Scope Of Southern District Of New York's Jurisdiction For Claims Arising From September 11, 2001

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Commentary

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Introduction

As has been widely reported, cases involving claims arising out of the terrorist-related aircraft crashes of September 11, 2001 and naming an airline, an airport security company, and/or The Port Authority of New York and New Jersey, have been consolidated for discovery and other pre-trial proceedings before Judge Hellerstein of the United States District Court for the Southern District of New York ("SDNY"). The SDNY has been granted original and exclusive jurisdiction over those actions by virtue of Section 408(b)(3) of the Air Transportation Safety and System Stabilization Act of 2001 (the "Act").

Congress introduced the Act on September 12, 2001 in response to the attacks and subsequent damage, and it was signed into law ten days later.[1] The bill was drafted with the dual purpose of compensating victims and preserving "the continued viability of the United States air transportation system." The fundamental goal of Section 408(b)(3) in providing a single exclusive forum for "all actions brought for any claim . . . resulting from or relating to" the events of September 11 was to ensure efficiency and avoid inconsistent rulings based on the same set of facts.

The language of Section 408(b)(3) vesting jurisdiction in the SDNY for September 11-related claims is very broad:

> JURISDICTION. The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.

At first blush, this all-encompassing language could arguably be interpreted as vesting the SDNY with exclusive jurisdiction over lawsuits only tangentially related to the September 11 attacks, including reinsurance and insurance coverage disputes where the underlying claim relates to the events of September 11. In fact, one federal court has noted that, read in isolation, Section 408(b)(3) is "unambiguous and appears to require" that all September 11-related claims be heard in the SDNY.[2]

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Despite numerous attempts by insurers and reinsurers to invoke Section 408(b)(3) jurisdiction, federal courts have consistently rejected the argument that September 11-related coverage disputes must be decided by the SDNY (in the absence, of course, of an alternative source of federal subject matter jurisdiction, e.g., diversity jurisdiction).

First, the SDNY and Court of Appeals for the Second Circuit ruled that the scope of Section 408(b)(3) did not stretch to contractual disputes between reinsurers over losses resulting from the events of September 11. Subsequently, the SDNY and other federal courts have ruled that the Act does not encompass insurance coverage disputes arising from September 11, e.g., claims under business interruption policies. Outside of the insurance context, the statutory language has also been narrowly construed, even in cases involving accidents occurring at Ground Zero itself. This article will examine this line of case law, which reflects a consistent attempt to limit the Act's jurisdiction to include few casualties other than the losses of the direct victims.

A. Reinsurance Disputes

The first case to address the scope of jurisdiction under Section 408(b)(3) was Canada Life Assurance Co. v. Converium Ruckversicherung (Deutschland).[3] That case involved a breach of contract action brought by a reinsurer, Canada Life Assurance Company ("Canada Life"), against its retrocessionaire, where the underlying losses resulted from the attacks of September 11. The retrocessionaire, Converium Ruckversicherung (Deutschland) ("Converium"), moved to dismiss for lack of subject matter jurisdiction, arguing that the Act was intended to apply only to direct actions for damages arising out of the hijacking and subsequent crashes of September 11. Canada Life countered that Section 408(b)(3) represented a broad grant of jurisdiction to the SDNY.

The SDNY, reading the Act as a whole and consulting the legislative history, concluded that "[w]hile Section 408(b)(3) may apply broadly to actions filed by the individual victims of September 11, its scope is not so sweeping as to apply to the dispute between reinsurers at issue here." Because the Act excepts from jurisdiction all civil actions to recover collateral source obligations,[4] "accepting the reinsurer's jurisdictional theory would yield the anomalous result of citizens injured by the attacks being unable to sue their insurers, while those same insurers would be permitted to sue their reinsurers."[5]

In affirming the SDNY's decision, the Second Circuit explained that Canada Life "does not allege that any claim or defense arising in the action will require adjudication of any issue of law or fact that concerns the events of September 11." Rather, the Court stated that, because Canada Life alleged only that the events of September 11 have increased the amount of its total losses under reinsurance contracts, the relationship between the cause of action and the events of September 11 is "solely one of 'but for' causation: 'but for' September 11, [Canada Life] would have had fewer losses to pay." As a result, although the insurance losses were caused in part by the actual events of September 11, the *events themselves* "are irrelevant to a resolution of the dispute."

