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INSIGHT

Insurance, Cyberattacks, and War in Ukraine

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The potential for large, correlated losses has long made insurers wary of offering coverage for war damage. The first exclusions in insurance contracts for marine war risks appeared in the late 1800s. With the relative absence of wars fought on U.S. territory, insurance against war risks has primarily been a concern for the transportation industry, with aviation being added to marine travel over the 20th century. The U.S. government has stepped in at various points and in various forms to ensure the availability of insurance against war risks from the beginnings of World War I through the aftermath of the September 11, 2001 terrorist attacks. (The 9/11 terrorist attacks also prompted a federal insurance program against terrorism risk.) While federal provision of war risk insurance is still authorized for sea and air vessels, it is narrower than it has been in the past. The risk of cyberattacks in the 21st century, particularly in regard to Russia's war in Ukraine, has brought the possibility of damages directly due to wars around the globe closer to home. Private insurance against such damage, however, may become more and more costly and difficult to obtain.

Federal War Risk Insurance from WWI-onward

The 1914 War Risk Insurance Act (P.L. 63-193) provided coverage through the Department of the Treasury for U.S. vessels unable to secure commercial insurance through World War I. Federal war risk insurance was again put into place following the outbreak of World War II and authority was made permanent for maritime transportation in 1950 (P.L. 81-763; currently codified at 46 U.S.C. §§53901-53911). This insurance has been focused on private ships providing direct support for Department of Defense (DOD) operations on a *nonpremium* basis—i.e., private ships do not pay premiums for this coverage. The Department of Transportation's (DOT) Maritime Administration (MARAD) operates the insurance program and pays initial claims. Following the payments, DOT is reimbursed by DOD since the ships are supporting DOD. MARAD also has authority to provide *premium* insurance—in which the private ships pay premiums for broader federal coverage—but this authority has been used less frequently.

From the Korean War onward, aircraft coverage became increasingly important as a growing amount of military support was provided through the air and the amount of civilian air traffic increased. The increased use of aircraft prompted the 1951 creation of federal war risk insurance for aircraft (P.L. 82-47; currently codified at 49 U.S.C §44301-44310). This insurance under DOT's Federal Aviation Administration (FAA) is somewhat similar to the MARAD insurance. It is, however, both broader in scope (with the authority to insure against "any risks" as opposed to primarily war risks) but more limited in time (with expiring authorities that would require reauthorization for further use). The FAA authority to provide premium insurance, which was used widely by air carriers following 9/11, expired December 11, 2014. The FAA authority to provide nonpremium coverage extends to September 30, 2023. (For more information on the post-9/11 program, see CRS Report R43715, *Aviation War Risk Insurance: Background and Options for Congress.*)

War Damage, Cyberspace and Insurance

The relative insulation of the United States from war damage may be lessening due to the interconnectivity fostered by the internet. For example, the 2017 NotPetya malware attack ,generally attributed to the Russian military and aimed at Ukraine, spread around the world, causing nearly a billion of dollars of damage to three U.S. companies alone, according to the Department of Justice. This damage could arguably be seen as war damage, and, were such damage to occur in the context of the current conflict in Ukraine, the argument to classify it as such would be even stronger. In addition, Russia is only one of many states that has been seen as sponsoring some variety of cyberattack. DOD views operations in cyberspace as a part of defending the United States and established a specific Cyber Command in response to growing cyber threats.

Insurance against cyberdamage has increased in prominence, but such insurance is still relatively new compared to the centuries of experience with marine insurance and the decades of experience with aviation. The novel nature of cyberinsurance, particularly the lack of historical data on losses and legal uncertainty about what is and is not covered by specific policy language, has led to volatility in cyberinsurance markets. Cyberinsurance overall has been growing, but insurers have experienced dramatically different levels of losses and policyholders have sometimes seen significant price increases.

Insurance policies often contain war risk exclusions, but such exclusions frequently have not been specifically litigated, particularly with regard to cyberdamage. In some cases, even with the presence of war exclusion language, courts have found that insurers may be liable for damage which could be considered due to war. The most notable instances involve the aforementioned NotPetya attacks with large lawsuits involving insurers and companies like Merck and Mondalez regarding the application on war risk exclusions. The Merck case has resulted in a $1.4 billion judgment that found the war risk exclusion did not apply, while the Mondalez case is still ongoing. The decisions in such cases may shape cyberinsurance going forward. To avoid potentially huge damages, insurers may continue to restrict coverage through more tightly crafted exclusions and increased prices. Similar dynamics in the past with terrorism coverage following 9/11 led to federal intervention, and some have previously called for something similar in cyber insurance.

Insurance and the War in Ukraine

Estimates of ultimate insured damages from the war in Ukraine are highly uncertain, but the impacted lines of insurance are not unexpected. Substantial aviation claims are already being made, with losses potentially in the range of $10 billion. Marine insurance is also expected to be highly impacted, as are other specialty lines of insurance. Such insurance is increasingly expensive, if available at all, but neither the FAA nor MARAD has announced expanded coverage under the federal war risk programs. Contrary to some expectations, widespread cyberattacks and damage have not seemed to occur, but the President has warned of the possibility of such attacks on the United States.

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