

# “NO CONCESSIONS” WITH NO TEETH: HOW KIDNAP AND RANSOM INSURERS AND INSUREDS ARE UNDERMINING U.S. COUNTERTERRORISM POLICY

## INTRODUCTION

The U.S. Government will make *no concessions* to individuals or groups holding official or private U.S. citizens hostage. . . . [I]t is U.S. Government policy to *deny hostage takers the benefits of ransom*, prisoner releases, policy changes, or other acts of concession.<sup>1</sup>

The United States’ policy for dealing with terrorist demands is clear: absolutely no concessions.<sup>2</sup> No ransoms shall be paid to hostage takers.<sup>3</sup> The policy is stern, but the government’s bark is worse than its bite because only the government is required to comply, not private entities. Private entities pay millions of dollars in ransom money every year, and scores of insurance companies sell kidnap and ransom (“K & R”) insurance policies to reimburse those entities for ransom payments.<sup>4</sup> An entire criminal industry surrounds the extortion of multinational corporations through kidnap for ransom—a criminal industry that insurance companies are financing by paying ransoms to hostage takers in direct opposition to U.S. government policy. One respected journalist wrote: ““In an unintentional conspiracy, the terrorist, the victim, and the insurance companies have found a level at which they are all prepared to work. The kidnapers get their cash, the victims have insurance, and the insurance companies get their premiums.””<sup>5</sup>

Not only are insurers funding terrorist activity and profiting from K & R premiums, but they are also undermining sound public policy designed to

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<sup>1</sup> Press Statement, Richard Boucher, U.S. Department of State, International Terrorism: American Hostages (Feb. 20, 2002), <http://www.state.gov/r/pa/prs/ps/2002/8190.htm> [hereinafter *State Department Hostage Policy*] (emphasis added).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> The Insurance Marketplace, <http://www.insurancemarketplace.com/default.aspx> (follow “Search for Companies by a Category and State” hyperlink; then select Category: “Kidnap/Ransom Insurance” and State: “Georgia;” then select “Search”) (last visited Oct. 17, 2006).

<sup>5</sup> ANN HAGEDORN AUERBACH, RANSOM: THE UNTOLD STORY OF INTERNATIONAL KIDNAPPING 216 (1998) (quoting James Adams).

prevent additional crimes. The U.S. government's "no concessions" policy is toothless when American companies, supported by their insurers, continue to comply with terrorist demands. This Comment suggests that the insurance industry could and should help put the bite back into U.S. counterterrorism policy by voluntarily adopting a no-pay policy.<sup>6</sup>

As kidnapping for political or criminal gain has become more prevalent, multinational companies and nongovernmental organizations ("NGOs") increasingly purchase K & R policies.<sup>7</sup> Since the U.S. invasion of Iraq in 2003, more than 430 foreigners have been abducted in that country<sup>8</sup> and at least 40 were subsequently killed.<sup>9</sup> The recent wave of kidnappings in Iraq has led to significant media coverage and congressional attention.<sup>10</sup> In fact, as part of the USA Patriot Act, the kidnapping of a U.S. national overseas is considered an act of terrorism.<sup>11</sup> However, this problem is not confined to Iraq. U.S. passports seem to mark Americans as kidnapping targets in many parts of the world.<sup>12</sup> As a result, U.S. companies interested in conducting business in the Middle East or other unstable regions must address the risk of employee abductions.

Many companies are managing the risk of kidnapping by purchasing insurance.<sup>13</sup> Just as organizations insure against fire, auto accidents, and

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<sup>6</sup> This Comment does not suggest that K & R insurance should be abolished, but rather that the focus of K & R policies should shift from after-the-fact ransom reimbursement to before-the-fact preventative coverage for kidnap prevention training, security consulting, and crisis management services. Just as property insurers assist their customers in designing sprinkler systems to prevent fires, K & R insurers should work toward decreasing the likelihood of abductions. Although insurance products accompanied by risk-prevention services might seem counterintuitive, at a basic level, insurance covers costs associated with risk, not risk itself. The origin of the cost covered by a policy—whether the realization of a risk or its prevention—is immaterial.

