any segment of the economy; or (b) It appears that the intent is to intimidate or coerce a government, or to further political, ideological, religious, social or economic objectives or to express (or express opposition to) a philosophy or ideology.


Id. at 1-3.


The ISO exclusion defines “terrorism”:

Activities against persons, organizations or property of any nature:

(1) That involve the following or preparation for the following:

(a) Use or threat of force or violence; or
(b) Commission or threat of a dangerous act; or
(c) Commission or threat of an act that interferes with or disrupts an electronic, communication, information, or mechanical system; and
(2) When one or both of the following applies:

(a) The effect is to intimidate or coerce a government or the civilian population or any segment thereof, or to disrupt any segment of the economy; or
(b) It appears that the intent is to intimidate or coerce a government, or to further political, ideological, religious, social or economic objectives or to express (or express opposition to) a philosophy or ideology.

Intra-Company Transfers

EXPERT TESTIMONIAL SERVICES

NAFTA (North American Free Trade Agreement) Visas

DESIGN CORPORATE IMMIGRATION POLICIES

ENTERTAINERS & SPORTS PROFESSIONALS

FAMILY RELATED PETITIONS

OUTBOUND VISA CAPABILITY

Blue/White Collar Employee Immigration Assistance

When It Comes to Immigration Law, We’re Your Best Move.
New laws, policies, and regulations present challenges to immigrants and their counsel

With the arrival of the one-year anniversary of the September 11 terrorist attacks, Americans will collectively pause and contemplate the many changes to our nation in the past year. The tragic loss of life and the turmoil and devastation experienced by the families who lost loved ones obviously overshadow all other thoughts and considerations.

The fact that the attacks were perpetrated by persons who were nationals of other countries has caused and will cause many changes to U.S. immigration policies. In the days immediately after September 11, immigration regulations were amended, visa categories were modified, new immigration laws were passed, immigration detention policies were modified, immigration and customs inspections became more rigorous, and bills with immigration components were introduced in Congress to combat terrorism.

Nine days after the terrorist attacks, one of the first acts of the Immigration and Naturalization Service was to amend a regulation in order to permit the INS to detain aliens longer than previously allowed. Under the prior regulation, the INS was required to make a determination within 24 hours of an arrest whether to release the arrested alien on bond or the alien’s own recognizance and to institute removal proceedings. For reasons of national security, the amendment extended the time to 48 hours after the arrest, except in the event of “emergency or other extraordinary circumstances.”

Congress also cited national security as the basis for its post-September 11 legislative endeavors. One bill passed by Congress and enacted into law amended Section 214(k) of the Immigration and Nationality Act (INA) to provide for a permanent S visa classification. The S visa will be granted to aliens who possess critical information regarding criminal or terrorist organizations and will supply or have supplied it to law enforcement agencies.

Congress also passed, and the president signed, the Enhanced Border Security and Visa Entry Reform Act of 2002, which requires a closer review of all visa applicants, including students. The new law would strengthen the monitoring of foreign students in the United States and provide for a more frequent review of schools to ensure compliance with all laws.

The most significant and talked-about measure, however, is the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, which has become known as the USA PATRIOT Act. President George Bush signed this bill on October 26, 2001, after little more than a month’s debate in Congress. The USA PATRIOT Act grants law enforcement sweeping authorization in its conduct of searches, its use of electronic surveillance, and its ability to detain persons suspected to be terrorists. The USA PATRIOT Act expands the definition of “terrorism” for purposes of inadmissibility and removal of aliens, requires mandatory detention of aliens certified by the U.S. attorney general to have engaged in terrorist activities, and limits judicial review.

On the other hand, the new law also recognizes that noncitizens were among the victims of the terrorist acts of September 11. Thus the act generously preserves some immigration benefits for noncitizens that would otherwise have been extinguished by death or loss of employment. For example, if a U.S. citizen had filed a relative visa petition (INS form I-130) or fiancé petition on behalf of a spouse, child, or fiancé on or before September 11, 2001, that petition would have been nullified by the death of the petitioner and will continue to be processed as if the petitioner had not been killed. The complete list of survivors’ benefits are described in Sections 421 through 423 of the USA PATRIOT Act.

The USA PATRIOT Act also amended Section 110 of the Illegal Immigration and Immigrant Responsibility Act of 1996. Section 110 had sought to establish an exit departure control system, but opposition from various border and business interests scuttled implementation of that system. However, the events of September 11 changed the political climate, and Congress ordered the INS to fully and expeditiously implement the “integrated
entry and exit data system.”12

On June 5, 2002, the Department of Justice announced the creation of a new National Security Entry-Exit Registration System, which is to be deployed as quickly as possible. The new system requires that certain individuals be fingerprinted, photographed, and registered. These individuals include all nationals of Iran, Iraq, Libya, Sudan, and Syria; certain other nationals of other countries whom the State Department and the INS determine to be heightened national security or law enforcement risks; and other aliens identified by INS inspectors based upon specific criteria to be established by the Department of Justice.

Under this new system, aliens who fall into these categories must report to the INS and register if they will be staying in the United States for at least 30 days. The aliens must visit the offices of the INS at the 30-day point of their stay in the United States and thereafter every 12 months until they depart. The aliens must also report to the INS at the time of departure. If an alien fails to register, he or she will be reported to law enforcement agencies. The alien will be subject to a $1,000 fine and the prospect of removal from the United States.13

New Rules

In the aftermath of September 11, there were dozens of other immigration-related bills introduced in Congress. The fate of these bills has not yet been decided, but many other significant changes in immigration policy were brought by agency fiat.

Several of the changes will have an impact in the areas of custody, deportation, and removal. For example, the INS and the Executive Office for Immigration Review, which is composed of the immigration courts and the Board of Immigration Appeals, promulgated an interim rule on October 31, 2001, that established a temporary automatic stay of an immigration judge’s decision to order an alien released from INS custody in cases in which the INS had ordered the alien held without bond or had set a bond amount of $10,000 or more.14 This rule, which amends 8 CFR Section 3.19(h), delays an alien’s release from custody for 10 days to allow the INS to decide if it wishes to appeal the custody determination to the Board of Immigration Appeals.

Another rule that will affect aliens in custody emerged on October 31, 2001. This rule, published by the Bureau of Prisons, amended 28 CFR Parts 500 and 501 to permit the monitoring of attorney-client mail or communications of inmates and detainees in federal custody if the attorney general has certified that reasonable suspicions exist that an inmate may be involved in terrorism.

A more problematic policy change was the announcement by the INS that it had begun sending to the FBI the names of more than 300,000 aliens who have failed to depart from the United States after having been ordered deported or removed. Those names will now be included in the FBI’s National Crime Information Center database, which is accessible by local police agencies. Thus any alien who has overstayed an order of deportation or removal may now be located and deported as a result of contact with local law enforcement, whether or not the alien is suspected to be in any way involved in terrorism.15

Even more significant is the Absconder Apprehension Initiative, which sets up apprehension teams of INS agents to locate aliens ordered deported or removed who have failed to surrender for deportation.16 This dragnet covers all aliens—whether criminals, terrorists, or nonimmigrant visitors who merely overstayed their period of authorized stay—who are under a deportation order but have not departed the United States.

There is a new requirement that any alien under a final order of removal who fails to surrender for removal within 30 days of the final order will forfeit all rights to discretionary relief.17 Thus, for example, an alien client who is granted the privilege of voluntary departure under INA Section 240B18 for a period of 60 days may now have to surrender within 30 days and be in custody for the balance of the voluntary departure period.

Aside from the new rules affecting the monitoring and deportation of absconders and suspected terrorists, immigration practitioners face many more mundane challenges in this new world of post-September 11 immigration law. The INS recently announced that arriving visitors will no longer be routinely authorized to stay for six months. The new policy is to grant only a 30-day stay unless an immigration inspector processing the arrival of an alien is convinced that a longer period is “fair and reasonable for the completion of the purpose of the visit.”19 This new policy, although well intended, will only add to the delays experienced by arriving passengers during immigration and customs inspections and may do little to deter a terrorist who is bent on carrying out his or her evil deeds within 30 days or is unconcerned about staying longer than permitted.

At the same time, the INS also announced new requirements for changing visitor status to student status. The rule would require that as a condition precedent for applying for a change of status to study, the alien visitor must have advised the immigration inspector at the time of arrival of his or her intent to study rather than merely visit.20 This presents an interesting dilemma for the prospective student, because in the past the INS has taken the position that an alien who has the preconceived intent to study is not admissible as a visitor for pleasure.21

Assuming that an inspector allows an alien to enter as a prospective student visitor, the alien will encounter an additional roadblock to studying. The new rule prohibits an alien student from commencing study until after the INS has approved an application to change the alien’s visitor status to student status.22 If a B-1 or B-2 visitor commences studies prior to the approval of the change of status, the visitor will be considered to be in violation of the conditions of his or her visitor status and become subject to removal from the United States.23

For immigration practitioners who assist their clients in obtaining visas abroad, the time-honored practice of consular-shopping at U.S. consular posts at the Mexican or Canadian border may no longer be feasible. In the post-September 11 immigration scheme there are additional security clearances that will delay the scheduling of a visa appointment, clearances that may delay the issuance of the visa, and a regulatory change that makes a visa trip to a border post much more risky.

In the past, many aliens who were already legally in the United States chose to apply for a visa at one of the border posts after they had already received their visa petition approval notice, because they understood that a denial of their visa application would not preclude their reentry into the United States. For example, an alien in possession of a valid, unexpired INS document called the I-94 and accompanying documentation verifying current lawful status could travel to a contiguous country and reenter the United States notwithstanding the expiration of the underlying visa. However, in a change announced on March 7, 2002, 22 CFR Section 41.112(d) has been amended to eliminate automatic revalidation of an expired visa. The new rule eliminates this benefit to persons who apply for and are denied a visa at the border. Future restrictions in this area are expected in the form of new legislation, because Congress has instructed the Department of State to review the process in which consular officers issue visas.

Some post-September 11 changes will have an impact on the immigration practitioners engaged in routine family- or employment-based petitions and applications. In mid-April 2002, the INS instituted a new security clearance procedure called the Interagency Border Inspection System (IBIS). Prior to the approval of an application or petition for any immigration benefit, the names of the applicant and the petitioner must be checked with the IBIS. In mid-May, the INS extended the IBIS clearance to encompass applicants for naturalization, of which there has been a flood since
September 11. This new clearance requirement created a new delay for many applicants—including those for adjustment of status as well as naturalization—because some INS offices only had limited access to the IBIS and not enough officers had been trained on the new system. Surprisingly, notwithstanding this additional delay, the Los Angeles and San Diego INS offices have actually accelerated their scheduling of interviews. Applicants for adjustment of status are being called in for interviews approximately eight months after they file their applications, down from the 30 months that applicants in Los Angeles had experienced as recently as just prior to September 11, 2001.

Reorganizing the System

In addition to the myriad changes in immigration policy, the very structure of the immigration court system and the INS is about to be revamped. The U.S. attorney general announced in February 2002 a proposed rule that will reorganize the Board of Immigration Appeals by reducing the number of board members in order to speed up the appellate process.24 The board will shrink to 11 persons from its current 21. The plan is to have appeals heard by a single board member in most cases rather than the current method of hearings by three-member panels. The proposed rule will have a 180-day transitional period during which the board is expected to clear up its backlog of appeals expeditiously. At the end of the 180-day period, members of the 21-member board will be asked to leave until only 11 remain.25 The attorney general will designate which board members will be allowed to stay on the job. This scenario brings to mind a 1954 case in which there was an allegation that the attorney general had impermissibly influenced the decision-making process of the Board of Immigration Appeals. The U.S. Supreme Court agreed.26

Lest anyone think that the attorney general is singling out the lawyers on the Board of Immigration Appeals for scrutiny, he has also commenced implementation of a major reorganization of the INS.27 At the same time, Congress has weighed into the imbroglio with its own reorganization plan.28 President Bush proposed the creation of the Department of Homeland Security, which would absorb the INS from the Department of Justice.29 Recently the House of Representatives passed a bill creating the Department of Homeland Security that would transfer the enforcement functions of the INS to the new department while leaving the immigration benefits portion of the INS with the Department of Justice.30

Notwithstanding all these changes, immigration attorneys generally report that...
ness is at similar levels to the period prior to September 11, although attorneys who handle immigration litigation report an increase in business. Those attorneys who handle family and business immigration report that business is about the same as before the terrorist attacks. The decrease in certain applications appears to be attributable more to the general economic slowdown, in the high-tech sector in particular, than to the events of September 11. Although there may be a decrease in certain types of cases, such as visa processing in Canada or Mexico, immigration practitioners are certain to be counseling new clients who have concerns about being subject to heightened scrutiny and who wish to protect themselves, perhaps by applying to legalize their status. Now that the very existence of the INS is at issue and the agency is being buffeted by the political winds, the old adage among veterans in the immigration field is as true now as before—the INS needs immigrants as much as immigrants need the INS.

1 78 INTERPRETER RELEASES 1493 (Sept. 24, 2001).
3 8 C.F.R. §287.3(d).
6 State Department cable, ADALC No 1.
8 Id. §411(a) (amending 8 U.S.C. §1182(a)(3), §1227(a)(4)(A) and (B)).
9 Id. §412(a) (adding §236a to the Immigration and Nationality Act, 8 U.S.C. §1226a (1994 ed.)).
10 Id. tit. IV, subtitle C.
12 The USA PATRIOT Act, supra note 7, §414.
15 78 INTERPRETER RELEASES 1899-00 (Dec. 17, 2001).
16 79 INTERPRETER RELEASES 261-2 (Feb. 18, 2002).
17 67 Fed. Reg. 31157 (May 9, 2002).
18 8 C.F.R. §1229c.
21 9 FOREIGN AFFAIRS MANUAL §40.63 n.4.7-1.
22 8 C.F.R. §248.1(c)(3) (Apr. 9, 2002).
25 Id. at 7312.
Correspondent Banking after September 11

New controls will combat money laundering and money transfers that aid illegal acts

Correspondent banking is the provision of banking services by one bank to another. Historically, this practice has enabled foreign banks (called respondent banks) to conduct business for and provide services to individual and institutional customers in the United States through correspondent bank accounts maintained in U.S.-based banks (called correspondent banks). By virtue of these correspondent relationships, respondent banks have avoided the financial costs and regulatory hurdles that are associated with licensing, staffing, and operating full-service banks in the United States.

