

SOME STRATEGIC DEFENSE INITIATIVES TOWARD
PREVENTING U.S. SPACE INSURANCE RELATED DISPUTES
AND LITIGATION

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Introduction

All would agree, it is in no one's best interest to become embroiled in protracted and complex space insurance related litigation/disputes venued in the United States. With that in mind, this paper is intended to explore, from a legal standpoint, some specific problem areas which tend to arise because of a lack of sufficient consideration of the following: (i) insuring agreements which contain language which it can be argued is subject to interpretation, (ii) requirements associated with proving a loss, (iii) due diligence requirements of the insured, and (iv) the insured's duty to advise of material changes to a risk. Reference will be made to some pertinent U.S. based space litigation involving the Westar IV and V satellites and the Leasat 3 satellite to illustrate how legal principles interplay with the problem areas, in the judicial environment. Finally, some recommendations, which will be called "strategic defense initiatives", will be made in the hope that parties to future space contracts can avoid some of the hazards which have led to disputes and litigation in the past.

The Recurring Problem Areas

The majority of space related insurance disputes between insurers and their policy holders, seem to have arisen because of:

1. Insuring Agreements which contain language which is subject to interpretation, and/or
2. requirements associated with proving a loss, and/or
3. due diligence requirements of the insured, and/or
4. the insured's duty to advise of material changes to risks.

Wording of Insuring Agreements

Contract law in the United States generally provides that in order for a valid and binding contract of insurance, or for that matter any

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contract, to be formed, the following four requirements must be met: (i) competent parties, (ii) legal subject matter, (iii) consideration and (iv) mutual assent. And the wording of the Insuring Agreement in an insurance policy is key to determining whether there has been a mutual assent, which is also sometimes referred to as a "meeting of the minds".

In many past disputes involving Insuring Agreements, where there has been some question about whether there had indeed been a mutual assent of the parties, the controversies involved either:

- (a) Agreements with terms that were not sufficiently specific or were conditional in nature, or
- (b) Agreements containing ambiguous terms.

The following is an example of an Insuring Agreement which would fall into category (a):

"Underwriters will indemnify the assured if the power output on the transponders fails to meet a level to be later agreed".

Such a wording can be characterized as an "agreement to agree" and would be generally unenforceable until such time as a "level" is agreed by the parties.

The following is an example of an Insuring Agreement (see (b) above) which contains a term that is so ambiguous that a court might be forced to "reform" the language to conform to the intent of the parties in order to find a valid contract:

"Underwriters will indemnify the assured if the power output on the transponders falls below a usable level"

The word "usable" is the main problem here. If this wording were to become the subject of litigation, one could rest assured that, depositions of the producing and placing brokers, and representatives of insurers and insured, would be necessary to attempt to find the true intent of the parties in the choice of the word "usable".

Requirements Associated With Proving A Loss

There is generally a condition contained in space insurance policies that requires that in the event of a loss, as soon thereafter as is practicable, a Proof of Loss must be filed in such form and including such information as Underwriters may reasonably require and request. In these policies, there is also usually a requirement that after the insured files a Proof of Loss, a certain amount of time will then be available for insurers to investigate the claimed loss. Under U.S. law, there is also an implied condition in all, including so-called "all risk", insurance policies that a

fortuitous event occur in order for a loss to be covered. After all, insurance is a game of chance, not a guarantee.

In the respected legal treatise *Couch on Insurance*, the following language appears:

The purpose of a provision for proof of loss is to afford the insurer an adequate opportunity for investigation, to prevent fraud and imposition upon it, and to enable it to form an intelligent estimate of its rights and liabilities before it is obligated to pay. Its object is to furnish the insurer with the particulars of the loss and all data necessary to determine its liability and the amount thereof.