The Court of Appeals further noted that in light of Congress' explicit exemption of collateral source obligations from the exclusive jurisdictional provision of Section 408(b)(3), the "but for" reading of the statute "would result in suits for losses against primary insurers being brought wherever jurisdiction and venue were proper, while suits between reinsurers over the same losses would be confined to the Southern District."[6] The Second Circuit elaborated that the word "claim" in Section 408(b)(3) must have "a more direct connection to the events of September 11 than is provided by an action for a 'but for' economic loss."

In rejecting a "but for" interpretation of the statutory language, the Second Circuit articulated a threshold for federal subject matter jurisdiction under 408(b)(3): whether the action for economic loss involves a claim or defense raising an issue of law or fact involving the events of September 11. Notably, however, the Court of Appeals emphasized that its "decision is limited

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to denying jurisdiction over this category of cases and does not purport to go further or to establish affirmatively jurisdiction under Section 408(b)(3) for any particular type of claim." In light of this decision, it was arguable that the "category of cases" referred to by the Second Circuit was limited to disputes between reinsurers, rather than insurance coverage disputes, since reinsurers are one further step removed from the events of September 11.

In Combined Ins. Co. of Am. v. Certain Underwriters at Lloyd's,[7] the Second Circuit affirmed another SDNY decision involving a reinsurance dispute. In that case, Combined Insurance Company of America ("Combined") brought a breach of contract action against its reinsurer, Certain Underwriters at Lloyd's ("Lloyd's"), where the underlying losses involved the deaths or injuries of approximately 176 employees working at the offices of Aon Corporation ("Aon") at 2 World Trade Center. All of those employees were insured under a group accidental death and dismemberment policy issued to Aon by Combined. Lloyd's refused to reimburse Combined for damages claims on the basis that it was liable only for the deaths or injuries of employees "'whilst on business travel.'"

The SDNY had ruled that the Act was inapplicable to the reinsurance dispute, and consequently dismissed the complaint for lack of subject matter jurisdiction. In affirming, the Second Circuit relied on Canada Life to reiterate that the Act "'does not vest the Southern District of New York with jurisdiction over actions involving economic losses that would not have been suffered "but for" the events of September 11 but otherwise involve no claim or defense raising an issue of law or fact involving those events.'"

The Court of Appeals explained that "[r]esolution of these narrow issues of contract interpretation does not require the court to refer to or choose among competing descriptions of the *events* of September 11 itself — a circumstance that otherwise creates the possiblity of inconsistent and inefficient judgments across the spectrum of September 11-related litigation, which is what section 408(b)(3) truly seeks to avoid."

More recently, the SDNY applied the same approach in Associated Aviation Underwriters v. Arab Ins. Group (B.S.C.),[8] when the court confirmed that suits to recover monies owed on reinsurance policies but related to events on September 11, are actions to recover collateral source obligations, and declined to take jurisdiction on that basis.

B. Insurance Coverage Cases

The SDNY and other district courts deciding insurance coverage matters have held that Section 408(b)(3) of the Act does not confer jurisdiction upon the SDNY.

In 730 Bienville Partners, Ltd. v. Assurance Co. of Am.,[9] plaintiff, a hotel owner and operator, argued that its standard commercial property insurance policy "contained additional business income coverage . . . for business losses where the physical damage was remote from the insured's premises." After the Federal Aviation Administration closed all United States airports following the September 11 attacks, Bienville tendered its claim with Assurance Company of America ("Assurance") for such business losses. Assurance denied Bienville's claim and, as a result, Bienville brought an action in state court, which Assurance subsequently removed to the Eastern District of Louisiana based on federal question and diversity jurisdiction. Assurance subsequently moved to transfer the case to the SDNY based on Section 408(b)(3).

The Louisiana District Court denied Assurance's motion, explaining that, read in its entirety, the Act clearly does not provide for such claims. The court concluded that although the September 11 attacks were implicated in the dispute, "plaintiff's claim is primarily a breach of contract claim against an insurer for wrongful denial of coverage," and that the Act does not intend for such claims to be filed exclusively in SDNY.