The worldwide demand for and popularity of U.S. dollars and the lucrative potential of correspondent banking have resulted in the development of thousands of correspondent banking relationships, which account for more than $1 trillion in wire transfers per day. Lax oversight and inadequate self-policing, however, have made correspondent banking susceptible to abuse by those engaged in money laundering and terrorism. These abuses became apparent in the days that followed September 11, 2001.

On October 26, 2001, in the wake of the most devastating terrorist attack in the nation’s history, President George Bush signed into law a comprehensive set of antiterrorism and anti-money laundering laws. Collectively called the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 20011 and known as the USA PATRIOT Act, these new laws impose significant new duties on a wide array of American financial institutions—including banks, insurance companies, brokerage houses, and currency exchanges.

Encompassed under Title III of the act is the International Money Laundering Abatement and Anti-Terrorism Financing Act of 2001 (IMLFA). This legislation increases the responsibilities of financial institutions regarding the detection of money laundering. Together, the USA PATRIOT Act and IMLFA serve to redefine the limits of international finance and, in turn, the relationship between financial institutions and their clients.

Among the changes that will be felt immediately are those affecting the historically unimpeded practice of correspondent banking. These changes will forever alter the way in which U.S. banks conduct business with their foreign counterparts. These changes also will require both in-house and outside counsel not only to appreciate the nuances of the new statutory and regulatory provisions governing this area of banking but also to provide insightful guidance to clients who otherwise risk running afoul of the new act’s provisions.

The act now requires financial institutions to establish appropriate, specific, and, when necessary, enhanced due diligence policies for all correspondent and private banking accounts located in the United States and owned or controlled by non-U.S. persons.

The U.S. Senate Report

The act is the result of not only the events of September 11 but also a congressional investigation into the practices of correspondent banking and its ties to international money laundering. On February 5, 2001, the minority staff of the U.S. Senate’s Permanent Subcommittee on Investigations issued a report titled Correspondent Banking: A Gateway for Money Laundering.2 The report detailed serious deficiencies in the correspondent banking system and identified three categories of foreign banks that indicated a greater likelihood of money laundering: shell banks, offshore banks, and banks located in jurisdictions with weak money laundering controls.3 The subcommittee’s recommendations initially met resistance from the banking community and, to some extent, Congress. Senator Phil Gramm, one of the report’s critics, argued that stricter regulations would increase the cost of banking and violate the privacy rights of bank customers.4 The report seemed to be destined for an unceremonious demise—until the morning hours of September 11, after which it received renewed attention.

The report’s conclusions were straightforward:

- U.S. banks, through correspondent accounts with high-risk foreign banks, were often unwitting conduits for illicit funds acquired through drug trafficking, fraud, tax evasion, Internet gambling, and other crimes.
- Poor due diligence by U.S. banks routinely enabled correspondent accounts to be opened for poorly regulated or managed banks, and, at times, the owners and customers of corrupt banks.
- Correspondent accounts gave foreign banks and their owners and customers access to the American banking system, which is known for its soundness.
- Correspondent accounts also gave access to the international wire transfer system—the most important link in the money laundering chain—making it possible for individuals engaged in illegal activities to commingle and disguise dirty monies and render tracing virtually impossible.

The impact on law enforcement perhaps is best described by Mary Lee Warren, deputy assistant attorney general of the U.S. Department of Justice’s Criminal Division, who stated: “Correspondent bank accounts are used in the ‘layering’ or ‘integration’ stages of money laundering and continue to frustrate the efforts of law enforcement into the movement of criminally

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derived funds into or through countries where law enforcement’s ability to identify the true beneficial owner of the funds is impaired or altogether prevented.”

The sentiment of the Senate Subcommittee on Investigations was best captured by Senator Carl Levin, who was the ranking minority leader of the committee and now is its chair, who stated: “We can’t condemn jurisdictions with weak anti-money laundering controls, weak banking oversight, and unregulated offshore sectors, and then tolerate U.S. banks doing business with the very banks these jurisdictions license and unleash on the world.”

The Senate report described and analyzed various weaknesses in the current correspondent banking system. Among these are:

Inadequate anti-money laundering programs. U.S. banks used relatively unsophisticated anti-money laundering procedures in their correspondent banking operations and conducted inadequate due diligence as to the respondent bank and its customers. This laxness was aggravated by the lack of anti-money laundering training and coordination between compliance officers and correspondent bankers, and the absence of proactive anti-money laundering programs to detect and report suspicious activity in correspondent accounts.

Misconceptions about money laundering. Correspondent bankers erroneously assumed their services were not susceptible to money laundering, believing that launderers dealt only in cash. This, of course, has never been entirely the case. For example, in a case prosecuted by the U.S. Attorney’s Office for the Central District of California, United States v. Rayhani, two money exchange houses located in the United Arab Emirates opened correspondent accounts with a U.S.-based bank. Unknown to the U.S. bank, the accounts were used to launder large sums of monies earned from transporting tons of heroin and morphine base manufactured in Pakistan for distribution in Western Europe and the United States. The correspondent accounts enabled the drug traffickers and money launderers to pool their assets. Funds went into and out of the accounts through the use of numerous wire transfers. Once the wire transfers were complete, it became nearly impossible to ascertain the identities of the ultimate beneficiaries.

A thorough investigation of these financial institutions resulted in the prosecution and conviction of numerous individuals and the seizure and forfeiture of millions of U.S. dollars from those accounts. The U.S.-based bank never suspected money laundering despite the very large sums of currency moving in and out of the accounts on a daily basis by foreign remitters from known drug-producing nations.

The conflicting roles of correspondent bankers. The typical correspondent banker in the United States has been burdened by conflicting roles. One has been to expand business, open new accounts, increase deposits, and sell additional services to existing accounts. The second has been to implement anti-money laundering techniques, evaluate risks associated with new accounts, monitor transactions, and report suspicious activity. The greater the conflict between the two roles, the greater the bank’s susceptibility to money laundering acts.

Some banks exacerbated the inherent conflict by compensating their correspondent banking officers according to the number of new accounts they opened or the income they generated for the bank. In this environment, a correspondent banker’s refusal to open new accounts, close existing accounts, or limit the scope of the services offered to existing clients reduces the banker’s compensation and adversely affects his or her ability to succeed at the bank—the perfect recipe for a doomed anti-money laundering program.

A lack of foreign oversight. There was a prevailing misconception among correspondent banks that they could rely on the respondent bank’s license as evidence of its good standing in the foreign country and that further due diligence was not required to protect themselves from money laundering claims. In fact, certain nations consistently fail to regulate and supervise their domestic financial institutions adequately.

The Senate report described a bank in the Republic of Montenegro that boasted on its Web site about its lax supervisory regime and minimal licensing requirements. This bank was able to gain access to the international wire transfer system through the correspondent banking system despite its blatant disregard for international money laundering laws. Neither the unverifiable assurances of foreign regulators nor the issuance of a foreign bank license can truly guarantee an offshore bank’s bona fides.

The practice of nesting. Nesting is the custom of allowing one respondent bank to use another respondent bank’s correspondent banking relationship. The Senate report characterized nesting as an insidious tradition that exposed domestic banks to criminal and civil liability. In an example, the report tells of a U.S.-based respondent bank that denied a request by a Dominican bank to open a correspondent account. The denied bank then simply opened a correspondent account with another Dominican bank that already had a correspondent banking relationship with that U.S.-based bank. No correspondent bank surveyed for the Senate report had any policy or procedure in place to deal effectively with nested accounts.

Reliance on foreign banks’ audited financial statements. Correspondent banks often placed undue weight on a foreign bank’s audited financial statements to determine solvency and the quality of a foreign bank’s operations. In light of the recent failure of Enron and others, it is clear that financial statements are only as good as their underlying data. Only if that data is accurate and truthful will the statements reflect the true financial condition of the institution. The report concluded that U.S.-based respondent banks cannot afford to rely entirely on the representations of bank auditors in foreign countries.

IMLFA and the USA PATRIOT Act

Section 311 of IMLFA has added a new Section 5318A to Title 31 USC. This new section gives the secretary of the treasury “broad discretion...to take measures tailored to...particular money laundering problems.” As one of those measures, Section 5318A authorizes the secretary to require domestic financial institutions that open or maintain correspondent accounts in the United States on behalf of foreign financial institutions to obtain certain information in connection with the foreign financial institutions’ customers and representatives.

This information can include the identity of every customer of the foreign financial institution who is allowed to use, or whose transactions are routed through, the correspondent account. It can also include the type of information that domestic financial institutions typically gather from their U.S.-based customers during their ordinary course of business. This informational requirement was added to IMLFA to combat nesting.

Section 312 of IMLFA also adds a new Section 5318(i) to Title 31 USC. Section 5318(i) imposes general due diligence requirements on domestic financial institutions that open or maintain correspondent accounts in the United States for non-U.S. persons. The new statute requires the creation and implementation of specific, appropriate and, if necessary, enhanced due diligence policies, procedures, and controls that are reasonably designed to identify and report instances of money laundering through correspondent accounts. Although the term “reasonably designed” awaits interpretation, at first blush, it appears to reflect an acknowledgment that not all money laundering schemes can be reasonably detected.

Title 31 USC Section 5318(i) (2) mandates enhanced due diligence requirements in opening or maintaining correspondent accounts on
behalf of certain types of foreign financial institutions that are called designated respondent banks. Designated respondent banks include foreign banks operating under an offshore banking license and foreign banks operating under a foreign banking license issued by a country that has been designated as noncooperative with international anti-money laundering efforts, both by the United States and by an intergovernmental group to which the United States belongs. Additionally, the act requires enhanced due diligence for correspondent accounts with foreign banks operating under a foreign banking license that, according to the secretary, requires special measures.

The enhanced due diligence requirements will require domestic financial institutions to take several steps:
1) Determine the identity of the owners of the designated respondent bank, along with the nature and extent of each owner’s interest.
2) Conduct an ongoing review and analysis of all correspondent accounts for the purpose of identifying any suspicious transactions.
3) Determine whether the designated respondent bank provides correspondent accounts to other foreign banks (these are known as second tier respondent banks) and, if so, determine the identity of those second tier respondent banks and conduct appropriate due diligence as a way of guarding further against the practice of nesting.

Violations of the due diligence requirements can result in criminal fines or civil penalties of no less than twice the amount of the transaction up to a total of $1 million. IMLAFA also authorizes the secretary to prohibit or impose conditions on the opening or maintenance of correspondent accounts by domestic financial institutions on behalf of foreign financial institutions. Before doing so, the secretary is required to consult with the attorney general, the secretary of state, and the chairman of the board of governors of the Federal Reserve.

This prohibition is especially applicable to foreign shell banks. Section 313 of IMLAFA adds a new Section 3318(j) to Title 31 USC that addresses shell banks. A shell bank is a foreign bank lacking any physical presence in any country. The physical presence requirement is satisfied if the bank maintains a place of business at a fixed address in the foreign bank’s licensing jurisdiction. The fixed address cannot be an electronic address, and it must serve as the place where the foreign bank has at least one full-time employee, maintains its operating and business records, and is subject to inspection by the foreign bank’s regulatory licensing authority.

Section 3318(j) includes two mandates. First, it prohibits any covered financial institution in the United States from opening or maintaining a correspondent account for a shell bank. Second, it requires covered financial institutions to take reasonable steps to verify whether foreign banks that have correspondent accounts in the United States are providing any banking services to shell banks.

Section 3318(j) carves out an exemption from these two requirements for any shell bank that is affiliated with any depository institution, credit union, or foreign bank that has a physical presence in either the United States or a foreign country and is subject to supervision by the relevant banking authority responsible for overseeing the affiliated financial institution. Recently enacted guidelines issued by the U.S. Department of the Treasury direct banks to obtain a signed certification from each correspondent account holder stating that it either is not a shell bank or is qualified under the above exemption.

Section 319 of IMLAFA adds a new Section 3318(k) to Title 31 USC. Pursuant to Section 3318(k)(3)(B)(i), every “covered financial institution” that maintains a correspondent account in the United States for a foreign financial institution must maintain records that identify the owners of the respondent foreign bank and the name and address of an individual who resides in the United States and has the authority to accept service of process for any records pertaining to the account. On request these records must be provided to a federal law enforcement agent within seven days.

Section 319 also authorizes the secretary of the treasury and the attorney general to issue a subpoena or summons to any foreign financial institution that maintains correspondent accounts in the United States for any records relating to those accounts. If the foreign financial institution fails to comply with the subpoena, the U.S.-based financial institution will be required to terminate its correspondent relationship with the foreign bank within 10 days of receiving notice from the government of the foreign bank’s failure to comply with the subpoena. Failure to terminate the correspondent relationship will subject the U.S. bank to a civil penalty of $10,000 for each day the relationship continues. From a bank’s perspective, the only saving provision of this section is that the U.S.-based bank will be immune from liability for terminating its relationship with the foreign bank.