The purpose is also to advise the insurer of facts surrounding the loss for which claim is being made. The proof of loss is also used by the insurer to make an estimate as to whether and under what factual circumstances recovery under the policy would be warranted.²

From past experience, space insurers generally require, at a minimum, the following be contained in a Proof of Loss:

1. A general statement identifying the policy under which the claim is being made and further identifying the property insured, the coverage provided, and the identity of the claimant and the insurer;
2. A description of the claimed loss including the time of the loss, a statement concerning the probable cause of the claimed loss and the result of the claimed loss. A statement ruling out excluded causes under the policy is sometimes required;
3. A statement concerning when notice of loss was first given to insurers;
4. A statement concerning ownership of the insured property upon which a claim is being made;
5. A statement concerning other insurance on the property;
6. A statement concerning the amount claimed and about the actual amount of the loss;
7. A statement concerning subrogation rights;
8. A statement affirming the assured played no part in intentionally causing the loss;
9. A statement concerning the assured's cooperation in Underwriter access to information;
10. A statement concerning non-waiver of insurer rights; and
11. that the Proof be sworn and subscribed by a corporate officer.

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13A GEORGE J. COUCH ET AL., COUCH ON INSURANCE 2D § 49A:3 (2d ed.1982).

The requirement in item 2 above, tends to make a generic Proof of Loss form practically impossible to compose. The reason for this difficulty is that a generic form would have to take account of the almost infinite variety of underlying scenarios for every possible type of loss (e.g.: power related, fuel related, transponder related, housekeeping system related, etc.).

Space related policies are often described as all risk in nature. The term "all risk" is actually a misnomer, because all risk policies are not "all loss" policies.³ All risk policies have an implied exclusion that a loss must occur as a result of a fortuitous event. The requirement of a fortuitous event is a "fundamental principle of law in interpreting insurance contracts."⁴ If the courts were to allow recovery under insurance policies without the fortuity requirement, public policy would be violated and fraud would be encouraged. Simply stated, an insurance policy is not a warranty of soundness.

Damage associated with a loss has generally been found by the U.S. courts to be fortuitous if neither party knew or contemplated that there was any defect at the time of the issuance of the insurance contract. A fortuitous event is one which so far as both parties to the contract are aware, is dependent on chance.

Due Diligence Requirements

The most well known case dealing with the subject of due diligence, as applied to a satellite insurance policy, is *Hughes Aircraft Company v. Lexington Insurance Company*⁵, which was filed by Hughes in 1986 in Los Angeles California Superior Court. The ultimate result in the case reflects what a strong duty can be imposed on an insured to avoid or diminish a loss.

By way of background, after reciting certain facts relating to the insurance policy and other contracts underlying the dispute, Hughes' Second Amended Complaint For Breach of Insurance Contract, Breach of Covenant of Good Faith and Fair Dealing, Breach of Statutory Duties and Breach of Fiduciary Duty against Lexington alleged, in pertinent part:

11. The [underlying] Contract required the Satellite to be at a synchronous altitude of approximately 22,000 miles. The Satellite as of the date of filing of this action was in a useless and deteriorating orbit of approximately 160 miles and was

³ Standard Structural Steel v. Bethlehem Steel Corp., 597 F. Supp 164, 192, (D. Conn. 1984).

⁴ Compagnie Des Bauxites De Guinee v. Insurance Company of North America, 554 F. Supp. 1080, 1083 (W.D. Pa. 1983), *rev'd on other grounds*, 724 F.2d 369 (3rd Cir. 1983).

⁵ Hughes Aircraft Company; Hughes Communications Services, Inc. v. Lexington Ins. Co., No. C-560-805 (Ca. Super. Ct. L.A. County filed March 26, 1986).

not acceptable to the U.S. Navy. The Satellite has at all relevant times since April 13, 1985 been a "Total Loss" as defined by the Lexington Policy. No "reasonably practicable" measure (as defined in Section 5(a) of the Lexington Policy) existed which, within a reasonable time or any time, could enable the Satellite to achieve Successful Orbit. Indeed, the only possibility for attempting to salvage the Satellite was an untested and unprecedented salvage mission by another space shuttle, the cost of which was estimated to approach one-quarter of the total cost of the Satellite. The implementation of such a speculative salvage mission was not a "reasonably practicable" measure "to avoid or diminish any loss" as required by clause 5(a) of the Lexington Policy.

