

## **The World Trade Center Property Insurance Trial: Lessons Learned?**

By Akos Swierkiewicz

Had the tragic events on 9/11/01 not occurred, we would have never learned about negligence, mistakes, errors and omissions, inconsistencies, and confusion that plagued the placement and negotiation of the property insurance program for the WTC and brought to light during the WTC trial.

The primary parties involved in the litigation were 13 WTC insurers, including Lloyd's syndicates, counted as one, the broker Willis and their client, Silverstein Properties, the leaseholder. The insurers contended that they were bound by the WilProp 2000 form, which defines "occurrence" and would limit the WTC claim to \$3.5 billion, while Silverstein's position was that the Travelers' form applied, which does not define occurrence and would respond to each of the WTC towers separately, resulting in a \$7.0 billion claim.

After the brilliant work by lawyers on behalf of the parties to this litigation, determination of what form applied to the 9/11/01 claim was left to a jury, unfamiliar with insurance, which was so confused early in the trial that it sent a note to the judge asking, "what is this case about" and, during their deliberations, asking whether Munich Reinsurance and Swiss Reinsurance were a part of Lloyd's.

Although this was a complicated and large insurance placement that taxed the world market capacity and there was pressure to complete it to meet the 7/24/01 deadline for the closing of the WTC lease, there is no excuse for the failure of the parties to reach explicit agreement on which form applied when coverage was bound, let alone by 9/11/01, almost two months after binding. By no means was this a unique placement as there are many other large insurance programs just as large and complicated, which must be placed in a relatively short time frame. Undoubtedly, various issues and problems that led to litigation in this case exists in many other instances but will remain hidden absent of a claim and subsequent dispute about coverage.

As this article is written, jurors rendered verdict in favor of ten, and against three of the 13 insurers. Regardless of the verdict, there are no winners in this case. The causes of this litigation could have been avoided and the fact remains that none of the parties to this case are blameless.

However, it is not the purpose of this article to castigate anyone involved in the placement and negotiation process, rather, by highlighting key issues that were the subject of the litigation, it is to identify some of the lessons learned or should be learned and to prompt insurers, brokers and risk managers to reexamine their role and involvement in the insurance placement and negotiation process.

Based on trade press reports, the following are some of the key issues that emerged during the trial:

- The broker's intention to switch from the WilProp form, that was part of the underwriting submission, to the Travelers form was not communicated properly

to the insurers

- None of the insurers identified the applicable form in their binders
- Several insurers waived their right to approve the form
- On 9/11/01, the final policy form had not been agreed upon and the broker was still analyzing the Travelers form
- Silverstein's risk manager authorized to bind on the basis of the Travelers form in July without obtaining and reviewing it and he did not have copy of it on 9/11/01
- When the form was requested from Silverstein's risk manager on 9/12/01, he released the WilProp form
- None of the parties adequately documented their negotiations

It is obvious, that clear agreement did not exist between the parties as to what form applied on 9/11/01, almost two months after binding. The most important lesson, applicable to each of the parties, simply boils down to the need for documentation of all substantive communications to ensure that there is a meeting of minds during the placement and negotiation process and, when coverage is bound, all parties have an explicit agreement regarding the form. Agreement to any subsequent form changes must also be fully documented.

Furthermore, each of the parties, by adhering to the following rather elementary principles or procedures, can substantially reduce the potential for disputes and litigation:

**Insurers should:**

- not bind coverage without obtaining and reviewing the proposed form
- indicate the applicable form in their binders
- not waive their right to approve form changes
- affirm their agreement in writing to any form changes

**Brokers should:**

- indicate intent to switch or change forms in writing
- not assume that lack of response from insurers means agreement to form changes and follow up to obtain written responses
- ensure that risk managers are adequately engaged in coverage negotiations, understand the implications of form changes and provide copy of forms and changes thereto

- work expeditiously to facilitate finalization of policy wording

**Risk managers should:**

- actively participate in the negotiation process
- be proactive and initiate corrective action, if needed
- review and approve the form and major form changes
- ascertain that coverage bound by insurers is sufficiently clear and provides acceptable coverage

Unfortunately, the clock cannot be turned back in this case but policyholders, brokers and insurers should examine their procedures and controls pertaining to insurance placement and negotiations and take corrective steps, if necessary, to prevent recurrence of similar disputes.

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