Foreign financial institutions that may have considered themselves beyond the reach of U.S. law enforcement must now pay special attention to Section 317 of IMLAFA, which grants federal courts long-arm jurisdiction over certain foreign individuals and financial institutions. Specifically, a federal court will now be able to exercise jurisdiction over any foreign financial institution that has been served with process, pursuant to established laws and rules of procedure, and that has minimum contacts with the United States. The minimum contacts requirement can be satisfied whenever the foreign financial institution maintains a correspondent account in the United States. Clearly, this provision is intended to enable criminal prosecution of foreign banks and their agents in the United States for money laundering activities.

Lastly, Section 352 of IMLAFA amends 31 USC Section 3318(h) to require financial institutions to implement basic anti-money laundering programs. The programs will be required to encompass policies and procedures, employee training, and the selection of a compliance officer and auditor responsible for the ongoing testing of the program.

It is now evident that all U.S.-based financial institutions will be required to fulfill, at a minimum, certain basic due diligence requirements. For certain banks and other financial institutions unaccustomed to such inquiries, compliance with the act will require a concerted effort to keep track of correspondent accounts and, when appropriate, investigate foreign institutions and their owners and account holders. To demonstrate commitment to the act, financial institutions should consider implementing the following measures immediately:
- Conduct the same know-your-customer inquiry with foreign accounts that financial institutions typically perform for domestic accounts.
- Adopt and implement an exacting due diligence protocol for the correspondent banking department. This will help screen and monitor problematic institutions such as shell banks, offshore banks, and banks in countries with weak anti-money laundering mechanisms.
- Conduct a detailed country-by-country analysis. There are currently 19 noncooperating countries and territories identified by the Treasury Department’s Financial Action Task Force on Money Laundering. Financial institutions need to be aware of these countries and identify all accounts originating from or moving through them. This exercise will also help financial institutions comply with the Trading with the Enemy Act, which prohibits financial transactions with designated nations.
- Conduct a systematic review of all current correspondent accounts with foreign banks to identify high-risk banks and close accounts with problem banks.
- Conduct regular monitoring of correspondent bank accounts and review all related wire transfer activity.
- Conduct training of correspondent bankers in order to enable them to identify potential

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misconduct by foreign respondent banks.

- Take affirmative steps aimed at getting to know client respondent banks. This can consist of studying and analyzing the nature of the respondent bank’s business as well as securing a realistic net worth of the bank. These steps will also help in identifying shell or offshore banks with little or no physical presence in a foreign country.

- Determine whether any potential foreign bank clients are at all involved in any law enforcement or regulatory actions related to money laundering, fraud, tax evasion, or drug trafficking.

- Take affirmative steps aimed at familiarizing domestic financial institutions with the clients of their foreign bank’s clients.

Although one cannot predict the degree to which prosecutors and bank regulators ultimately will enforce the act’s provisions, it is undeniable that correspondent banking has been forever altered as a result of the events of September 11. The extent to which financial institutions avoid running afoul of the act will turn, in large part, on their willingness and determination to implement protective measures. The commitment to such measures will ultimately determine whether U.S.-based financial institutions successfully avoid the penalties associated with the act while continuing to maintain and foster legitimate correspondent banking relationships.

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2 U.S. Senate, Committee on Governmental Affairs, Minority Staff of the Permanent Subcommittee on Investigations, Report on Correspondent Banking: A Gateway for Money Laundering (Feb. 5, 2001) [hereinafter Senate Report].
3 Id. at 1, 14-17.
5 Senate Report, supra note 2, at 1-2, 13, 56.
8 Senate Report, supra note 2, at 3, 26-27, 30-31.
9 United States v. Rayhani, Case No. CR-95-984-JGD (C.D. Cal.).
10 Senate Report, supra note 2, at 32-33.
11 Id. at 33.
12 Id. at 36-37.
13 Id. at 37.
14 Id. at 34-35.
15 Id. at 35-36.
16 Id. at 37-38.
18 IMLAFA uses “financial institution” as the term is defined at 31 U.S.C. §5312(a)(2) of the Bank Secrecy Act. The definition includes commercial banks, thrifts, credit unions, broker-dealers, mutual funds, insurance companies, U.S. branches and agencies of foreign banks, money transmitters, and other entities capable of handling large volumes of currency and other payments.

19 IMLAFA defines a “correspondent account” as an account established to receive deposits from or make payments of a foreign financial institution or to handle other financial transactions related to the foreign financial institution.

20 On July 23, 2002, 270 days after the enactment date of IMLAFA, 31 U.S.C. §5318(i) took effect. All due diligence requirements apply to all correspondent accounts opened before or after the enactment of the section. The secretary of the treasury was also required—within 180 days of the enactment of IMLAFA (i.e., April 24, 2002)—to promulgate all regulations needed to define further and implement the requisite due diligence standards.

21 To date, the only intergovernmental organization that disseminates a list of noncooperative nations is the Financial Action Task Force on Money Laundering (FATF). The United States belongs to this group and currently has approved of its list of noncooperative countries. The current FATF list: Cook Islands, Dominica, Egypt, Grenada, Guatemala, Hungary, Indonesia, Israel, Lebanon, Marshall Islands, Myanmar, Nauru, Nigeria, Niue, Philippines, Russia, St. Kitts and Nevis, St. Vincent and the Grenadines, and Ukraine.


24 The term “covered financial institution” does not include all U.S. financial institutions. Instead, it includes insured banks, commercial banks or trust companies, private bankers, agencies or branches of foreign banks in the United States, insured institutions, thrifts, and registered broker-dealers.

25 The act required the closing of all correspondent accounts for shell banks by Dec. 25, 2001.

26 An affiliate is a foreign bank that is controlled by, or under the common control of, a depository institution, credit union, or foreign bank.


28 Section 5318(k) took effect on Dec. 25, 2001, 60 days after the enactment of IMLAFA.


30 Pursuant to IMLAFA’s requirements, on Feb. 26, 2002, the National Association of Securities Dealers, which supervises and examines over 3,500 U.S.-based securities firms, issued a regulation requiring firms to enact a five-pronged anti-money laundering program by Apr. 24, 2002. See NASD RULE 3011. Similarly, on Apr. 24, 2002, the Financial Crimes Enforcement Network of the Department of the Treasury enacted a series of federal regulations requiring financial institutions to establish anti-money laundering programs consistent with the requirements of the newly amended 31 U.S.C. §5318(b). See 31 C.F.R. §§103.120 et seq. These rules apply to a wide array of financial institutions, including banks, savings associations, credit unions, registered brokers and dealers in securities, futures commission merchants, casinos, money services businesses (including currency dealers or exchangers, check cashers, issuers of travelers checks or money orders, and money transmitters), operators of credit card systems, and mutual funds. For now, all other financial institutions are temporarily exempted pending further study by the Financial Crimes Enforcement Network and the Treasury Department of the money laundering risks posed by such institutions. See 31 C.F.R. §103.170. 

Drastic times require drastic measures. The savagery of September 11 must yield to justice, which means that fugitives stuffed in caves or seeking refuge in far-flung lands must inexorably be produced before U.S. courts for judgment on their heinous acts. The pursuit of these international terrorists, wherever in the world they hide, is a mission of vital importance to the national security of the United States—indeed to the civilized world.

Technology (particularly satellite communications technology), international commerce, and the rapidly expanding international presence of U.S. law enforcement have worked in the last 30 years to make the world a much smaller place for international criminals. Laws passed by Congress now reach and thus regulate conduct occurring far beyond U.S. borders. The first series of legislation was prompted by a spate of airline hijackings in the 1960s and early 1970s. The Comprehensive Crime Control Act of 1984 criminalized the act of taking Americans hostages anywhere in the world. The act further provided U.S. courts with jurisdiction over any crime occurring “outside the jurisdiction of any nation” when the offense is committed by or against a U.S. person. In the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Congress went further, criminalizing acts of violence occurring anywhere outside the United States if the victim is an American citizen. The 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) outlawed, among other things, providing material support or resources to foreign organizations engaged in terrorist activities—one of several criminal statutes invoked in the prosecution of John Walker Lindh, who is charged with providing his “personal services” to the Taliban.

Concurrent with this expansion of American
can criminal jurisdiction, the overseas presence of U.S. law enforcement agencies has mushroomed in recent years. Various federal agencies, including the Federal Bureau of Investigation, Drug Enforcement Agency, Internal Revenue Service, and U.S. Customs Service, now have offices in many foreign countries. Between 1967 and 2000, the DEA expanded its presence abroad from a dozen agents in 8 foreign countries to 338 agents in 44 countries. The FBI’s overseas enforcement has likewise expanded to 34 legal attaché offices (known as LEGATs). FBI agents are now stationed in 52 countries. These U.S. agents, working closely with their foreign counterparts, serve principally to collect evidence in criminal matters eventually prosecuted in the United States and in combating international terrorism.

While the reach of U.S. law enforcement overseas has been greatly extended in recent years and undoubtedly will reach unprecedented levels as a result of September 11, the Constitution’s reach has been correspondingly limited by recent Supreme Court decisions. As recently as 1986, when the Third Restatement on Foreign Relations Law was articulated, it was thought that constitutional protections set forth in the U.S. Bill of Rights would be applied to U.S. actions abroad as well as at home. The Supreme Court expressed a contrary view in a series of cases beginning with United States v. Verdugo-Urquidez in 1990, in which the Court held that the Fourth Amendment did not apply to a warrantless search in Mexico conducted by U.S. agents. Anticipating with chilling perspicacity the future need for U.S. latitude in taking action in foreign lands unrestrained by limitations imposed by the U.S. Constitution, the Supreme Court said:

For better or worse, we live in a world of nation-states in which our government must be able to function effectively in the company of sovereign nations. Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country....Situations threatening to important American interests may arise halfway around the globe, situations which...require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty or legislation.

When international terrorists or U.S. fugitives are detected in these sovereign nations, various methods may be used by the political branch of government to extract them. Three principal means, which effect increasingly serious consequences, have evolved through which such criminals may be brought, invariably against their will, before a U.S. court and thus subjected to American justice: 1) extradition, 2) irregular rendition, and 3) the exercise of war powers. Collectively, these processes are termed generically as rendition. The preferred method under international law is extradition.

Extradition

International extradition occurs when a person suspected of committing a crime in one country (the requesting country) but who is found in another country (the host country) is surrendered through diplomatic means for trial or punishment in the requesting country. Extradition is based on fundamental principles of international law reflecting respect for the territorial integrity of another country, specifically the notion that agents of one government cannot enter and perform sovereign acts—arresting suspected criminals—in the territory of another state without the host state’s permission, implicit or explicit. The extradition process is necessarily formal and defined by treaty. A treaty obligation, the Supreme Court has held, invokes obligations more compelling than just international law; it is “the law of the land...equivalent to an act of the [federal] legislature.” So, requirements of law resulting from the executive branch’s entering into extradition treaties are important and may be enforced by the courts.

A fundamental aspect of any extradition treaty is the principle of reciprocity: A foreign government (the host country) grants an extradition request in reliance on a promise of future extradition of an alleged offender sought by the host country who may be found in the requesting country. Most treaties specify a limited number of specific extraditable offenses, which generally must constitute a criminal offense in both nations. It is rare, for example, for a tax offense or an inchoate crime, such as conspiracy, to be extraditable. A second principle, reflected in most extradition treaties, is the imposition of an obligation on the host country either to extradite or prosecute criminal suspects found within its borders. Modern treaties typically require the contracting nations to provide “the greatest measure of assistance in connection with the criminal proceedings, whether that be to extradite or prosecute.”

For extradition treaties to work effectively, this duty must be exercised, of course, with appropriate diligence.

U.S. efforts to invoke extradition treaties have frequently been stymied by a number of longstanding exceptions. Israel, Mexico, and many European countries have consistently adhered to a policy of refusing to extradite their own citizens, a practice that derives from the medieval principle that loyal subjects of the crown were entitled to ius de non evocando, the right not to be withdrawn from the jurisdiction and protection of the crown. Some countries, most notably Canada and Mexico, will refuse to extradite fugitives (even U.S. citizens) who, on account of their crimes, are subject to the death penalty. The Mexican government further refuses to hand over persons potentially subject to life sentences (without possibility of parole), making the extradition process south of the border particularly problematic.

Extradition treaties invariably contain another loophole—the “political offense exception”—which has frequently frustrated U.S. law enforcement in its efforts to extradite foreign terrorists who profess their crimes to be political in nature. The exception, intended to apply to true political dissidents, has often been applied by politically sympathetic courts to terrorists who prefer to articulate their nostrum of political change through bombs rather than words, and indeed, this very rationale has hindered the extradition from the United States of at least one IRA terrorist.

The U.S. Department of Justice coordinates all foreign extradition requests through its Office of International Affairs (OIA) which “provides information and advice to Federal and State Prosecutors about the procedure for requesting extradition from abroad.” Every extradition treaty to which the United States is a party requires that a formal request for extradition be forwarded through diplomatic channels with appropriate supporting documentation to comport with the host country’s due process requirements. Such documentation typically consists of an affidavit from the U.S. prosecutor setting forth the facts underlying the offense as well as information on the specific crimes allegedly committed and the evidence of their commission. In urgent cases, a provisional arrest warrant may be sought, enabling the host country to apprehend and detain the fugitive pending submission of a formal extradition request. If the OIA determines that the offense and the fugitive are extraditable under the terms of the treaty, there are few factual defenses available to the fugitive to resist the extradition process, which generally results in the successful extradition of the subject after a preferably short delay.