12. On or about April 20, 1985, plaintiffs gave due and timely notice of the Total Loss of the Satellite to Lexington. Plaintiffs also submitted a sworn statement and proof of loss claiming the full Lexington Policy proceeds of \$4 million (the "Claim"). Plaintiffs' notice and proof of loss complied in all respects with their notice and proof of loss obligations under the Lexington Policy.

13. On or about May 14, 1985, Lexington denied the Claim. Lexington has failed and refused and continues to fail and refuse to pay the \$4 million due to plaintiffs under the Lexington Policy.

14. As a direct and proximate result of Lexington's failure to pay benefits due under the Lexington policy, plaintiffs have been damaged in the amount of \$4 million, together with interest thereon."

Attached to the Second Amended Complaint was a copy of the insurance policy. Condition 5(a) of the policy reads:

"5. NAMED INSURED'S DUTIES

In the event of an occurrence likely to result in claim, the Named Insured shall:

(a) Use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss under this policy."

After the satellite had been marooned in low orbit, Hughes did indeed enter negotiations with NASA to repair it. Thirteen of the fourteen insurers agreed to pay a total loss, with Lexington being the only hold out. After the discussions with NASA, Hughes proposed to insurers that if insurers would pay for the repair mission, and the mission were to turn out to be successful, the insurers could share in the subsequently earned revenues, potentially earning back most, if not all, of their loss payments.

Lexington only agreed to pay for its share of the repair mission, but not to make any loss payment, reasoning there had not been a total loss under the policy.

In August of 1990, after a six week trial, a jury decided that Leasat 3's initial failure to reach its intended orbit did not constitute a total loss under the policy. Therefore, judgment was entered in favor of Lexington. Hughes later appealed.

The Insured's Duty to Advise of Material Changes to Risks

A typical Material Changes condition in a contemporary space insurance policy might read:

If the Named Insured shall waive or modify any Technical Specifications [such term defined elsewhere in the policy], the Named Insured shall promptly notify Insurers of such waiver or modification. Insurers shall then have the right to review all of the terms and conditions of the Policy with the Named Insured and to the extent the waiver or modification results in an increase in risk of loss or change in insurable interest under the Policy, to renegotiate the effected terms. To the extent such negotiations cannot be successfully concluded, where a loss subsequently occurs and such loss is the direct result of said disputed waiver or modification; said loss or any loss resulting therefrom shall not be covered under the Policy.

Under the terms of the above wording, it is extremely important that the insurers receive up to date underwriting information all the way through and past the time of launch of the insured space device. A number of disputes have arisen because of failures to provide up to date information.

The Western Union Fuel Related Litigation

The following information is contained in public records concerning the case of *Western Union v. Lexington and the AA Mutual Defendants*, pending in the federal court for Newark, New Jersey.⁶ In that litigation the firm of Mendes & Mount, in which firm the author of this note is a partner, represents the so-called AA Mutual Defendants. The AA Mutual Defendants comprise the vast majority of insurers who are parties to the action.

Stripped to its essence, Western Union⁷ sued insurers for alleged breach of contract for failure to pay claims for some \$57,300,000 for

⁶ New Valley Corporation v. Lexington Insurance Company, No. 91-193 (D. N.J. filed Jan. 18, 1991).

⁷ Western Union is now known as New Valley Corporation.

Insufficient Fuel associated with the Westar IV and V satellites. The claims rely on language in the life insurance section of the policy which reads, in pertinent part: "Underwriters will pay for loss of hydrazine occurring after the expiration of this policy that results from causes known to exist during the policy period." The suit has been prosecuted by Western Union despite their, among other things, not owning the Westar IV and V satellites at the time of the alleged loss, not having advised insurers of the potential claims until some five years after the policies expired, and despite the fact that the satellites were retired from orbit with substantial amounts of fuel remaining onboard. The successor company to Western Union, New Valley, entered Chapter 11 Bankruptcy after the suit was commenced but New Valley, nonetheless, continued to press the litigation forward as a debtor-in-possession.