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In Goodrich Corp. v. Winterthur Int'l Am. Ins. Co.,[10] Goodrich, a major manufacturer of parts and assemblies for commercial aircraft, contended that its "all risk" property insurance program covered losses resulting from customers' cancellation or reduction of orders for plaintiff's aerospace goods and services, causing a decrease in revenue. The District Court for the Northern District of Ohio held that Section 408(b)(3) applies exclusively to the federal cause of action created in Title IV of the Act, i.e., "to victims of the terrorist related aircraft crashes of September 11, 2002 [sic]," and not to insurance coverage actions.

The Ohio District Court referred to the November 2001 amendment excluding from Section 408 lawsuits by victims against collateral-source providers, explaining that "[b]ecause actions against collateral source providers do not draw from the finite pool created by the liability limitations, the factors favoring jurisdiction in the Southern District of New York are not present." The court further noted that in creating the Section 408 cause of action and corresponding jurisdiction clause, Congress' focus was "tort suits by persons physically injured or family members of those killed in the attacks, against all entities that could be held liable either for not preventing the attack or for the extent of the damage they caused."

In SR Int'l Bus. Ins. Co., Ltd. v. World Trade Ctr. Props. LLC,[11] Allianz Insurance Company ("Allianz") sought to compel SR International Business Insurance Company ("SR") to submit their dispute concerning the amount of loss under a property and business interruption insurance policy to an appraisal process pursuant to a provision that any such dispute would be so resolved. SR claimed that the appraisal process was preempted by Section 408(b)(3). In addressing the contractual right to an appraisal, the SDNY determined that neither the legislation itself nor its history suggested that "Congress in any way intended to affect the rights and obligations between those having a property interest in the World Trade Center Complex and their insurers," and held that the parties' contractual appraisal procedure for evaluating the amount of loss was not preempted by the Act.[12]

In Hudson News Co. v. Fed'l Ins. Co.,[13] Hudson News Company ("Hudson News"), which was engaged in the business of distributing and selling publications at various locations throughout New Jersey and New York, purchased insurance coverage for business income losses from Federal Insurance Company ("Federal") covering the period from December 31, 2000 to December 31, 2001. Prior to September 11, the parties corresponded about Hudson News' intent to add certain retail locations to a list of scheduled locations in order to make them subject to a $15 million blanket business income loss coverage. Although Federal received the appropriate worksheets from Hudson News in April 2001, it claimed that the additional retail locations were not specified in the policy for business income and extra expense coverage, and were thus subject to a limitation of liability for unnamed locations.

Federal argued that because an overwhelming majority of Hudson News' damage claims were directly caused by the September 11 attacks, the action belonged under the jurisdictional purview of Section 408(b)(3). Hudson News argued that its claim merely constituted a declaratory judgment action which should be brought in New Jersey Superior Court. Relying on the above cases, the District Court for the District of New Jersey held that because the litigation involved only the *existence* of insurance coverage, a dispute that arose in the Spring of 2001, the insurance company failed to meet its burden to establish original jurisdiction under the Act.

A different factual scenario was presented in Int'l Fine Art and Antique Dealers Show Ltd. v. ASU Int'l, Inc.[14] There, International Fine Art and Antique Dealers Show Ltd. ("International") took out an event cancellation policy issued and underwritten by the defendant underwriters, among others. The policy was to cover two antique fairs to be held at the Seventh Regiment Armory in New York City from September 24 to October 4, 2001 and from October 13 to 25. Due to the terrorist attacks on the World Trade Center, the New York National Guard occupied the Armory and "effectively cancelled International's lease to use the space for the fairs." The two art fairs had been scheduled to be held "almost six miles from the World Trade Center, and to

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begin 12 and 32 days, respectively, after September 11." International contended that because it was forced to cancel the two antique fairs, it suffered substantial losses and was subsequently exposed to numerous claims and suits by proposed exhibitors.

The SDNY found the facts of that action too remotely connected to the terrorist attacks to warrant exercise of jurisdiction. The court ruled that Section 403(b)(3) did not give it jurisdiction over claims seeking coverage for the cancellation of two antique fairs in the wake of the September 11 terrorist attacks because even if Section 408(b)(3) is read expansively, the dispute did not come within the court's reach. The SDNY held it "unnecessary to define the precise contours of section 408(b)(3), for whatever its scope, it does not create jurisdiction over an action that seeks a declaration of contractual rights under an insurance policy against which the plaintiffs have claimed because the response by our Government to the events of September 11 forced the cancellation of their antique shows."