Extradition law generally requires the receiving nation to try the extradited person solely on the charges set forth in the extradition request. This principle was reaffirmed by the Supreme Court in United States v.
Rauscher. Rauscher had been extradited by England to the United States pursuant to the 1842 Webster-Ashburton Treaty to stand trial for murder on the high seas. Once the defendant arrived in the United States, he was prosecuted on a related but different charge. Although the treaty did not expressly prohibit the United States from varying the charges against the accused, the Court held that the “doctrine of specialty,” which was part of customary international law, required an extraditing government to confine its prosecution to the charges for which the individual was surrendered. Consistent with this principle, the Supreme Court held that the treaty implicitly contained such a requirement, which was then enforceable by the defendant.

Irregular Rendition

Although extradition is the preferred method under settled principles of international law, it obviously does not always work. Indeed the efficacy of extradition is frequently diminished by political unrest, lack of foreign will (including political resistance borne of corrupt influences), or simply the absence of an extradition treaty. Sometimes, the process is just too time-consuming. Other times political complications make formal extradition proceedings problematic. When this situation presents itself, self-help sometimes comes into play, a concept euphemistically termed irregular rendition.

In short, irregular rendition is borne of frustration caused by the unwillingness of a country upon which a valid extradition request has been made to carry out its international obligations (that is, to prosecute or extradite the fugitive). The historical roots for irregular rendition run deep; indeed the practice goes back further than regular rendition—the practice of extradition. In U.S. history, frequent exchanges of prisoners occurring on the borders of Canada and Mexico were the result of such self-help. A notorious historical example was the manner by which the United States retrieved John Surratt, who was accused of conspiracy in the assassination of Abraham Lincoln. Surratt was snatched forcibly by U.S. agents from Alexandria, Egypt, where he had fled following the assassination.

The varieties of irregular rendition fall roughly into three categories:

- **Transnational forcible abduction.** One sovereign may simply kidnap the culprit seeking refuge in a foreign land, an action that is invariably against the law of the foreign jurisdiction. In some cases, the abductee is literally cast over the U.S. border by foreign agents working for or at the direction of agents of the U.S. government and promptly taken into custody.
- **Informal surrender.** Without formal process, the foreign jurisdiction may simply grant permission or silently accede to the requesting nation’s demand for the surrender of the fugitive or it may affirmatively move to deport or expel him or her. This practice, also referred to as disguised extradition, occurs frequently in cases in which the fugitive is not a citizen of the host country. Handing the fugitive over in this manner has occurred with some frequency between the United States and Canada. An example of informal surrender is the February 1995 arrest by FBI agents in Islamabad, Pakistan, of international terrorist Ramzi Ahmed Yousef, the mastermind of the 1993 World Trade Center bombing. Yousef was quietly handed over to U.S. agents by the Pakistanis and transported the following day to the United States without any formal extradition proceeding or protest.
- **Lures.** Tricked by subterfuge or deception, the fugitive may be lured from an extradition refuge to U.S. territory, international waters, or to another country permitting extradition to the United States. Fugitives have been enticed back to the United States in the past by schemes promising that they were winners of a prize or sweepstakes or “by inviting a fugitive by telephone to a party in the United States.” A high-profile example of a successful lure occurred in 1987 when the FBI and CIA enticed suspected terrorist Fawaz Yunis, a citizen of Lebanon, into a vessel in international waters off the coast of Cyprus under the guise of participating in a drug deal. Once Yunis stepped on board, the FBI arrested him on charges of aircraft piracy, returning him to the United States on U.S. naval craft. Yunis’s jurisdictional challenge in district court to the manner of his arrest ultimately proved fruitless.

Transnational forcible abduction—that is, unlawful abduction of international fugitives—is by far the most controversial of the three varieties of irregular rendition, with the most notorious instance probably being the 1960 kidnapping of Adolf Eichmann by Israeli agents. Eichmann, one of the principal participants in Hitler’s Final Solution, fled Europe in the aftermath of World War II, eventually settling in Argentina under an assumed name. Tracked by his relentless Israeli pursuers, Eichmann was seized one night after he got off work at an automobile factory, bundled unto a private plane chartered by the Israeli government, and flown to Israel. Argentina vehemently protested the kidnapping as a violation of its sovereignty, charging that “through its agents, Israel had violated the sovereignty of Argentina.” Ultimately, nothing came of these protests, and Eichmann was tried by an Israeli court, convicted, and executed in 1962.

Forcible transnational abduction typically raises legal issues when a fugitive arrives in the United States. The defendant may challenge the U.S. court’s jurisdiction, particularly when the accused’s physical presence was the direct result of an illegal abduction of some variety and the offended government did not waive the violation. International law is frequently invoked. Indeed, the Restatement of Foreign Relations Law provides that when an offended nation makes a demand for an individual’s return under such circumstances, international law requires that the demand be honored.

Like Israel in the Eichmann case, U.S. courts have generally ignored this rule. Thus, in Ker v. Illinois, the Supreme Court held that an otherwise illegal abduction did not divest the U.S. court of jurisdiction. In that case, a fugitive was kidnapped in Peru by a private security guard despite the existence of an extradition treaty between the United States and Peru and the issuance of an extradition warrant. Forcibly returned to Illinois for trial, Ker moved to dismiss the indictment. Holding that the circumstances of Ker’s arrest did not involve the defendant’s constitutional rights, the Supreme Court stated: “[S]uch forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such offense.” On similar facts, the court reaffirmed this principle nearly a half century later in Frisbie v. Collins, and the doctrine is now known as the Ker-Frisbie doctrine.

The Ker-Frisbie doctrine was believed to have its limits, however. For one thing, in neither case did the sovereign whose ox was gored, so to speak, complain about the incursion on its sovereignty, despite its failure to carry out the extradition request. Second, in Ker the kidnapping was performed by private agents and was not sanctioned (which is to say, not aided or endorsed) by government agents. Moreover, in United States v. Toscanino, the Second Circuit imposed an important qualification on the wide latitude of the Ker-Frisbie doctrine.

In that case, the fugitive, an Italian citizen living in South America, was kidnapped in Montevideo, Uruguay, and transported to Brazil, where he was tortured for weeks while subjected to prolonged interrogation. He was then drugged and flown against his will to the United States to stand trial on drug charges, all of this done allegedly with the complicity, if not direct involvement, of U.S. agents. The court refused to affirm jurisdiction over Toscanino based on the patent unconscionability of these circumstances viewed...
in total. Nevertheless, the following year a different panel of the same court of appeals narrowed Toscanino, holding in United States ex rel Lujan v. Gengler, that absent allegations of brutality by U.S. government agents, an illegal abduction alone was insufficient to divest the trial court of jurisdiction. The court thus restricted Toscanino's application to instances of "shocking governmental misconduct." The Toscanino exception, moreover, has never been endorsed by the Supreme Court and was rejected outright by the Seventh Circuit in Matta-Ballesteros v. Henman.

In 1992, the limits of Ker-Frisbie were stretched further by the strange case of Dr. Humberto Alvarez-Machain, a Mexican physician who was abducted at gunpoint from his medical office in Guadalajara, Mexico, and flown in a private plane to El Paso, Texas, where he was arrested by DEA agents who had procured his indictment for crimes allegedly committed in Mexico.

The Machain case is an excellent example of the legal maxim that hard cases make bad law. Ultimately U.S. authorities prosecuted 19 people, including high-ranking Mexican politicians, police officers, narcotics traffickers, and Machain, for the grisly 1985 kidnapping, torture, and murder of DEA special agent Enrique Camarena-Salazar and his pilot in Mexico. Seven persons ultimately were convicted, all in U.S. federal courts. These heinous crimes committed against a U.S. officer brought the full weight of the U.S. government to bear on the prosecutions. As one federal prosecutor later wrote, "It is conceded that Alvarez-Machain was abducted by Mexican police officers who were acting at the request of the DEA," just as it was clear to U.S. authorities that Machain had assisted in the agent's interrogation by Mexican drug lords "by administering medication to Special Agent Camarena to revive him and to keep him alive so he could be further tortured and interrogated." Despite these extraordinary facts, the Mexican government moved neither to extradite Machain nor to prosecute him or his coconspirators. This international intransigence was simply too great for the U.S. government, in particular for U.S. law enforcement and the DEA, so plans were made to bring the principal offenders, including Machain, before U.S. courts by any means necessary, even if that meant creating an international incident with Mexico—which, of course, it did.

Predictably enough, Machain moved to dismiss the indictment, claiming that the district court lacked jurisdiction to try him because his forcible abduction at the hands of U.S. agents violated the United States-Mexico Extradition Treaty, violated international law, and, unlike Ker, was the subject of a formal diplomatic protest by the Mexican government. Machain argued that Article 9 of the treaty set forth the exclusive means by which the United States could gain custody of a fugitive in Mexico, and that the United States deliberately violated the treaty when it elected to take Machain by force. Under the treaty, neither country is duty-bound to extradite its nationals, and if Mexico chose not to prosecute him, Machain argued, the United States was without remedy—and, notably, without justice. Accepting this argument, District Court Judge Edward Rafeedie dismissed the indictment and ordered Machain's repatriation to Mexico. The Ninth Circuit affirmed.

The Supreme Court reversed the repatriation order in an opinion by Chief Justice William Rehnquist. The Supreme Court's analysis turned on two fundamental issues: first, whether the U.S. government violated the treaty with Mexico by the admittedly unlawful abduction of Machain by U.S. agents, and, second, regardless of the treaty, whether the defendant could raise a jurisdictional challenge based upon his abduction in violation of international law. Applying a literalist and text-specific approach to the first question, the Supreme Court analyzed the United States-Mexico Extradition Treaty, concluding that the treaty merely provided a means, but not an exclusive one, of obtaining jurisdiction over a fugitive. Accordingly, the Supreme Court held that the U.S. government did not violate the extradition treaty when it chose to ignore it. The treaty, thus "provides a mechanism which would not otherwise exist…and establish[es] procedures to be followed when the treaty is invoked." These provisions, the Supreme Court held, were permissive rather than exclusive or mandatory: The United States was not "prohibited" by the treaty from acts of irregular rendition or other extralegal means of removing a wanted fugitive from Mexico.

Although the Court appeared to recognize that the kidnapping was "shocking" (at least to Mexico) and potentially occasioned a "violation of general international law principles," the Court held that Machain's "abduction was not in violation of the Extradition Treaty between the United States and Mexico." Since the treaty was not violated, the Court saw no need to analyze the second question about the violation of international law, finding that issue to be controlled by Ker. "The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States." The Machain decision has generated a great volume of scholarly and international legal discourse, much of it harsh, nearly all of it critical. Professor (now Undersecretary of the Treasury) Jimmy Gurule has defended the practice and the court's decision aptly:

International law [also] imposes a duty on the state [Mexico] to protect the
safety of foreign individuals within its borders—here, Special Agent Camarena.... A state is required to act with “due diligence” to prevent the commission of acts of violence and terrorism within its jurisdiction...[and while the right of territorial sovereignty is important] it is not absolute. Customary international law recognizes the right of a nation to intervene to protect the safety of its nationals abroad.49

**Gunboat Extradition**

The third type of rendition self-help is military in nature—literally sending in the 82nd Airborne, as the Supreme Court appeared to anticipate in *Verdugo-Urquidez*. Direct military action in the form of invasions, coercive use of military force, and the involuntary removal of individuals charged with criminal activity in the United States was infrequently in the last century, although this tactic has shown increasing favor in the battle against terrorists and narcoterrorists and the rogue states supporting them. Direct military action has the benefit of being fast and decisive. Appeals are rare. Sovereignty issues arise, of course, but in some cases the sovereign is unable to muster a protest.

In 1985, faced with a lack of international assistance in apprehending the hijackers of the ocean liner *Achille Lauro* who killed U.S. citizens in committing their crimes, the United States resorted to a military option, deploying American fighter jets to intercept an Egyptian aircraft carrying the hijackers away from their crime and divert the plane to Italy, where the terrorists were taken into custody.

In 1989, the military option was chosen again, this time to reach into a sovereign foreign nation and extract a narcoterrorist who just happened also to be the head of state: General Manuel Antonio Noriega of Panama. U.S. military forces invaded Panama on December 20, 1989. Noriega sought refuge in the Vatican Embassy in Panama City on Christmas eve, eventually surrendering to U.S. troops who controlled the capital. The United States gave three reasons for its invasion of Panama: 1) to capture Noriega and produce him for trial in the United States on a sealed indictment, 2) to protect American lives, and 3) to protect U.S. interests in the canal.50 Whatever the justification, like the Taliban and al Qaeda fighters removed from Afghanistan more than 10 years later by American armed forces, Noriega was swiftly delivered to U.S. jurisdiction. Once in the United States, Noriega sought to dismiss the various indictments lodged against him, arguing that, as the deposed former head of state, he could not, under principles of sovereign immunity, be prosecuted. He further contended that he was a political prisoner brought forcibly and illegally before the jurisdiction of a U.S. court.

The district court rejected Noriega’s claims, and on appeal the Eleventh Circuit affirmed. Rejecting Noriega’s claim to sovereign immunity under the Foreign Sovereign Immunities Act,51 the court held, with a touch of irony, that the executive branch had “manifested its clear sentiment that Noriega should be denied head-of-state immunity.”52 The court also rejected Noriega’s claim that his prosecution should have been foreclosed because he was “brought to the United States in violation of the Treaty Providing for the Extradition of Criminals” between the United States and Panama, ruling that this challenge was foreclosed by *Machain*.53 Finally, Noriega argued the direct military means by which he was brought to the United States—a “military invasion”—constituted outrageous and unconscionable conduct sufficient to “shock the judicial conscience,” thus implicating due process rights. The court rejected this contention as well, finding that Noriega’s due process claim was controlled “by Ker-Frisbie doctrine, which holds that a defendant cannot defeat personal jurisdiction by asserting the illegality of the procurement of his presence.”54 So even a military invasion, it seems, will not serve to block the prosecution of a defendant once the abducted fugitive arrives in the United States.