The insurance policy underlying the dispute had a period extending from October 1, 1981, to October 1, 1984. Coverage was provided under three Policy sections: SECTION I - TRANSIT AND GROUND PROPERTY INSURANCE, SECTION II - LAUNCH INSURANCE, AND SECTION III - LIFE INSURANCE.

Claims were made by Western Union under the life insurance section of the Policy. The pertinent policy language associated with the claims reads as follows:

2. *LIABILITY OF UNDERWRITERS*

Underwriters Will Pay:

C. In the event of Insufficient Fuel, the Agreed Value per pound of hydrazine stated by endorsement. Underwriters will pay for loss of hydrazine occurring after the expiration of this policy that results from causes known to exist during the policy period.

3. *ATTACHMENT AND TERMINATION OF INSURANCE*

The insurance provided under this Section III attaches at 12:01 A.M. Eastern Standard Time on the 120th day following each Launch Attempt and terminates at policy expiration.

7. *FUEL BUDGET*

The fuel budget established prior to Launch Attempt will be reviewed and revised if necessary to reflect the actual amount of hydrazine fuel on board at the attachment of coverage under this Section III on the 120th day following each Launch Attempt.

It should be noted that Westar IV was launched February 26, 1982, and Westar V was launched on June 6, 1982.

The Policy defined Successful Launch as follows:

That within 120 days after a Launch Attempt, the WESTAR Spacecraft is: (1) placed on station in synchronous circular equatorial orbit in the longitudinal position assigned by the FCC and (2) functions so as to meet or exceed all Spacecraft Performance Specifications and (3) is determined to be capable of performing its intended commercial operations for its 10 year design life.

If the launch was not Successful, the Policy required that Western Union make a claim, if at all, under Section II of the policy, the launch coverage. With respect to fuel claims, the launch section provided for fuel values of about one-tenth of those computed under the life section of the policy, per pound of fuel.

Insufficient Fuel was defined in the Policy as follows:

"That the WESTAR Spacecraft's Reaction Control Subsystem has less than the budgeted amount of hydrazine fuel remaining at the end of indicated time period as stated by endorsement."

Endorsement Number Three to the Policy provides:

"For all purposes of this Policy, the Agreed Value per pound of Hydrazine under Section III of the Insuring Agreements is \$3,000,000."

The AA Mutual Defendants responded to Western Union's Complaint by asserting, among other things, the following affirmative defenses:

1. Failure to state a claim against which relief can be granted.
2. Plaintiff has failed to perform duties and meet conditions required under the Policy. [The conditions are set forth elsewhere in the Answer and include such things as failure to provide: timely and adequate notice of loss, adequate Proofs of Loss, reasonably obtainable information concerning the alleged losses, appropriate fuel budgets, and an accurate determination as to the successfulness of the launches.]
3. Waiver.
4. Laches.
5. Statutes of Limitations.
6. Estoppel.
7. No liability since no fortuitous event occurred.
8. Failure to supply appropriate and accurate fuel budgets.
9. Lack of a sufficient insurable interest.

10. No recovery since no cause known during the Policy period.
11. No recovery since failure to supply timely notice of loss.
12. Cause, if any, during launch phase, not life phase.
13. Failure to mitigate damages.

The AA Mutual Defendants also filed a Counterclaim asserting six different cause of action seeking declarations of non-coverage, reformation of the insurance policy to reflect the true understanding of the parties, and return of no claims bonuses/premium reductions improperly paid. What follows is the full text of the Counterclaims to illustrate the level of complexity of the matter:

COUNTERCLAIMS

JURISDICTION

1. These Counterclaims are compulsory under F.R.C.P 13(a) and jurisdiction is proper under 28 U.S.C. Section 1367(a) (Counterclaim).

