Cooley

War and Office of Foreign Assets Control Exclusions: Insurance Policy Language Matters

March 8, 2022

Nearly two weeks into the Russian invasion of Ukraine, numerous companies are focused on how the war might impact their business, including their insurance coverage. This advisory provides a high-level overview of two types of insurance exclusions that may be implicated: war exclusions and OFAC exclusions.

War exclusions

In numerous insurance policies over the past century, "war" exclusions have become a standard coverage term that often goes unnoticed. With a hardened insurance market and in the face of novel risks in the modern world, the industry has reassessed legacy language to add expanded "war" exclusions in insurance policies. For example, at the end of 2021, the Lloyd's Market Association released **four model clauses** to specifically exclude coverage for "cyber war" from cyber insurance policies. However, consideration of the definition of "war" certainly doesn't stop with cyber insurance.

What is meant by "war" has been the subject of case law and interpretation for decades in both insurance and non-insurance contexts. The seminal decision in the insurance context is *Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989 (2d Cir. 1974), which rejected the application of a war exclusion to a terrorist group's hijacking and destruction of a plane. Referring to existing precedent, as well as international law, the court held "that war is a course of hostility engaged in by entities that have at least significant attributes of sovereignty." Indeed, "cases dealing with the insurance meaning of 'war' have defined it in accordance with the ancient international law definition" – that is, "war refers to and includes only hostilities carried on by entities that constitute governments at least de facto in character." Various subsequent authorities rely on *Pan American*'sdefinition of "war," including recently the Ninth Circuit's decision in *Universal Cable Productions, LLC v. Atlantic Specialty Ins. Co.*, 929 F.3d 1143, 1147, 1155 (9th Cir. 2019) ("war" has a "specialized meaning in the insurance context," requiring "hostilities between de jure or de facto sovereigns" and "employment of force between governments or entities essentially like governments," with war being "the method by which a nation prosecutes its right by force").

But certain war exclusions reach events broader than formally declared, all-out "war" per se, including those issued by the Insurance Services Office, which drafts policy forms for the insurance industry that provide that the insurer will "not pay for loss or damage caused directly orindirectly" by "War And Military Action," including "undeclared" wars and "[w]arlike action by a military force" (ISO Form CP 10 20 10 12, § B.1.f.). The issue for insureds is the risk that insurers invoke a "war" exclusion – some of which may incorporate vague concepts such as "hostile or warlike action" or "warlike operations" – to reserve rights on or deny coverage for an otherwise meritorious claim.

OFAC exclusions

In addition to war exclusions, many policies, including directors and officers (D&O) insurance policies, have Office of Foreign Assets Control exclusions. The US Department of the Treasury has issued **strict guidelines** for insurance companies when it comes to coverage, including having insurers add "an explicit exclusion for risks that would violate U.S. sanctions law. For example,

the following standard exclusion clause is often used in open marine cargo policies to avoid OFAC compliance problems: ‘whenever coverage provided by this policy would be in violation of any U.S. economic or trade sanctions, such coverage shall be null and void.’ The legal effect of this exclusion is to prevent the extension of a prohibited service (insurance or risk assumption) to sanctioned countries, entities or individuals.”

Like war exclusions, not all OFAC exclusions are created equal. Although the sample exclusion above is somewhat narrow, some OFAC exclusions are broader, arguably reaching beyond the scope of the sanctions issued. The issue is that, in some cases, a carrier may invoke these exclusions to negate coverage, despite a policyholder’s expectations for coverage in a given scenario.

So, what should companies do? Check your policy language to better understand where there might be gaps in coverage. If the exclusions are overly broad, think about what your exposures might be – and potentially assess whether the exclusions can be narrowed or clarified at renewal. In some cases, companies we have spoken to are already making decisions to alter or limit certain parts of their business, not because they will be in violation of OFAC regulations, but because the exclusions that they have are so broad, they are at risk of insurers denying (possibly unjustifiably) coverage when a loss occurs. And that risk is too great.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as “Cooley”). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. This content may be considered **Attorney Advertising** and is subject to our **legal notices**.

Key Contacts

Kevin King Washington, DC	kking@cooley.com +1 202 842 7823

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All rights reserved.