Employment of abduction or similar methods—rendition by paratrooper—raises serious ethical, diplomatic, and legal concerns that are rooted, at least, in international law. Undoubtedly, it will not be difficult to muster domestic support for such exceptional measures in the wake of the September 11 terrorist attacks on the United States. Indeed every indication is that Americans favor strong and decisive action. Few would object to American agents abducting Osama bin Laden and transporting him back to the United States for trial if he were to be found in a country not amenable to extradition, and it is clear that absent truly outrageous behavior on the part of U.S. agents involved in the abduction, U.S. courts will not entertain due process or other constitutional challenges to the manner by which the terrorists are brought before a U.S. court. Indeed, recent statements by Chief Justice Rehnquist indicate a receptivity of the courts to bend constitutional protections in times of war. “One is reminded,” the chief justice remarked to a group of federal judges, “of the Latin maxim, *inter arma silent leges*. In time of war, the laws are silent.”55

Irregular rendition, therefore, may turn out to be the best weapon of the United States in the war against terrorism. As powerful a weapon as it is, however, it is worthwhile to pause and consider the political and diplomatic costs of its rapid deployment before utilizing such methods to bring terrorists to justice in the United States. At the very least, U.S. forces, military and prosecutorial, should exhaust all extradition efforts and all available channels of diplomatic relief before resorting to drastic measures of self-help.

Failure to do so on a regular and systematic basis could undermine U.S. foreign policy and the nation’s professed adherence to the rule of law, just as Israel paid dearly in diplomatic capital for its abduction of Eichmann in 1960. Israel’s cause then was no less just, no less compelling, than the need of the United States to secure justice in U.S. courts.

As compelling as the need appears to be to do justice by these heinous terrorists, when the law falls silent—even if only temporarily quieted by the exigencies of war—because the ends are perceived to be grave, the law is weakened, and so with it our fundamental liberties.

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4 *The Antiterrorism and Effective Death Penalty Act of 1996*, 18 U.S.C. §§2339A, 2339B. Walker is charged with, among other things, providing “material support and assistance” to organizations designated as “terrorist” by the Secretary of State under §8 U.S.C. §1189. Providing such “material support or services” is alleged by the government in that case to include providing “personnel” or personal services in a foreign country, arguably a broad assertion of jurisdictional authority.
7 See *RESTATEMENT (THIRD) OF FOREIGN RELATIONS §453 cmt. a.*
9 Id. at 274 (internal citations omitted).
12 Id. at 418.
13 Extradition has not always been used for morally worthwhile purposes, however. In the United States, early extradition cases were the product of efforts to forcibly return fugitive slaves to the United States from Mexico. (See *ETHAN A. NADLER*, *COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF UNITED STATES CRIMINAL LAW ENFORCEMENT* 33-45 (1993)).
14 Bilateral extradition treaties to which the United States is a party are set forth in the table following 18 U.S.C. §3181.
15 For example, three broad-based international treaties spawned by the aircraft hijacking epidemic of the 1970s and the 1979 takeover of the U.S. Embassy in Iran—the
Never-ending Story?

9-15.210. Some countries, however, will not permit extradition if the defendant's presence was procured by deception or subterfuge. This method is recognized and accepted by the U.S. Department of Justice. See U.S. ATTORNEY'S MANUAL, supra note 22, 9-15.610.


See International Fugitives, supra note 20, at 53. The Israeli action received widespread international criticism as well and resulted in a U.N. Security Council resolution condemning it. Id. at 9-15.620.


International Fugitives, supra note 20, at 53. The Israeli action received widespread international criticism as well and resulted in a U.N. Security Council resolution condemning it. Id. at 9-15.620.


Id. at 853.


United States v. Toscanino, 500 F. 2d 267 (2d Cir.), reh'g denied, 504 F. 2d 1380 (2d Cir. 1974).


Matta-Ballesteros v. Henman, 896 F. 2d 255, 263 (7th Cir.), cert. denied, 111 S. Ct. 209 (1990) (Defendant's kidnapping, torture, and delivery from Honduras to the United States created no due process violation or jurisdictional bar.).


Id. at 471-72.

The Mexican government not only protested the illegal kidnapping and violation of its sovereignty, it petitioned the United States to extradite the lead DEA agent who directed the operation and took Machain into custody when he reached the U.S.


Id., 504 U.S. at 665-66 (emphasis added).

Id. at 663.

Gurule, supra note 43, at 468.

See United States v. Noriega, 117 F. 3d 1206 (11th Cir. 1997).


Noriega, 117 F. 3d at 1212.

Id. at 1214.

Id. (quoting United States v. Darby, 744 F. 2d 1508, 1520 (11th Cir. 1984)).

On September 11, 2001, the world saw two planes crash into two different buildings at New York’s World Trade Center some 16 minutes apart, igniting two separate fires and ultimately resulting in the collapse of each of those buildings and causing damage to other buildings in the vicinity. The world also learned of a plane crashing into a field in Pennsylvania and saw another plane crash into the Pentagon. Four planes had been hijacked, belonging to two different airlines leaving three different airports with two cities as their destinations. The destruction of the WTC and its continuing aftermath was transmitted globally, live and nonstop, via television and other media, for the whole world to see.

The collapse of the WTC towers created reverberations both near and far. Not only were businesses near ground zero affected but businesses throughout the country felt the effects of the collapse, with many suffering losses resulting from the interruption of business operations and the imposition of civil authority.

What exactly did the world see that day? Was the loss at the WTC towers, and the resulting damage, attributable directly or indirectly to one series of similar causes? Or was the loss and damage at each tower attributable to two separate and dissimilar causes? Can an event be one thing to the general public and another thing for insurance purposes? And does the distinction make a difference? What insurance is applicable to these losses? What rights, duties, and obligations do the insurers of the affected properties and persons have to their policyholders? The answers lie in how the applicable insurance contracts are phrased, interpreted, and applied.

Insurance coverage for the events of September 11 will hinge upon the interpretation of often ambiguous policy language.
suits involving the WTC, parties have raised issues regarding whether the WTC towers must be rebuilt before policy benefits are payable, or whether monies can be paid as expenses are incurred. Other suits have sought to adjudicate whether New York courts have jurisdiction over Bermuda insurers and whether arbitration in London could be enforced.1

Several of the WTC suits involve “occurrence” issues under contracts of insurance that were either not issued or not fully negotiated as of September 11.2 These, in particular, have captured the imagination of the legal and insurance communities with the intellectual aspects of the contractual issues presented.

There are claims arising from damaged buildings in the vicinity of the WTC. Mold in ventilation systems of damaged buildings, having been opened to the elements, is a concern. Business owners just outside the designated WTC prohibited zones in lower Manhattan worry about how they can keep their doors open, while businesses just across the street and inside a prohibited zone may still be unable to open.3 Hotels located in far-ranging locations, such as Louisiana, have filed suit or are reported to have submitted claims for business interruption losses.4 Billions of dollars are at stake.

One Occurrence or Two

In October 2001, the first WTC insurance coverage action was filed in the U.S. District Court for the Southern District of New York.5 Other suits involving the WTC property and its insurers followed soon thereafter in the same court.6 These cases have been consol-

idated and are being handled by the same judge. The trial date has been set for November 15, 2002.

To understand the complexity of the insurance issues in these lawsuits, it is necessary to examine the scope and nature of the insurance program that was being negotiated for the WTC properties as of September 11. In court proceedings, the WTC has been described as “a complex of seven commercial buildings. The Port Authority owns Buildings 1 through 6 and the underlying land, the retail mall underneath the complex, and the ground beneath Building 7.”7 The Port Authority of New York and New Jersey entered into a 99-year lease with various entities controlled by Larry Silverstein on or about July 16, 2001.8 The entities that leased the WTC properties from the Port Authority are referred to by the court as the Silverstein Parties.

The WTC property insurance program involves more than 20 insurance companies collectively providing $3.5468 billion in per occurrence limits, with a primary level of $10 million per occurrence and 11 excess layers.9 Despite a projection that $5.05 billion in insurance would be necessary “both to replace the buildings and cover the group’s rental income losses in the event of a catastrophe,” the insurers contend that the “lessees instead bought insurance almost sufficient to rebuild without regard to any possible loss of rental income.”10 Nonetheless, according to the Silverstein Parties, this was the largest property insurance program ever issued on a single real estate complex, and the Silverstein Parties’ broker, Willis Limited, has been said to have “canvased the world’s insurance markets to place first party property coverage for their leasehold.”11

Primary policies for the property coverage provided by The Travelers Indemnity Company were initially issued on or about September 14, 2001.12 SR International Business Insurance Co., Ltd.—referred to as Swiss Re—is an excess insurer participating in the WTC insurance program. Swiss Re agreed “based upon the terms of signed placing slips...to underwrite 22% of the lessee’s coverage, excess of the primary $10 million layer.”13

Swiss Re claims that in June 2001, its underwriters received an underwriting submission and placing slip from Willis.14 It contends that the underwriting submission contained the proposal of coverages, terms, and conditions for the Silverstein Parties’ interests as lessees of the WTC and that the placing slip, which identified the terms of the coverages that Silverstein was seeking, was submitted with a proposed policy form, the “WilProp form.”15

The proposed WilProp form included an “occurrence” definition providing that losses attributable to any cause or series of causes would be subject to a single occurrence limit.16 Specifically, the proposed occurrence language in the WilProp form provided:

Occurrence shall mean all losses or damages that are attributable directly or indirectly to one cause or one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occur.17

Travelers agreed to participate in the primary level of insurance and in various excess levels, conditioning its willingness to do so upon it being the lead underwriter using its own form of policy for property insurance—“the Travelers’ form”—rather than the WilProp form.18 Nonetheless, Travelers asserts that the WilProp form was the basis not only for its decision to issue its policy but also for the language in the deductible portion of its policy. Therefore, Travelers, like the other insurers, is arguing that the attack on the WTC constitutes only one occurrence due to policy language, New York law, and the intentions of the parties as evidenced by the WilProp form.

As the representative of the Silverstein Parties, Willis is alleged to have accepted the Travelers’ position as the lead underwriter and to have adopted the ‘Travelers’ form as the form policy, subject to some further modifications reflecting exposures unique to the WTC.19 In this regard, the Silverstein Parties contend that “once the

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What’s in a Word

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S. District Judge John S. Martin Jr., in his Opinion and Order denying the Silverstein Parties motion for summary judgment in World Trade Center Properties v. Travelers Indemnity Company, asked, “Is the term ‘occurrence’ ambiguous?” The judge continued, “As Justice Holmes noted more than 80 years ago, ‘A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.’” The judge also supplied his own answer: “The history of litigation over the meaning of the term ‘occurrence’ amply demonstrates that its meaning is far from unambiguous and must be divined from the particular context in which it is used.”

Earlier in his opinion, the judge noted, “Several hundred years ago, Lord Chief Justice Coke observed that truth is the mother of justice.” Judge Martin continued, “Our system of justice is founded on the principle that litigation is to be a search for the truth; it is not some type of intellectual game that is circumscribed by the inflexible rules that define it.” The judge’s conclusion was unambiguous.

“As the representative of the Silverstein Parties, Willis is alleged to have accepted the Travelers’ position as the lead underwriter and to have adopted the ‘Travelers’ form as the form policy, subject to some further modifications reflecting exposures unique to the WTC.” In this regard, the Silverstein Parties contend that “once the
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lead underwriter has been designated, it is customary that the co-insurers and excess insurers will ‘follow the form’ of the lead underwriter with respect to the terms of their own coverage.29

The Silverstein Parties have taken the position that because the Travelers’ form contained no special or expanded definition of “occurrence,” it therefore left the term to be interpreted and applied in accordance with New York law. The Silverstein Parties contend, “Under New York law, absent any language to the contrary, an ‘occurrence’ is defined as the immediate unfortunate event resulting in a loss—and not any more remote cause, plot or scheme that may lie behind or bring about the immediate cause.”30

Swiss Re filed the initial coverage action, naming World Trade Center Properties, various Silverstein and Westfield entities, the Port Authority of New York and New Jersey, and others with property interests in the WTC buildings as defendants, seeking a declaration of rights and duties of the parties to the Swiss Re share of the insurance program.22 There is no issue about whether there was in fact an agreement to provide insurance. Swiss Re specifically acknowledges in its complaint that “Swiss Re is prepared to honor its insurance obligations following the September 11 attack based upon insurance policy language provided by Mr. Silverstein’s representatives [Willis] at the time Swiss Re agreed to underwrite the property insurance for the World Trade Center.”31 However, because “there is insufficient insurance to both rebuild the World Trade Center and to fund years of rent interruption” and “the potential payment to the Silverstein group for years of lost rental income could erode coverage to which other insureds under the policy are entitled for purposes of rebuilding,” Swiss Re requests a declaration of rights.29

The primary question that the court has been asked to address in connection with these coverage actions is whether the property damage at the WTC resulted from one occurrence or two. The answer to this question will resolve the issue of the amount that the Silverstein Parties are entitled for purposes of rebuilding, Swiss Re’s agreement to the terms of the insurance coverage a condition of its obligation to the insured.32 In particular, Swiss Re asserts that as of September 11, “Willis...had represented to Swiss Re in its underwriting submission that [the WilProp language] would be the starting point for any Swiss Re policy.”36

The Silverstein Parties, on the other hand, have taken the position that their interpretation of New York law on the meaning of “occurrence,” and their insistence that the lack of an “occurrence” definition in the Travelers policy should apply to the other policies, must result in a determination that there were two occurrences and thus the limits for two occurrences (approximately $7.1 billion) should be available to the Silverstein Parties in connection with their loss.