NATURE OF COUNTERCLAIMS

2. These are Counterclaims for Breach of Contract, for Unjust Enrichment, for Declaratory Judgments and for Reformation.

PARTIES

3. Counterclaimants are the AA Mutual Defendants named in this Answer.

4. The Counterdefendant is New Valley Corporation ("NEW VALLEY").

ALLEGATIONS PERTINENT TO ALL CAUSES OF ACTION

5. In 1981, NEW VALLEY, which was, among other things, in the telecommunications business, planned to launch three communications satellites to be known as Westar IV, Westar V, and Westar VI and desired to obtain insurance for these satellites.

6. In order to obtain this insurance, NEW VALLEY engaged the services of Alexander & Alexander ("A&A"), an insurance broker which held itself out to be an expert in such matters, as its agent to negotiate with the AA Mutual Defendants and others on NEW VALLEY's behalf.

7. Jointly and/or individually, NEW VALLEY and A&A drafted, arranged and designed policies of insurance for the Westar IV, V and VI satellites ("Policies") which Policies

were then submitted by A&A and/or other brokers acting on NEW VALLEY's behalf to the AA Mutual Defendants and to other insurance companies and entities worldwide. The AA Mutual Defendants individually agreed to the terms of the Policies and individually agreed to insure various percentages of the total coverage in return for payment by NEW VALLEY of corresponding percentages of the total premium. The period of the Policies all ran from October 1, 1981 until October 1, 1984.

8. The Policies provided three types of insurance for the Westar IV, Westar V and Westar VI satellites, which types of insurance are named Transit and Ground Property Insurance; Launch Insurance; and Life Insurance. For each satellite the Launch Insurance commenced upon its Launch Attempt and ran for 120 days. Then the Life Insurance commenced and ran until the Policies expired on October 1, 1984.

9. The launch insurance premium for Westar IV was fixed. However, the premiums for Westar V and VI depended on whether the previous Westar launch or launches were successful as defined under the Policies.

10. Under the terms of the Policies, NEW VALLEY had a duty to accurately determine whether each Westar launch was successful and to represent and/or warrant its success to the AA Mutual Defendants within 120 days of each Westar Launch Attempt.

11. A Successful Launch meant that the satellite (1) was placed on station in synchronous circular equatorial orbit in the longitudinal position assigned by the FCC and, (2) functioned so as to meet or exceed all Spacecraft Performance Specifications and, (3) was determined to be capable of performing its intended commercial operations for its 10 year design life. The Spacecraft Performance Specifications meant the specifications contained in the relevant Westar contracts between NEW VALLEY and the satellite manufacturer.

12. For each Successful Launch, under the terms of the Policies, NEW VALLEY was to be paid a No Claims Bonus in the amount of 20% of the premium it had paid for the launch insurance on that particular satellite.

13. The life insurance covered, among other things, "Insufficient Fuel". Insufficient Fuel meant that the satellite's positioning system had less hydrazine fuel remaining at a given time than was budgeted by NEW VALLEY, as indicated in budgets endorsed to the insurance policies.

14. As a basis for determining Insufficient Fuel losses NEW VALLEY was obligated to accurately calculate the fuel budget for each satellite before launch and to accurately adjust that budget as of the 120th day after launch to reflect

the amount of fuel remaining at the start of the life insurance period. Both the pre-launch and adjusted fuel budgets for each satellite were to be attached to, and to become a part of the Policies as endorsements.

15. To induce the AA Mutual Defendants to enter into the Policies agreement, NEW VALLEY represented to them that the fuel budget for the life policy period was deterministic.

16. The AA Mutual Defendants relied on NEW VALLEY's representation that the fuel budget for the life policy period was deterministic in agreeing to the terms of the life insurance portion of the Policies, and in particular, the Insufficient Fuel coverage.

17. Westar IV was launched on or about February 25, 1982. Under the terms of the Policies, NEW VALLEY represented and/or warranted to the AA Mutual Defendants that this launch was successful; and the AA Mutual Defendants relied on said representations and/or warranties.