C. Non-Insurance Cases

Outside of the insurance context, Graybill v. City of New York[15] significantly narrowed the scope of Section 408(b)(3) jurisdiction. Plaintiff sued the City of New York (the "City") for injuries sustained as a construction worker when, in cleaning the debris from the site of the destroyed World Trade Center, he was struck by a steel beam. Plaintiff alleged the site-owners' negligence under certain sections of the New York Labor Law. Based on Section 408(b)(3), the Port Authority removed the action to the SDNY. The SDNY remanded the case to state court, holding that "Congress did not intend to oust state court jurisdiction in cases . . . involving injuries common to construction and demolition sites generally, and risks and duties not alleged to be particular to the special conditions caused by the terrorist-related aircraft crashes of September 11."

In reviewing the statutory language of Section 408(b)(3), the SDNY explained that Title IV of the Act "appears to treat the right to seek compensation from the [September 11th Victim Compensation Fund ("Fund")], and the right to file suits at law, as alternatives," and therefore that the jurisdictional phrase "resulting from or relating to [the events of September 11]" may be plausibly interpreted "as applying only to suits by individuals who also had the right to seek compensation from the Fund."

The SDNY ultimately rejected this exclusive construction in light of the lawmakers' focus on consistency, but nevertheless held that nowhere in the scant legislative history was it suggested that "any case, however tangentially connected to the events of September 11, should be brought exclusively" in the Section 408(b)(3) forum. Furthermore, the SDNY suggested that the tort concept of proximate causation — limiting a tortfeasor's liability "to the expected, natural or foreseeable consequences of his or her wrongful conduct" — is a useful framework for limiting the scope of Section 408(b)(3). Therefore, the court did not allow its jurisdiction to be invoked "merely because the accident took place on the WTC site."

The three most recent cases involving the interpretation of Section 408(b)(3) are In re World Trade Ctr. Disaster Site Litigation,[16] Burnett v. Al Baraka Inv. and Dev. Corp.[17] and Virgilio v. Motorola, Inc.[18]

In In re World Trade Ctr., approximately 1200 workers involved in the rescue and clean-up efforts following the September 11 attacks brought suit against the City and the Port Authority alleging that these entities violated the state's labor laws by not providing adequate safety equipment, and that because of such violations, the plaintiffs suffered respiratory injuries. Although plaintiffs filed their lawsuits in the Supreme Court of New York, defendants relied on the Act in removing the injury suits to the SDNY. The court held that "claims for respiratory injury based on exposures suffered at the World Trade Center site between September 11, 2001 and September 29, 2001 'arise out of,' 'result from,' and are 'related to' the attacks of September 11, 2001 and must proceed exclusively under the Act and in [the SDNY]." In contrast, claims based on exposures

outside the World Trade Center or *after* September 29, 2001 "fall beyond the pre-emptive reach of the Act" and remain governed by the state's labor laws. The court explained that by September 29, 2001, the predominant task of "search[ing] for the living" had officially ended, and workers' efforts focused on demolition and debris removal that lasted through May 2002, and that the differences between these two phases affects the nature of the claims and the court's jurisdictional determinations.

Burnett involved more than two thousand victims seeking to hold accountable the persons and entities that funded and supported *al-Qaeda* under a series of statutory laws, including the Antiterrorism Act ("ATA"),[19] and the common law, in excess of one trillion dollars.[20] Subject matter jurisdiction was challenged only by Al Rajhi Banking and Investment Corportation, who argued that the Act vests exclusive jurisdiction over the plaintiffs' claims in the SDNY. The District Court for the District of Columbia held that construing the Act's jurisdictional language "to encompass claims against the September 11 terrorists and their conspirators would bring [it] irreconcilably into conflict with the ATA." Giving a narrow construction to the "exclusive jurisdiction" language of Section 408(b)(3), however, avoids a conflict between the two statutes. The court cited the Goodrich Court in agreement that the "exclusive jurisdiction" provision of Section 408(b)(3) arguably applies only to the federal cause of action created by Section 408(b)(1), i.e., "to victims of the terrorist related aircraft crashes of September 11."