This issue of one occurrence or two is not a simple matter of how many planes hit how many buildings and started how many fires. The answer lies in whether the court finds the WilProp form to be the basis for all the policies, including the Travelers policy, and if so, how the court then applies the wording of the form. Simply stated, this issue as to the number of occurrences is contractually driven. To be resolved by the application of New York law, evidence regarding underwriting negotiations and expectations of the parties regarding the terms and conditions of the insurance contracts has been held relevant to the determination of whether the WilProp form should be applied or if there is some other definition of “occurrence” that might be more reasonably applied. Once it has been determined what specific policy language was negotiated and/or intended, the focus will move to applying the facts of the loss to the particular language adjudged to be part of each particular insurance contract. (It should be noted that in other suits, the Silverstein Parties are reported to have reached settlements and agreed that only one occurrence payment is due.35)

This process invokes the universal threshold question regarding contract disputes: How is the contract to be interpreted? New York is a state that adheres to the general rule that “courts will not look behind the plain meaning of the words of a contract, no matter how strong the extrinsic evidence that the parties intended something other than that which is indicated by their words.”38 However, “if the contract language is ambiguous, then the courts should look to extrinsic evidence to determine the true intent of the parties.”39 Further, “[a] term is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and...
15. In order for the typical business interruption coverage to apply, there must be:
   A. Actual loss of income.
   B. Suspension of operations.
   C. Damages to covered property.
   D. All of the above.

16. What is the primary issue regarding civil authority coverage before the court in 730 Bienville Partners v. Assurance Company of America?
   A. Physical damage to covered property.
   B. Liability of the airlines.
   C. The reasonableness of the airport shutdown order.
   D. All of the above.

17. Was there a civil authority order in effect near ground zero, with prohibited or restricted access zones?
   A. Upon the action taken by the civil authority in prohibiting access to the described premises.
   B. When the national state of emergency is declared over.
   C. When the local government makes a decision that the interruption of business is over.
   D. All of the above.

18. When does business interruption coverage end?
   A. When the “period of restoration” ends.
   B. When the national state of emergency is declared over.
   C. When the local government makes a decision that the interruption of business is over.
   D. All of the above.

19. When does extra expense and civil authority coverage begin?
   A. Upon the action taken by the civil authority in prohibiting access to the described premises.
   B. On the date of direct physical loss.
   C. 72 hours after the civil authority prohibits access to the described premises.
   D. None of the above.

20. Extra expense and civil authority coverage ends 1) three consecutive weeks after the civil authority prohibits access to the described premises, or 2) when the insured's business income coverage ends; whichever is later.
   A. Access to the described premises.
   B. Access to the neighbor’s premises.
   C. Access to police.
   D. Access to the fire station.

1. Study the MCLE article in this issue.
2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
3. Mail the answer sheet and the $15 testing fee ($20 for non-LACBA members) to:
   Los Angeles Lawyer
   MCLE Test
   P.O. Box 55020
   Los Angeles, CA 90055

Make checks payable to Los Angeles Lawyer.

4. Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-assessment activity.

5. For future reference, please retain the MCLE test materials returned to you.

Answers
Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1. □ A □ B □ C □ D
2. □ A □ B □ C □ D
3. □ A □ B □ C □ D
4. □ A □ B □ C □ D
5. □ A □ B □ C □ D
6. □ Yes □ No
7. □ A □ B □ C □ D
8. □ True □ False
9. □ True □ False
10. □ A □ B □ C □ D
11. □ Yes □ No
12. □ A □ B □ C □ D
13. □ A □ B □ C □ D
14. □ A □ B □ C □ D
15. □ A □ B □ C □ D
16. □ A □ B □ C □ D
17. □ Yes □ No
18. □ A □ B □ C □ D
19. □ A □ B □ C □ D
20. □ True □ False
who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.30

With this as the threshold, on June 3, 2002, in the first substantive legal opinion to emanate from the consolidated WTC cases, the trial judge in World Trade Center Properties v. The Travelers Indemnity Company found the term “occurrence” to be ambiguous. His ruling applies to each of the occurrence-related WTC cases. (See “What’s in a Word,” page 40.) Thus the interpretation and application of the insurance contracts at issue will be made after consideration of extrinsic evidence:

In sum, none of the relevant cases compels a finding that the term “occurrence” has such an unambiguous meaning that, in its search for truth, justice should blind itself to the wealth of extrinsic evidence concerning the parties’ intentions that is available in this case. This includes the specific definition of the term “occurrence” circulated by the insurance agent for the Silverstein Parties, testimony and documents relating to the negotiations prior to September 11th and the overall structure of the insurance program from the WTC, and testimony and documentary evidence concerning statements made after September 11th by those who had been involved in negotiating the insurance contracts, in which they expressed their views on the question of whether there had been one or two occurrences.31

The judge’s opinion is similar to California authority on this issue, albeit from a slightly different perspective. For example, in a case involving the number of occurrences to be applied under a property policy in a situation involving 653 thefts of diesel fuel from a pumping facility by tanker truck drivers over an 11-month period, a California appellate court grappled with “what meaning is to be given the undefined term ‘occurrence’, and could these thefts constitute only one occurrence so as to require application of a single deductible rather than one for each of the six hundred fifty-three thefts?”32

The California court, like the Travelers court, first approached the threshold question of contract interpretation before moving to the question of whether the undefined term “occurrence” was ambiguous:

The principles which govern the interpretation of insurance contracts are both familiar and well settled. Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code § 1636.)

Such intent is to be inferred, if possible, solely from the written provisions of the contract. The “clear and explicit” meaning of these provisions, interpreted in their “ordinary and popular sense,” unless “used by the parties in a technical sense or a special meaning is given to them by usage” (Civil Code § 1644) controls judicial interpretation. (Civil Code § 1638.)…This reliance on common understanding of language is bedrock. Equally important are the requirements of reasonableness and context. An insurance policy provision is ambiguous when it is capable of two or more constructions both of which are reasonable…. [L]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case….33

After referring to dictionary definitions of “occurrence” and the manner in which the term is defined in liability policies, the court determined that the question of whether “occurrence” was an ambiguous term could not be resolved by reference to the ordinary and everyday usage of the word. The court thus concluded:

[W]e must interpret the term “occurrence” in context, with regard to its intended function in the policy. As used in the policy, the term “occurrence” reasonably contemplates that multiple claims could, in at least some circumstances, be treated as a single occurrence or loss. It appears reasonable to us that the term “occurrence” as used in the deductible clause is effectively referring to a loss. In our view…multiple claims, all due to the same cause or a related cause, would be considered a single loss….34

The matter was reversed and remanded to the trial court for a determination as to whether there was “an organized and systematic scheme [regarding] its diesel fuel products.” The court held that if such a scheme were to be established, the thefts would be treated as one single occurrence.

In considering this question of whether a series of acts constituted a single occurrence or multiple occurrences, the California court looked to the cause of the loss, with a particular focus on the ruling in a factually similar Third Circuit case.35 In that case, the trial court had held that thefts “constituted one occurrence because they were part of a single continuous scheme,” determining “that each theft was a part of a larger scheme…and that the scheme to steal was the proximate cause of each theft.”36 In reaching its decision, the California court stated:

Courts, both in California and across the country, have reached a similar conclusion when faced with a fact situation involving a series of related acts which can be attributed to a single cause; and the same principle is applied whether the coverage involves property, liability or fidelity insurance.37

By contrast, the Ninth Circuit, in an unpublished opinion decided September 11, 2001, determined that arson fires at four different county courthouses, set by the same individual, were four separate occurrences, with the seeming distinction being whether or not there had been a concerted plan of action.38

These are the same questions facing the New York court in the WTC cases. By ruling in Travelers that the term “occurrence” was ambiguous, and in denying summary judgment for the Silverstein Parties, the court has set the stage for the factual issues to be developed, from which it can then determine the intent of the parties as it interprets and applies the insurance contracts at issue. Assuming that the language in the WilProp form is applied to the loss, it would appear that a reasonable reading of the “occurrence” definition and the factual information developed since September 11 could dictate the finding of one occurrence rather than two.

Business Interruption

Among the other September 11 insurance claims, claims of business interruption have been asserted by businesses in the New York and Pentagon areas and by businesses located far away from ground zero and the prohibited zones of lower Manhattan. The losses and insurance claims arising from September 11 encompass a broad array of elements. After the attacks in New York, Washington, and Pennsylvania, the Federal Aviation Administration shut down the country’s commercial airports, leaving stranded passengers, including tourists and people traveling on business. In New York, civil authority was imposed until September 17, 2001. Each of the prohibited zones in the WTC area had their own level of allowable activity. As a result of the damaged and contaminated commercial and residential buildings in the areas surrounding the WTC, businesses needed alternative office space and people lost their jobs. There was an immediate drop in tourism.

Indeed, businesses throughout the nation that are dependent upon tourism and travel lost income, just as did those located in the WTC and its environs. These businesses have made claims on their property policies to seek recovery of their lost profits. The typical claimant is a hotel in a tourist locale such as Hawaii or Las Vegas that relies on travelers who arrive by airplane. With the grounding of all airplanes and the closure of all air-
ports, hotels had an immediate decrease in occupancy and loss of income. Some unique business interruption claims include those asserted by lessees in response to various aspects of being relocated, including the way relocation to a new space was handled by a landlord, the cleanup efforts in the damaged prior space, and rental obligations.

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These claims and others have caused insurers and insureds to examine their coverages for business interruption and the imposition of civil authority with renewed interest. The language in the Insurance Services Office, Inc. (ISO) Business Interruption coverage form illustrates the typical business interruption coverage in insuring agreements:

We will pay for the actual loss of Business Income you sustain due to the necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration.’ The ‘suspension’ must be caused by direct physical loss of or damage to property at the premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of the site at which the described premises are located.

Thus, the coverage requires the following elements:
1) Actual loss of income.
2) Suspension of operations.
3) Direct physical loss to…
4) Covered property...
5) Caused by a “covered cause of loss.”

With a hotel or a restaurant located in an airport, one can easily determine that there is a loss of income and a suspension of operations. These properties, however, were not directly physically damaged. Thus, the primary issue for remote facilities and businesses is whether the WTC and the Pentagon can be deemed “covered property” as described in the policy of the insured hotel or restaurant. Traditionally, damaged property at a remote, unrelated site in most instances is not covered property.

Courts have addressed the issue of direct physical loss in several instances with differing results. In one case, the court rejected an attempt by a hotel to recover lost revenues when a restaurant that was adjacent to the hotel was destroyed.40 Significantly, the hotel was undamaged. In that case, the court found that the damage must be to the covered property of the insured in order for the business interruption coverage to be triggered.

However, at least one court found coverage in a case in which there was an unquestioned danger of direct physical loss to covered property, which required the insured to vacate the premises.41 The court equated damages with risk and therefore the danger of direct physical loss was covered. So there may be some wiggle room in a policy and the analysis of what the policy covers. Insureds are likely to argue that, for example, at the time of the airport shutdown there was a risk of direct physical loss to covered property. Note, however, that the airports were only closed for several days after September 11. This argument would not appear to succeed once the airports were opened and planes were again flying.

There are, however, certain unique versions of business interruption coverages that could apply to losses caused by the shutdown of the nation’s commercial airports and airlines. An example is insurance coverage for contingent business interruption. The ISO Contingent Business Interruption form provides:

This policy covers only against loss resulting directly from necessary interruption of business conducted on premises occupied by the Insured, caused by damage or destruction of any of the real or personal property described above and referred to as CONTRIBUTING PROPERTY(IES) and which is not operated by the Insured, by the peril(s) insured against during the term of this policy, which wholly or partially prevents the delivery of materials to the Insured or to others for the account of the Insured and results directly in a necessary interruption of the Insured’s business.

Thus, if a hotel in Las Vegas needed supplies from a business located in a building that incurred direct physical loss due to the events of September 11, coverage could be found under this endorsement. Given the potential for terrorist attacks in the future, and the interconnection of businesses, it would be wise for insureds and their brokers to become familiar with types of business interruption coverages that extend beyond the basic business interruption form.

Civil Authority

In order to recover loss of income, insureds have also looked to their coverage for the
imposition of civil authority. The ISO Civil Authority coverage form provides in pertinent part:

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property other than at the described premises, caused by or resulting from any Covered Cause of Loss.

The coverage for Business Income will begin 72 hours after the time of that action and will apply for a period of up to three consecutive weeks after coverage begins.

The coverage for Extra Expense will begin immediately after the time of that action and will end:

1. 3 consecutive weeks after the time of that action; or
2. When your Business Income coverage ends; whichever is later.

At first blush, this coverage would seem to apply to the income loss due to the shutdown of the commercial airports. However, under the requirements of the coverage, the civil authority must prohibit access to the insured’s premises, not merely render access to the insured’s premises inconvenient or difficult. For example, in a case stemming from the Los Angeles riots in 1992, the establishment of a curfew by civil authorities did not prevent access to the insured’s theaters following the riots and therefore coverage was not triggered.

The requirement that the civil authority deny direct access to the insured’s property is in accord with an opinion of the Wisconsin Supreme Court. In that case, civil disturbances in Milwaukee in 1967 resulted in a curfew imposed on the city. There was no physical damage to the insured’s property. The Wisconsin Supreme Court reviewed and adopted the analysis of the District of Columbia Court of Appeals that a requirement for civil authority coverage is that access to the insured’s property be prohibited due to damage or destruction to the insured’s property.

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coverage for business interruption was available irrespective of any physical damage to the covered property. Significantly, the civil authority clause of the policy did not state that there was a necessity for direct physical damage.