18. Westar V was launched on or about June 9, 1982. Under the terms of the Policies, NEW VALLEY represented and/or warranted to the AA Mutual Defendants that this launch was successful; and the AA Mutual Defendants relied on said representations and/or warranties.

19. NEW VALLEY paid launch premiums for Westars IV, V and VI in the approximate amounts of \$7,125,000, \$6,000,000 and \$5,062,500, respectively or such amounts as are proved at trial. The AA Mutual Defendants received proportionate shares of these premiums.

20. Had NEW VALLEY not represented and/or warranted that the launches of Westars IV and V were successful, it would have paid approximately \$9,375,000, or an amount to be proved at trial, for each of the launches of Westar V and VI. The total additional premium would have been approximately \$7,687,500, or an amount to be proved at trial, of which the AA Mutual Defendants would have received their proportionate shares.

21. Having represented and/or warranted that the launches of Westars IV and V were successful, under the terms of the Policies, NEW VALLEY was paid and accepted No Claims Bonuses for approximately \$1,425,000, or an amount to be proved at trial, for Westar IV, and approximately \$1,200,000, or an amount to be proved at trial, for Westar V, respectively, for a total of approximately \$2,625,000, or an amount to be proved at trial, of which AA Mutual Defendants paid their proportionate shares.

22. On or about October 24, 1989, NEW VALLEY gave notice to A&A of a potential Insufficient Fuel claim with respect to Westar IV.

23. On or about November 7, 1989, NEW VALLEY gave notice to A&A of a potential Insufficient Fuel claim with respect to Westar V.

24. NEW VALLEY alleges that Insufficient Fuel resulted from plume impingement and/or thruster modeling errors. "Plume impingement" allegedly occurs when the exhaust from the satellite's positioning jets strikes other parts of the satellite, thus diminishing effectivity of inclination stationkeeping maneuvers. Thruster modeling errors are allegedly errors concerning thruster efficiency.

25. It was known before launch that plume impingement would occur, except NEW VALLEY alleges that its negative effects had been under estimated when fuel budgets endorsed to the policies were calculated.

26. NEW VALLEY misrepresented to the AA Mutual Defendants that the fuel budget for the life policy period was deterministic for the Westar satellites when in fact NEW VALLEY knew before launch that the effects of plume impingement were uncertain and that the satellite manufacturer had provided to NEW VALLEY only an estimate of the effects of plume impingement to be used in the fuel budget calculation.

27. If the facts alleged in NEW VALLEY's Proof of Loss are true, Westar IV was never capable of completing its 10 year design life.

28. If the facts alleged in NEW VALLEY's Proof of Loss are true, Westar V was never capable of completing its 10 year design life.

29. If the facts alleged in NEW VALLEY's claim are true, its prelaunch fuel budget for Westar IV was in fact not true.

30. If the facts alleged in NEW VALLEY's Proof of Loss are true, its prelaunch fuel budget for Westar V was in fact not true.

31. If the facts alleged in NEW VALLEY's Proof of Loss are true, its determination that the launch of Westar IV was successful, was in fact not true.

32. If the facts alleged in NEW VALLEY's Proof of Loss are true, its determination that the launch of Westar V was successful, was in fact not true.

33. The Policies only covered losses which were caused by fortuitous events which occurred, and which were known to have occurred, prior to the expiration of the Policies.

34. Plume impingement and thruster modelling errors are not fortuitous events.

35. Under the terms of the Policies, after October 1, 1984, coverage was limited to the specified risk of "loss of hydrazine", and Insufficient Fuel, as defined in the Policies, was no longer covered.

36. Under the terms of the Policies, after October 1, 1984, coverage was limited to "loss of hydrazine" resulting from causes which were "known to exist during the policy period".

37. NEW VALLEY alleges Insufficient Fuel subsequent to October 1, 1984, but does not allege loss of hydrazine.

38. NEW VALLEY alleges that prior to October 1, 1984 it did not know of the existence of a cause that would result in loss of hydrazine after October 1, 1984.

