Alert

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COZEN O'CONNOR

Ninth Circuit (California): Hamas Attacks on Israel Do Not Trigger the War Exclusions

The U.S. Court of Appeals for the Ninth Circuit has held that coverage for expenses incurred by the insured when it was forced to relocate its television production out of Israel following attacks by Hamas were not barred by two war exclusions contained in its general liability policy because the conflict did not satisfy the generally accepted definition of "war" and the attacks did not constitute "warlike action by a military force." Overturning a district court decision, the Ninth Circuit in *Universal Cable Prods., LLC v. Atlantic Specialty Ins. Co.*, 2019 U.S. App. LEXIS 20704 (9th Cir. March 4, 2019) held that the terms war and warlike action by a military force require hostilities between either *de jure* or *de facto* sovereigns, and Hamas was neither.

Factual and Procedural Background

During the Summer of 2014, Hamas fired rockets from Gaza into Israel. At that time, Universal Cable Productions, LLC and Northern Entertainment Productions, LLC (collectively, Universal) were producing a television show, Dig, in Jerusalem. Due to the attacks, Universal made the decision to move the production out of Israel and submitted a claim for the expenses it incurred as a result of the move. Universal's insurer, Atlantic Specialty Insurance Company (Atlantic) denied coverage under three war exclusions, which precluded coverage for damages resulting from war, warlike action by a military force, or "insurrection, rebellion, [or] revolution." Universal filed suit against Atlantic in the U.S. District Court for the Central District of California, which granted summary judgment in favor of Atlantic. The court held that coverage was precluded under the first two war exclusions barring coverage for war and warlike action by a military force, and found that the exclusions did not require the involvement of two sovereign states. Universal appealed the decision to the Ninth Circuit.

The Ninth Circuit Finds That War Exclusions Require Hostilities Between Sovereigns

On appeal, the Ninth Circuit focused on unrebutted testimony by the insured's insurance expert that war and warlike action by a military force have a specialized meaning in the insurance context that require hostilities between either *de jure* or *de factor* sovereigns. It then concluded that under California Civil Code section 1644 it was compelled to apply those specialized meanings proffered by the insured's insurance expert in determining whether the exclusions barred coverage. Section 1644 of the California Civil Code states that the words of a contract are to be construed using their ordinary and popular meaning, rather than their strict legal meaning, unless a special meaning is given to the words by usage, in which case the strict legal meaning shall be applied.

The Ninth Circuit then considered the longstanding conflict among Israel, Palestine, and Hamas. The court noted that in 2014, Hamas agreed to cede formal responsibility for governing Palestine and, although Hamas security forces remained in Gaza, the United States has never recognized Palestine or Gaza as sovereign territorial nations, nor Hamas as a sovereign or quasi-sovereign. The court remarked that Hamas is not recognized by the United States as an authority in Palestine or Gaza, it does not engage in formal relations on behalf of Palestine or Gaza, and it does not control Palestine's borders, airspace, or immigration. It therefore held that Hamas was not a *de jure* or *de facto* sovereign at the time of the conflict and the exclusion did not apply.

The Ninth Circuit held that the district court erred in failing to consider the special meaning of war and warlike action by a military force as required by Section 1644. Of particular note is that Ninth Circuit found that Atlantic failed to adequately dispute that the insurance industry has a customary usage that limits exclusions for war to hostilities between *de jure* or *de facto* sovereigns. Regarding warlike action by a military force, the court again held that the phrase has a special

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meaning in the insurance industry, requiring "operations of such a general kind or character as belligerents have recourse to in war" and "that such operations be carried out by the military forces of a sovereign or quasi-sovereign government." Based upon its determination that Hamas is not a *de facto* sovereign, the court held that the warlike action by a military force exclusion also did not apply.

The district court did not reach a conclusion as to the application of the third exclusion for insurrection, rebellion, [or] revolution due to its finding that the war and warlike action by a military force exclusions applied. The Ninth Circuit therefore remanded the case to the district court to determine the applicability of the third exclusion.

The *Universal* Decision is Anomalous Due to its Reliance on Section 1644

While the *Universal* decision may impact the interpretation of war exclusions in California and other states that adopt specialized meanings in a contract setting, the majority of jurisdictions construe undefined terms in insurance policies pursuant to their plain, ordinary, and popular meaning. By holding that there must be a *de jure* or *de facto* sovereign, the court has effectively rewritten the exclusions by imposing a requirement that is not in the policy. Further, the court dwelled on Atlantic's purported failure to provide rebuttal expert testimony in its reliance on the testimony of Universal's insurance industry expert to establish the specialized industry definitions of war and warlike action by a military force. In future cases, insurers should be mindful of the need for expert testimony where there is a risk that a specialized meaning analysis will be used.