The issue of whether coverage can be found under the civil authority coverage without physical damage to covered property is now before the U.S. District Court for the Eastern District of Louisiana in a September 11 case.4 A hotel is seeking to invoke its civil authority coverage due to the loss of business because of the issuance of the order to shut down all commercial airports in the United States. The insurer rejected the claim of the hotel because of the lack of physical damage to the airports. It will be instructive to see if the court requires direct physical loss as a condition for coverage.

A civil authority order was in effect near ground zero for several days after the September 11 attacks, with prohibited and restricted access zones limiting pedestrian and motor vehicle traffic. Some policies have time limitations for their civil authority coverage, so the coverage may apply only after a certain number of days, which will limit recoverable amounts.

As September 11 claims and suits are adjudicated, judges, juries, and lawyers will be required to address issues under previously unthinkable circumstances. These issues will be resolved based on a combination of unique factual situations and contractual terms. The outcome of the insurance claims and litigation arising from September 11 will affect the manner in which the corporate community and the insurance industry manage their exposures and calculate the financial risks that they are willing to assume in the future.

1 World Trade Ctr. Props. v. ACE Bermuda Ins. Ins., Ltd. and XL Ins., Ltd., 01 CV 9731 (dismissible, Mar. 25, 2002).

Copies of court filings in the WTC suits and other insurance suits related to September 11, as well as articles and other items regarding terrorism, can be found on the Federation of Defense & Corporate Counsel (FDCC) Web site, available at http://www.thefederation.org (begin search at Terrorism Ins. Guide).


30 ID.
31 ID.
33 ID.
34 ID.
36 ID.
37 ID.
39 ISO form CP 00 30 10 00.
41 Hampton Foods, Inc. v. Aetna Cas. & Surety Co., 787 F. 2d 549 (8th Cir. 1986).
42 ISO form 15 30 05/77.
43 ISO form CP 00 30.
44 ISO form CP 00 30 12 00.
45 ISO form CP 00 30 13 00.
In response to the attacks of September 11, 2001, and to the continued threat of domestic terrorism, the United States has launched a war on terrorism and has undertaken numerous other steps to increase the security of the nation, including the capture and detention of hundreds of suspected al Qaeda terrorists. As part of these efforts, the United States has established a framework for the use of military commissions, rather than the federal courts, for prosecuting suspected terrorists.

The September 11 attacks by al Qaeda terrorists involved hijacked U.S. airplanes that crashed into the World Trade Center, the Pentagon, and the Pennsylvania countryside. These acts resulted in the deaths of approximately 3,000 people, almost all civilians.1 Unfortunately, it appears that the September 11 attacks are not the last of al Qaeda’s terror campaign against the United States: according to Vice President Dick Cheney, “[T]he prospects of a future attack against the United States are almost certain.”2 The U.S. government believes that the use of military commissions (also referred to as military tribunals) to try al Qaeda terrorists will, in part, help prevent future attacks by the organization.

Assuming that the attacks on September 11 were acts of war,3 they also constituted war crimes.4 As the American Bar Association Task Force on Terrorism and the Law, in its Report and Recommendations on Military Commissions, stated: “That a deliberate attack on noncombatant civilians violates the law of war is firmly embedded in customary law of war and also reflected in several conventions such as Common Article 3 of the Geneva Conventions of 1949.”5

Shortly after the attacks, President George Bush dispatched U.S. forces to Afghanistan and, together with allied forces, principally from the United Kingdom, and a coalition of Afghanistan fighters, routed the Taliban regime. As a result of its military campaign in Afghanistan as well as operations in neighboring states, the United States and its allies have captured numerous suspected al Qaeda terrorists and their Taliban accomplices.

According to news reports, by early July 2002, there were more than 564 suspected al Qaeda terrorists and Taliban being held as detainees at the U.S. Naval Base at Guantanamo Bay. The vast majority of the detainees are Saudi Arabian or Pakistani nationals.6 The base at Guantanamo Bay is leased by

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the United States from Cuba and, therefore, unlike other remote island bases such as those in the South Pacific, does not technically constitute U.S. territory subject to the jurisdiction of U.S. district courts.7

The U.S. government has taken the position that the Geneva Conventions do not apply to al Qaeda detainees, because al Qaeda is not a “state-party” to the conventions but is a foreign terrorist organization.8 Accordingly, al Qaeda detainees do not have the status of prisoners of war. On the other hand, the U.S. government has concluded that the Geneva Conventions do apply to the Taliban. However, because the Taliban did not conduct their operations with any regard for the legal criteria for soldiers under Article 4 of the Geneva Conventions of 1949, the United States does not accord them POW status.9 (See “Why Not POWs?” this page.)

Although not recognized as POWs, the detainees have been allowed many POW privileges as a matter of policy. It has been widely reported and noted by at least one court that conditions at the base are being monitored by the International Committee of the Red Cross,10 and that the detainees are eating well and receiving excellent medical care.11 Moreover, the United States has stated that the detainees will not be subjected to physical or mental abuse or cruel treatment.12 The detainees will be denied such POW privileges as access to a canteen to purchase food, soap and tobacco; a monthly advance of pay; the ability to maintain and review personal financial accounts; and the ability to receive scientific equipment, musical instruments, or sports outfits.13

The judicial process awaiting these terrorist suspects has been the subject of much speculation, and their detention has already been subject to legal attack in the United States. On January 20, 2002, the Coalition of Clergy, Lawyers and Professors filed a petition for writ of habeas corpus in the U.S. District Court for the Central District of California on behalf of the detainees held at Guantanamo.14 In the action, Coalition of Clergy v. George Walker Bush, the petitioners alleged that the detainment of the al Qaeda suspects violated the U.S. Constitution because the detainees “(1) have been deprived of their liberty without due process of law; (2) have not been informed of the nature of the accusations against them, and, (3) have not been afforded assistance of counsel.”15 In a first amended petition, the petitioners added a claim for cruel and unusual punishment.16 Among their requests for relief, the petitioners asked that the court “direct respondents to produce the detainees for hearing” before the district court in Los Angeles.17

In February 2002, Judge A. Howard Matz dismissed the petition and first amended petition, holding that 1) the petitioners lacked standing to assert claims on behalf of the detainees, 2) the court did not have jurisdiction to hear the case, and 3) no federal district court would have jurisdiction over the petitioners’ claims.18 The court’s holding regarding the lack of jurisdiction of district courts over the detainees was most fatal to the petition and was based on the controlling decision of the U.S. Supreme Court in 1950 in Johnson v. Eisentrager.19 Judge Matz held that the detainees at Guantanamo Bay are like the German detainees in Eisentrager: [They] are aliens; they were enemy combatants; they were captured in combat; they were abroad when captured; they are abroad now; since their capture, they have been under the control of only the military; they have not stepped foot on American soil; and there is no legal or judicial precedents entitling them to pursue a writ of habeas corpus in American civilian court.20

Moreover, the court held that there are practical reasons, such as “legitimate security concerns, that make it unwise for this or any court to take the unprecedented step of conferring such a right [of access to American courts] on these detainees.”21

The Military Order
With the denial of the detainees’ right to seek relief in the federal courts, the legal framework for the disposition of the detainees’ cases now appears to be substantially in place as a result of a military order issued by President Bush and an order promulgated by Secretary of Defense Donald Rumsfeld establishing military commissions to try suspected al Qaeda terrorists.

A congressional resolution authorized President Bush to “use all necessary and appropriate force against those nations [and] organizations” involved in the September 11 attacks.22 Anticipating the capture of al Qaeda terrorists and their accomplices and consistent with the congressional resolution, the president on November 13, 2001, issued a

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3 Id.
The military order titled the “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism.” The military order provided for the establishment of military commissions to try aliens charged with terrorism.22

The president made a number of findings in the military order justifying his decision to use military commissions for the trial of al Qaeda suspects. Most significantly, he found that the September 11 attacks created a state of armed conflict between the United States and al Qaeda,24 that al Qaeda has both the capability and intention to undertake further terrorist attacks against the United States that could result in mass deaths and injuries and the massive destruction of property, and that al Qaeda’s actions may place at risk the continuity of the operations of the U.S. government.25 Consequently, he found that using military commissions to try al Qaeda suspects would protect the United States and its citizens, allow for the effective conduct of military operations, and prevent future terrorist attacks.26

These findings received significant support among leading military and international legal scholars. Major General Michael J. Nardotti, a retired judge advocate general of the army, testified in Congress that the need for military commissions under the current circumstances arises out of “legitimate concerns for public and individual safety, the compromise of sensitive intelligence, and due regard for the practical necessity to use as evidentiary information obtained in the course of military operation rather than through traditional law enforcement means.”27

Ruth Wedgwood, a professor of law at Yale and Johns Hopkins universities, wrote that the president’s decision to use military commissions are backed by solid practical realities: “[D]islosure of the methods used by the government to follow the activities of the al Qaeda network, in order to prove a case in open court, could have disastrous consequences, especially since it is believed that al Qaeda has attempted to acquire weapons of mass destruction such as radiological bombs and nuclear devices.”28 Wedgwood noted that the al Qaeda network is skilled in counterintelligence and has changed communications systems several times to block U.S. surveillance. An open trial would permit “al Qaeda members [to] scrutinize the trial record to see what the government knows about their operating methods.”29

In addition to concerns that criminal trials might frustrate attempts to prevent future terrorism, Wedgwood also recognized that under the Federal Rules of Evidence, juries in district courts would be prevented from hearing “various forms of probative evidence, including reliable hearsay,” whereas such evidence would be admissible before a military commission.30 Finally, Wedgwood echoed concerns regarding the safety of judges, juries, and innocent civilians living and working near federal courthouses hearing al Qaeda cases in urban areas.31

The application of the military order is limited by its terms to non-U.S. citizens about whom there is reason to believe 1) they are or were members of al Qaeda; 2) they have aided, abetted, or conspired with al Qaeda or are believed to have engaged in international terrorism; or 3) they are planning a terrorist attack.32 (See “American Taliban,” page 52.) Under the military order these suspects must be treated humanely, without any adverse distinction based on race, color, religion, gender, origin of birth, wealth, or any similar criteria. They also must be afforded adequate food, drinking water, shelter, clothing, and medical treatment and allowed the free exercise of religion.33

The military order not only provides for the detention of al Qaeda suspects and trial by military commission; it also states that punishment may include life imprisonment or death.34 The military commissions, which make findings of fact and law, must provide the suspects with “a full and fair trial.”35 This standard, however, does not preclude relaxed evidentiary rules that will allow, for example, the use of documents found by U.S. and allied soldiers in caves and terrorist hideouts as evidence as well as the admission of reliable hearsay evidence as long as the evidence is relevant and probative.36 The military order also provides for less-than-unanimous verdicts for conviction and sentencing.37

By providing that defendants tried before military commissions will not be allowed to seek any remedy in U.S. state or federal courts, foreign courts, or international tribunals, the military order seeks to prevent collateral attacks on the proceedings, verdicts, and sentences of the military commissions.38 Of course, whether this provision would cause any court, especially one of a foreign nation or an international tribunal, to reject a claim by a detainee is open to question.

Constitutionality of the Commissions

The use of military commissions by the United States dates from the Revolution, when General George Washington established a court of inquiry to try Major John André, a British officer and suspected spy. André was captured wearing civilian clothes and carrying documents obtained from Benedict Arnold relating to the defense of West Point. He was tried and sentenced to death in substantially the same manner that the British
had earlier dealt with an American officer and accused spy, Nathan Hale. Since that time, military commissions have been employed in almost every American conflict, including the Mexican-American War (during which the term “military commission” was first used), the Civil War, the Spanish-American War, World War I and World War II.

The U.S. Supreme Court has upheld the constitutionality of military commissions on several occasions in various wars. In the case most analogous to the present circumstances, *Ex Parte Quirin,* the court upheld the convictions and sentences of eight German saboteurs who landed in New York by German U-boat and were subsequently arrested wearing civilian clothes. They were tried and six of them sentenced to death pursuant to an order issued on July 2, 1942, by President Franklin Roosevelt. President Roosevelt’s order was very similar to President Bush’s military order.

In *Quirin,* the court held that unlawful combatants are “subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.” The court also held that the accused in military commissions are not entitled to the same constitutional safeguards afforded defendants in civilian courts:

> [Section 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commissions, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.]

Other Western democracies also rely on military commissions to punish unlawful combatants in circumstances that are similar to those involving suspected al Qaeda terrorists. For example, last year, Switzerland prosecuted and convicted in a military tribunal a former Rwandan mayor, arrested in Switzerland, for war crimes arising out of the massacres of Tutsi civilians in his village in Rwanda. The prosecution based its case on the defendant’s violations of the Swiss Military Penal Code for murder and violations of the laws and customs of war, among other charges. On appeal, in *Niyonteze v. Public Prosecutor,* the Tribunal Militaire de Cassation upheld the validity of the military tribunal’s verdict and the tribunal’s punishment of the defendant with a long prison sentence.

Notwithstanding the well-established American tradition of using military commissions to try enemy combatants, the plan to try suspected al Qaeda terrorists and their accomplices by military commission instead of using the established criminal justice system has sparked some criticism. One prominent concern voiced by critics is the current indefinite nature of the detainees’ confinement. Nevertheless, there appears to be a consensus among legal scholars that military commissions are an appropriate response to the al Qaeda attacks and continuing threat so long as adequate due process safeguards are present to ensure that defendants receive a full and fair trial.

Still, the ABA Task Force on Terrorism and the Law conceded that the major disadvantage of trying al Qaeda terrorists and their accomplices by military commissions is not a constitutional or legal matter but the perception that military commissions “lack adequate safeguards to ensure a fair trial.” The task force recognized that this perception “will depend significantly on the application of the order and the procedures used in any military commission.”