In Virgilio, the plaintiffs brought an action against Motorola and the City alleging shortcomings in the design and function of certain Motorola radios, as well as the circumstances under which the radios came to be used by firefighters present at the World Trade Center. The SDNY held that it had jurisdiction under Section 408(b)(3) for the claims against Motorola. However, the SDNY stated that the claims against the City did not fall within the scope of Section 408(b)(3) since they were characterized as "a civil action to recover collateral source obligations," and therefore excepted from the Act's jurisdictional purview. Nevertheless, the SDNY held that those claims against the City could proceed based upon supplemental jurisdiction because most of plaintiffs' claims "are so closely related to their claims against Motorola individually and [the City and Motorola] jointly that they form part of the same case and controversy."

Conclusion

The pattern of the aforementioned cases is clear. Any insurance dispute, involving either insurers and reinsurers, relating to a loss suffered as a result of the events of September 11, falls outside the scope of Section 408(b)(3). Such disputes will be deemed to be seeking recovery of "collateral source obligations," and will be held not to raise issues of law or fact involving the events of September 11.

ENDNOTES

1. Pub. L. No. 107-42, 115 Stat. 230 (Sept. 22, 2001) (amended by the Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (Nov. 19, 2001)).

2. Burnett v. Al Baraka Inv. and Dev. Corp., 2003 U.S. Dist. LEXIS 12730, at *9 (D.D.C. 2003).

3. 210 F. Supp. 2d 322 (S.D.N.Y. Apr. 19, 2002), aff'd, 335 F.3d 52 (2d Cir. July 8, 2003).

4. Section 408(c) was added by the November 2001 amendments to the Act which stated that Section 408(b) does not apply to civil actions to recover "collateral source obligations," which are defined as "all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001."

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5. LaGory et al., "Recent Developments in Excess, Surplus Lines, and Reinsurance Law," 38 Tort & Ins. L.J. 335 (Winter 2003); see also Canada Life, 210 F. Supp. 2d at 329-30.

6. See also Associated Aviation Underwriters v. Arab Ins. Group (B.S.C.), 2003 U.S. Dist. LEXIS 6254, at *22 (S.D.N.Y. April 16, 2003) (holding that because Congress "specifically excluded life insurance claims from the grant of exclusive jurisdiction . . . it would be anomalous for this Court to hold that Congress did not also intend to exclude reinsurance claims brought by insurance carriers.").

7. 2003 U.S. App. LEXIS 17545 (2d Cir. Aug. 22, 2003).

8. No. 02 Civ. 4983, 2003 U.S. Dist. LEXIS 6254 (S.D.N.Y. April 16, 2003). Elliott M. Kroll of Herrick, Feinstein LLP brought the motion to dismiss on behalf of Arig Reinsurance Co.

9. 2002 U.S. Dist. LEXIS 13004 (E.D. La. Apr. 16, 2002).

10. 2002 U.S. Dist. LEXIS 11448 (N.D. Ohio June 17, 2002).

11. 2002 U.S. Dist. LEXIS 15272 (S.D.N.Y. Aug. 19, 2002), aff'd, World Trade Ctr. Props., LLC v. Hartford Fire Ins. Co., 345 F.3d 154 (2d. Cir. Sept. 26, 2003).

12. In affirming a related proceeding, the Second Circuit noted that although the broad language of Section 408(b)(3) "would appear to encompass the . . . claims filed by the World Trade Center property interest holders against their insurers . . . the very breadth of this jurisdictional grant . . . raises the question of whether it exceeds the constitutional limitations on Congress's authority to grant jurisdiction to federal courts." World Trade Ctr. Props. v. Hartford Fire Ins. Co., 345 F.3d 154, 164 (2d Cir. Sept. 26, 2003).

13. 258 F. Supp. 2d 382 (D.N.J. Apr. 4, 2003).

14. 2002 U.S. Dist. LEXIS 10878 (S.D.N.Y. June 19, 2002).

15. 247 F. Supp. 2d 345 (S.D.N.Y. Sept. 11, 2002).

16. 270 F. Supp. 2d 357 (S.D.N.Y. June 20, 2003).

17. 2003 U.S. Dist. LEXIS 12730 (D.D.C. July 25, 2003).

18. 2004 U.S. Dist. LEXIS 1194 (S.D.N.Y. Jan. 29, 2004).

19. 18 U.S.C. § 2331 et seq.

20. 2003 U.S. Dist. LEXIS 12730, at *1-4 (plaintiffs who are United States nationals invoked the court's jurisdiction under the ATA, and those who were not claimed under the Alien Tort Claims Act). ■

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