COUNT I

FOR BREACH OF CONTRACT (False representation and/or warranty of Successful Launch)

39. Paragraphs 1 through 38 of the Counterclaim are incorporated herein.

40. NEW VALLEY had a duty under the Policies to truthfully and accurately represent and/or warrant whether the launches of Westar IV and V were, or were not, successful. If the facts alleged by NEW VALLEY in its Proofs of Loss, concerning plume impingement and thruster modeling errors, are true, it breached its duty by falsely representing and/or warranting the success of those launches. The AA Mutual Defendants relied on this false representation and/or warranty and were damaged in that they erroneously paid to NEW VALLEY No Claims Bonuses for Westar IV and Westar V in their proportionate shares of the total amount of \$2,625,000 and were further damaged in that New Valley paid a proportionate share to the AA Mutual Defendants of the total of \$7,687,500 less in premium than the AA Mutual Defendants were entitled to under the Policies for launch insurance on Westar V and VI. Amounts stated above are approximate and may be such other amounts as are proved at trial.

COUNT II

FOR UNJUST ENRICHMENT

41. Paragraphs 1 through 38 of the Counterclaim are incorporated herein.

42. By reason of the foregoing, New Valley has been unjustly enriched in that it has paid \$7,687,500 less than it should have in insurance premiums and it has collected No Claims Bonuses in the amount of \$2,625,000 which it should not have received. AA Mutual Defendants are entitled to their proportionate shares of the stated amounts, which stated amounts are approximate and may be such other amounts as proved at trial.

COUNT III

FOR BREACH OF CONTRACT (*False representation and/or warranty of the fuel budgets*)

43. Paragraphs 1 through 38 of the Counterclaim are incorporated herein.

44. NEW VALLEY had a duty under the Policies to truthfully and accurately represent and/or warrant the fuel budgets for Westars IV and V. If the facts alleged by NEW VALLEY in its Proofs of Loss, concerning plume impingement and thruster modeling errors, are true, it breached that duty by falsely and inaccurately representing and/or warranting those fuel budgets and the AA Mutual Defendants relied on this false representation or warranty. The AA Mutual Defendants were damaged in that a claim is being made against them by NEW VALLEY for Insufficient Fuel under the life insurance coverage of the Policies.

COUNT IV

FOR DECLARATORY JUDGEMENT (*Life insurance claim for Insufficient Fuel*)

45. Paragraphs 1 through 38 of the Counterclaim are incorporated herein.

46. An actual controversy exists between the parties to the Policies in that NEW VALLEY contends that it has a valid claim under the life insurance section of the policy for Insufficient Fuel for both Westar IV and V caused by plume impingement and thruster modelling errors. The AA Mutual Defendants contend that the facts alleged by NEW VALLEY in its claim, concerning plume impingement and thruster

modelling errors, do not support a valid life insurance claim for Insufficient Fuel in that:

(a) the Insufficient Fuel loss alleged by NEW VALLEY was not an Insufficient Fuel loss; but was in fact, only an error in the fuel budget which New Valley represented and/or warranted to be true and accurate, and;

(b) the Policies cover only losses caused by fortuitous events occurring during the policy period and the Insufficient Fuel loss alleged by NEW VALLEY was not caused by a fortuitous event occurring during the policy period.

47. The AA Mutual Defendants wish a judicial determination of the rights and duties of the parties under the Policies and in particular a determination that NEW VALLEY has no valid life insurance claim for Insufficient Fuel.

COUNT V

FOR DECLARATORY JUDGEMENT (Life insurance claim for loss of hydrazine after the expiration of the Policies)

48. Paragraphs 1 through 38 of the Counterclaim are incorporated herein.

49. An actual controversy exists between the parties to the policies in that NEW VALLEY contends that it has a valid life insurance claim for loss of hydrazine for both Westar IV and V after expiration of the Policies. The AA Mutual Defendants contend that the facts alleged by NEW VALLEY in its claim, concerning plume impingement and thruster modelling errors, do not support a valid life insurance claim for loss of hydrazine after the expiration of the Policies in that:

(a) during the policy period NEW VALLEY did not know of the existence of any cause which would result in loss of hydrazine after the expiration of the Policies, and,

(b) no loss of hydrazine occurred after expiration of the Policies.