### The Military Commission Order

On March 21, 2002, Secretary of Defense Rumsfeld promulgated Military Commission Order No. 1 detailing the procedures to be used in military commissions. The commissions are composed of three to seven members, who preside over the trial and render the verdict and sentence.

**Under Military Commission Order No. 1, due process safeguards include:**

- The defendant will receive “a copy of the charges [against him or her] in English and a language that the Accused understands.”
- The defendant will be presumed innocent until proven guilty.
- The standard for a conviction is “beyond a reasonable doubt,” and the determination of guilt will be based solely on the evidence that is admitted during the trial.
- The prosecution must provide the defense with all the evidence that the prosecution plans to introduce at trial, including exculpatory evidence.
- The defendant has the right to testify at trial, and the members of the commission will draw “no adverse inference” from the defendant’s decision to exercise this right.
- The defendant has the right to obtain documents for his or her defense and “[s]ummon the witnesses to attend trial and testify” using service of process. In addition, “investigative and other resources…[will be] made available to the Defense.”
- The defense will be able to cross-examine the prosecution witnesses. All witnesses will testify under oath.
- The defendant will have the assistance of appointed interpreters.
- The defendant has the right to “be present at every stage of the trial.”
- The defendant is protected against double jeopardy. 

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The commission trial will be open to the public, except in circumstances involving public safety, national security, or the disclosure of classified information or law enforcement sources. Under the military commission procedures, military defense counsel will be appointed for defendants, irrespective of indigence, "in advance of trial to prepare a defense and until any findings and sentence become final." Defense counsel is charged with defending the accused "zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused" and to represent the interest of the Accused in any review process. A defendant has the right to select a judge advocate from any branch of the armed services to replace the appointed defense counsel and may retain an American civilian attorney at his or her own expense to assist appointed defense counsel.

The commissions are required to "provide a full and fair trial" and "proceed impartially and expeditiously excluding irrelevant evidence, and preventing any unnecessary interference or delay." All who participate in a commission "shall take an oath to perform their duties faithfully." The nature of the trial proceedings before a military commission will be familiar to counsel from common law jurisdictions. The proceedings begin with the opening statement of the prosecution and the presentation of its case using witnesses and other evidence. The defense may elect to make an opening statement following the opening statement of the prosecution. The defense may introduce evidence in rebuttal and surrebuttal. The prosecution and defense may both present closing arguments with a reply permitted for the prosecution and defense counsel shall deliberate and vote on verdict by secret written ballot in closed conference. A guilty verdict requires an affirmative vote of two-thirds of the members. A defendant is entitled to the defense or offenses for which there was a finding of Guilty, for any lesser term of imprisonment, and any other lawful punishment as the Commission shall determine to be proper."
the sentencing proceedings, the commission members will again deliberate and vote on the sentence by secret written ballot in closed conference.82 The sentence also requires agreement by two-thirds of the commission members; however, a death sentence requires a unanimous vote83 of a seven-member commission.84

All convictions and sentences will automatically be reviewed by a Review Panel established by the secretary of defense that consists of three military officers, at least one of whom has experience as a judge.85 The Review Panel has 30 days to review the conviction and sentence and may then either forward the case to the president or the secretary of defense with a recommendation regarding the disposition of the matter or return the case for further proceedings to the Appointing Authority—either the secretary of the defense or his designee—if a majority of the panel forms the “definite and firm conviction that a material error of law occurred.”86

The verdict and sentence of a military commission is not final until it is affirmed by the president, or, if he so designates, the secretary of defense.87 The president also has the right to “disapprove findings or change a finding of Guilty to a lesser-included offense, or mitigate, commute, defer or suspend the sentence imposed or any portion thereof.”88 A verdict of not guilty, however, cannot be changed to a verdict of guilty.89

As a response to the September 11, 2001, attacks on the United States and in light of the continuing and grave threat posed to the nation by the al Qaeda terrorist network and its accomplices, the use of military commissions to try suspected terrorists is appropriate both as a practical and legal matter. These commissions will significantly reduce the risk that classified information and law enforcement sources and methods will fall into the hands of al Qaeda operatives and thereby increase the likelihood of preventing future attacks on the United States and its allies. They will also allow prosecutors to introduce at trial reliable evidence collected on the battlefield and by intelligence agents. Moreover, the use of military commissions will eliminate the threat to the safety of civilian judges, jurors, witnesses, and the public that would arise from district court trials of suspected al Qaeda terrorists.

Military commissions have a long history in the United States and other civilized nations and have repeatedly passed constitutional muster before the U.S. Supreme Court. Furthermore, the extensive procedural safeguards promulgated by the president and the secretary of defense are fully sufficient to ensure due process rights and full and fair tri-
als for all who are accused and tried by military commissions.

3 See AMERICAN BAR ASSOCIATION TASK FORCE ON TERRORISM AND THE LAW REPORT AND RECOMMENDATIONS ON MILITARY COMMISSIONS, Jan. 4, 2002, reprinted in THE ARMY LAWYER, DA PAM 27-50-350, Mar. 2002, at 11 [hereinafter ABA REPORT]. As noted by the task force, the question of whether the al Qaeda attacks were an act of war is somewhat complicated. “Although there is room for argument on both sides, it can be reasonably concluded that these were acts of war.” Id. (emphasis added). NATO’s action on September 12, 2001, lends further support to the position that the September 11 attacks constituted an act of war; NATO decided that if the attacks were directed from abroad, they would be covered by Article 5 of the Washington Treaty because “an armed attack on one or more of the Allies in Europe or North America shall be considered an attack against them all.” Invocation of Article 5 Confirmed, NATO Update, available at http://www.nato.int/docu/update/2001/1001/e1002a.htm (Oct. 3, 2001). On October 3, 2001, the secretary general of NATO stated that since the attacks had been directed from abroad, they were, in fact, covered by Article 5 of the Washington Treaty. Id. This was the first time in NATO’s history that Article 5 has been invoked. Id.
4 ABA REPORT, supra note 3, at 11.
5 Id. (citation omitted).
7 Bravin, supra note 6.
9 Id.
11 Id.
12 Coalition of Clergy, Case No. CV 02-570 AHM, at 1-2.
13 Id. at 2.
14 Id. at 3 n.1.
15 Id. at 3.
16 Id. at 3-4.
18 Coalition of Clergy, Case No. CV 02-570 AHM, Order of the court dismissing the petition, at 19.
19 Id.
21 Detention, Treatment and Trial of Certain Non-
Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter the Military Order].

\[\text{Id. §1(a).}\]

\[\text{Id. §1(e).}\]


\[\text{Id.}\]

Ruth Wedgwood, Tribunals and the Events of September 11th, §3(a)-(d).

\[\text{Id.}\]

Id

The Military Order, supra note 23, §2(a)(1)-(2).

\[\text{Id.}\]

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24th Annual Child Custody Colloquium

ON SATURDAY, SEPTEMBER 28, the Family Law Section and the Los Angeles County Superior Court will present their dynamic annual child custody program. After an introductory address by Judge Aviva K. Bobb and Lawrence E. Leone, the first session will examine how to present the child’s evidence in a custody dispute (presented by Judge John W. Ouderkirk, Commissioner Ann Dobbs, Dianna J. Gould-Saltman, Neal Hersh, Roxane Lipton, and Stan J. Katz). After a break, this topic will be continued by a second panel consisting of Judge Rolf M. Treu, Commissioner John Chemeleski, Robert Neal Kipper, Pamela Stettner, Anthony J. Aloia, and Marjorie Cain Mitchell. Carol Anne Tavris will be the keynote speaker during lunch. The first afternoon session will address how to resolve conflict when conflict itself is the issue. This discussion will feature Judge Richard Denner, Judge Lee Edmon, Dvorah Markman, Terri Asanovich, David Kuroda, Linda Louie, and Loretta Warabow as speakers. The last session will be presented by Judge Aviva K. Bobb, Judge Roy Paul, Glen H. Schwartz, Margaret A. Little, and Jaye-Jo Portanova.

The colloquium will take place at Le Meridien Hotel, 465 South La Cienega Boulevard in Los Angeles, with complimentary self-parking off Clifton Way on the north side of the street. Valet parking is available for $8 for those who indicate that they are attending a LACBA program. On-site registration will begin at 8 A.M., a continental breakfast at 8:30, and lunch at 12:15 P.M.; the program will take place from 8:30 A.M. to 4:15 P.M. Event code number: 8095128.

$135—CLE+PLUS members
$190—Family Law Section members
$210—other LACBA members
$230—all others (alternate prices available for mental health professionals, psychologists who require MCEP credit, nonprofit legal service providers, first-year admittees, and law students)
6.25 CLE hours

Risk Management Techniques for 2002

ON TUESDAY, SEPTEMBER 24, the Attorney Errors and Omissions Prevention Committee and the Attorneys’ Advantage Program will present a seminar on navigating the legal malpractice minefield. Attorneys can receive a credit of up to 7.5 percent off their firm’s malpractice insurance premium by joining the Attorneys’ Advantage Program for three consecutive years following attendance at this seminar. To qualify for the full discount, at least half of the firm’s attorneys must attend the entire program. The credit, the percentage of which is subject to change, must be applied within one year of the seminar attendance date. At the seminar, speakers Wendy G. Carroll, Harry W. R. Chamberlain II, Randall A. Miller, and Andrew J. Waxler will discuss what all Los Angeles attorneys need to know to avoid malpractice. The seminar will take place at the Hilton Los Angeles Airport, 5711 West Century Boulevard in Los Angeles. Self-parking is $8, and valet parking is $12. On-site registration and continental breakfast will begin at 8:30 A.M., with the program continuing from 9 A.M. to 12:30 P.M. Event code number: 7093124.

$50—CLE+Plus members
$100—other LACBA members
$125—all others
3.25 CLE hours, including 2 ethics hours
Remember. Rebuild. Renew. These words embody the challenge faced by the Lower Manhattan Development Corporation as it unveiled its proposals a few weeks ago for the reconstruction of New York’s World Trade Center site. All the preliminary designs under consideration prominently feature a memorial park honoring the men, women, and children whose lives tragically and prematurely came to an end on September 11, 2001.

It is doubtful that anyone in our lifetime will forget the devastation that our nation experienced that September day. The acts of terrorism perpetrated against this country did, however, unify Americans in unprecedented ways. Regardless of our politics, race, religion, gender, or sexual preference, we shared our grief and transcended our differences to unite under one banner. The displays of red, white, and blue in all corners of our nation helped express emotions that words could not describe. In one of this country’s darkest hours, new heroes emerged from the rubble and chaos, exemplifying the very traits that built the United States: determination, courage, and resolve.

With the passage of time, our lives inevitably return to normal and the impact of even singularly momentous events begins to fade, especially among members of a younger generation who have no direct experience with watershed moments in modern U.S. history. As with other defining moments for our country, the events of September 11 have left an indelible mark on our heritage and our history. On September 11, it was our core values and the rights and liberties embodied by our government that were assaulted. It is our duty as responsible adults to ensure that our youth—tomorrow’s decision makers—understand these events, their impact on our lives, and their imprint on the nation’s identity.

Many years ago, Ernest Hemingway observed, “The world breaks everyone and afterwards many are stronger at the broken places.” On September 11, our world experienced a break of epic proportions. While we now endeavor to repair our nation’s fractured seams and discover our renewed strength, a critical need exists for dialogue about the principles of democracy and freedom and what it means to live in a country based upon those ideals.

To that end, on September 12, 2002, one day after the anniversary of the tragic events, the Los Angeles County Bar Association, in collaboration with the Los Angeles Unified School District, will present a Dialogue in our Schools program. This program—chaired by Los Angeles Superior Court Judge Laurie D. Zelon, a past president of the Association; and Laura Farber, a partner at Hahn & Hahn and former president of the Association’s Barristers Section—is modeled after the Dialogue on Freedom initiative developed by the American Bar Association in consultation with U.S. Supreme Court Justice Anthony Kennedy. It will focus high school students on the freedoms and responsibilities that make our nation unique. As Justice Kennedy explains, these dialogues “foster among our nation’s youth the identification and understanding of fundamental American values and those universal moral precepts that all free people share.”

The Los Angeles dialogues will take place simultaneously at approximately 20 local public and private high schools and will create invaluable opportunities for students to explore with volunteer lawyers, judges, and community leaders the rights guaranteed by the U.S. Constitution and their meaning in light of the September 11 tragedy. Our Association has also encouraged other California bar groups to conduct similar discussions in their cities. Later in the month, on September 24, Justice Kennedy will share his views on the importance of ongoing discussions with the volunteer lawyers, judges, teachers, and selected student participants at a post-dialogue “town hall” gathering.

Yes, a year has passed. While the words to describe fully both the events and the emotions of that day still elude us, we must endeavor to connect with our youth as we move forward. As lawyers, we are in a unique position to share our knowledge of the U.S. Constitution, government, and justice system, which define us as a country and reflect our nation’s soul. We can use our professional perspectives to explain the values upon which our country was founded and our responsibility to protect and preserve these values. As Robert Hirshon, 2001-02 ABA president, said, “[W]e represent our citizens in our institutions of justice. Our oath is the same oath taken by our elected officials: to protect and defend our constitution and uphold our nation’s laws. We take this oath seriously and were reminded by the events of September 11 that we are joined in this noble endeavor by millions and millions of other Americans, each of whom reaffirmed in one way or another his or her commitment to our constitutional form of government.”

All of us can join as participants in this dialogue on this first anniversary of September 11: Take time to talk with your children, their friends, your neighbors next door. These dialogues, admittedly, are just a small step. They aren’t meant to replace the original three Rs—reading, ’riting, and ’rithmetic—but they nonetheless can play a critical role in our next generation’s commitment to the challenges ahead—to remember, rebuild, and renew.
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