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Omni Berkshire Corp. v. Wells Fargo Bank, N.A. 2004 WL 375954 (S.D.N.Y)

Anyone concerned about the effect of insurance provisions in lease documents can benefit from a quick review of this case. Borrower took out a loan for approximately \$250 million and the loan was secured by five hotel properties. The loan documents required Borrower to keep the collateral insured by way of a "comprehensive all risk" policy and "such other reasonable insurance" as Lender may require from time to time.

The all risk policy originally covered terrorism but, after the attacks on September 11, terrorism was added to the list of exclusions and was no longer covered by Borrower's "all risk" policy. Lender informed Borrower that, in order to comply with its obligations under the loan documents, Borrower must obtain a separate policy covering terrorism. Borrower refused, citing the extremely costly nature of such coverage. As a result, the matter ended up in litigation.

The court reviewed the loan documents thoroughly to determine whether or not those documents contractually required Borrower to maintain insurance against terrorism. After much discussion, the court concluded that the requirement of an "all risk" policy did not necessarily mean that Borrower had to insure against the risk of terrorism. According to the court, the fact that the loan agreement did not define the term "all risk" resulted in ambiguity as to whether terrorism must be covered. The court then used standard rules for interpreting contracts in order to determine the intention of the parties. The court noted that the common understanding of "all risk insurance" was that it covered all risks *other than* those that are specifically excluded by the policy. Typical exclusions historically found in such policies include war, pollution, earthquakes and floods. However, exclusions vary over time



and, in many respects, reflect the general consensus of society as to what type of risks are worth insuring pursuant to an all risk policy. For example, in the mid to late 1990s, the "Y2K exclusion" was introduced to exclude damages caused from the failure of computer systems to recognize the year 2000. Similarly, "mold exclusions" have been becoming mainstream given the large suits resulting from toxic torts and other problems relating to mold. The "terrorism exclusion" is just the latest part of that evolution.

The problem in this case was that terrorism coverage was part of an "all risk" policy at the time the parties entered into the loan but subsequently became a standard exclusion to many such policies. According to the court, Borrower and Lender could have specifically required terrorism coverage or, alternatively, could have noted that Borrower must maintain insurance against "all risks" covered by such policies at the time the loan documents were executed. The failure to do so evidenced an intention by Borrower and Lender to allow the insurance requirements to evolve over time. In other words, the court held that the "all risk" policy that must be maintained by Borrower must only cover risks that are generally being covered by such policies from time to time. As additional exclusions arise, Borrower need not necessarily obtain separate policies to cover them.

Luckily for Lender, the loan documents contained a "catch-all" provision that allowed Lender to require "other reasonable insurance." After analyzing the risks that terrorism imposes on hotels (i.e. the main collateral for the loan), the court determined that it was reasonable for Lender to require terrorism insurance even if it were not covered by an "all risk" policy.

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