50. The AA Mutual Defendants wish a judicial determination of the rights and duties of the parties under the Policies and in particular a determination that NEW VALLEY has no valid life insurance claims for loss of hydrazine after the expiration of the Policies.

COUNT VI

FOR REFORMATION OF THE COVERAGE FOR LOSS OF
HYDRAZINE AFTER THE EXPIRATION OF THE POLICIES

51. Paragraphs 1 through 38 of the Counterclaim are incorporated herein.

52. By mutual mistake of the parties, or by the mistake of the AA Mutual Defendants and the fraud of NEW VALLEY in concealing knowledge of the mistake, the Policies do not express the true understanding of the parties in that the parties believed that coverage after expiration of the Policies was limited to loss of hydrazine, which resulted from a cause which, before the expirations of the Policies, New Valley knew to exist.

53. If the facts alleged by NEW VALLEY in its Proof of Loss are true, the Policies do not express the true understanding of the parties in that NEW VALLEY now claims that the Policies provide for Insufficient Fuel loss resulting from a cause which, after the expiration of the Policies, was known to have existed during the policy period.

54. The Policies should be reformed and revised to express the true intent of the parties with respect to coverage for loss of hydrazine after the expiration of the Policies.

WHEREFORE, Counterclaimants pray for judgement as follows:

(a) As to COUNTS I and II, return of the AA Mutual Defendants' proportionate share of the No Claims Bonuses in the approximate total amount of \$2,625,000, or such other amount as is proved at trial, and for the AA Mutual Defendants' proportionate share of the approximate total amount of \$7,687,500, or such other amount as is proved at trial, representing additional premiums due and owing for launch insurance on Westar V and VI.

(b) As to COUNT III, a setoff in an amount equal to the amount of NEW VALLEY's life insurance claims.

(c) As to COUNT IV, a declaration that NEW VALLEY has no valid life insurance claim for Insufficient Fuel for either Westar IV or V.

(d) As to COUNT V, a declaration that NEW VALLEY has no valid life insurance claim for loss of hydrazine after the expiration of the Policies.

(e) As to COUNT VI, reformation of the wording of the Policies which state: "Underwriters will pay for loss of hydrazine occurring after the expiration of this policy that

results from causes known to exist during the policy period." to read "Underwriters will pay for loss of hydrazine which occurs after the expiration of the policy but results from causes which were known, before the expiration of the policy, to exist."

(f) For prejudgment interest, attorney's fees and costs and for such other and further and different relief as this Court deems just and proper.

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 Through mid-August 1993, hundreds of thousands of documents have been requested and reviewed, seventeen depositions have been taken [some individual deponents being questioned for as many as seven days] and hundreds of pages of discovery related motions have been filed. And European based witnesses are set to be deposed in October 1993, in London, England. All of this and discovery concerning technical engineering related issues in the case is not even underway. And entirely from what defendant insurers would allege is an ill-founded interpretation of several words in one sentence of a fifteen page insurance policy.

The Strategic Defense Initiatives and Conclusion

To prevent having to expend extraordinary resources in future U.S. venued space insurance related disputes and litigation, the following courses of action, which will be called strategic defense initiatives, are strongly recommended:

1. In future space related insurance policies, Insuring Agreements should contain no terms that it can even be argued are imprecise, ambiguous or conditional;
2. Insureds should be fully aware of the requirements to establish and prove a loss and should be prepared to respond promptly to reasonable requests of insurers for documents and information;
3. Insureds should fully explore all means of avoiding or diminishing losses at the time a claim is being considered; and
4. Insureds should keep all underwriting information current with insurers and continue to advise insurers of pertinent information up to the time of launch and thereafter.

Based on experience to date, by following the above simple recommendations, the likelihood of future space insurance related disputes and litigation arising in the United States can be greatly reduced.