<sup>7</sup> Angie Wong, *Insurers Meet Rising Demand for Kidnap and Ransom Insurance*, COLUM. NEWS SERV. (New York, N.Y.), Mar. 15, 2004, <http://www.jrn.columbia.edu/studentwork/cns/2004-03-15/644.asp>.

<sup>8</sup> Peter Slevin, "We Have Your Husband," WASH. POST, June 7, 2006, at A18.

<sup>9</sup> Oliver Poole, *Iraqi Gets Life for Role in Murder of British Aid Woman*, DAILY TELEGRAPH (London), June 6, 2006, at 15.

<sup>10</sup> *Implications of Power Blackouts for the Nation's Cybersecurity and Critical Infrastructure Protection: Joint Hearing on the Electrical Grid, Critical Interdependencies, Vulnerabilities, and Readiness Before the Subcomm. on Cybersecurity, Science, and Research and Development and the Subcomm. on Infrastructure and Border Security*, 108th Cong. 4 (2003) (statement of Hon. J. Cofer Black, Coordinator of the Office of the Coordinator for Counterterrorism, Dep't of State).

<sup>11</sup> See *infra* Part III.A.2 and accompanying text.

<sup>12</sup> *U.S. Representative Christopher Shays (R-Conn.) Holds Hearing On Overseas Terrorist Threats*, 107th Cong. (2001).

<sup>13</sup> According to Chubb Insurance Company, "[U]p to 80% of Fortune 500 companies had purchased K & R policies for their globetrotting executives by December 2003." Wong, *supra* note 7.

worker injuries, they also frequently insure against the risk of kidnap, ransom, and extortion. Transferring the risk of employee abduction to an insurance company may be a sound financial decision. However, if an incident occurs and the K & R policy is triggered, multinationals may be faced with a dilemma: either finance terrorist organizations by paying a ransom or conform to U.S. policy directives and possibly subject their employee to additional harm.

This Comment suggests that neither insurers nor insured entities should have the option to diverge from U.S. government policy. K & R insurers should stop reinforcing terrorist behavior by paying ransoms. K & R insurance should continue to exist but without provisions for ransom reimbursement. Instead, K & R insurers should provide their customers with enhanced kidnap prevention training and crisis management services. Shifting the focus of K & R policies from reactive services to preventative mechanisms would allow the K & R insurance industry to exist without undermining the U.S. government’s “no concessions” stance.

This Comment explains the functionality and history of commercial kidnap, ransom and extortion insurance products and assesses the conflicting public policy ramifications of “one of the world’s murkiest legitimate businesses”: K & R insurance.<sup>14</sup> Kidnap victims typically fall into one of four categories: (1) expatriates and employees of high-profile companies, (2) business travelers, (3) tourists, and (4) wealthy local residents and their families.<sup>15</sup> This Comment focuses on K & R policies for businesses and nonprofit organizations, which typically cover scenarios in which employees<sup>16</sup> are kidnapped and held for ransom in a foreign country.<sup>17</sup>

Part I of this Comment discusses the emergence of kidnapping as a tool for extorting funding for criminal activity and compelling political action. Part II describes the genesis of K & R and the basic concepts of insurance that permit organizations to insure the lives of their employees. Part II.D discusses a key

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<sup>14</sup> William Prochnau, *Adventures in the Ransom Trade*, VANITY FAIR, May 1998, at 136.

<sup>15</sup> Melanie Simpson-Mills, *Spotlight on Kidnap and Ransom*, INT’L MONEY MARKETING, Sept. 9, 2004, at 32.

<sup>16</sup> Technically, some nonprofit organization workers may be volunteers and not employees, but for the sake of this Comment, the distinction is not important because generally they are treated in the same way if kidnapped in the course of completing their assignments.

<sup>17</sup> Although this Comment focuses on corporate insurance, it is interesting to note that several homeowners’ insurers offer K & R as an addendum for domestic events such as home invasion and child abduction. See, e.g., Fireman’s Fund Insurance Company, Prestige Home Premier, <http://www.firemansfund.com/servlet/dcms?c=personal&rkey=24> (last visited Oct. 17, 2006).

K & R policy benefit: access to security consultants who advise before and during kidnapping incidents. Part III reviews U.S. law and government policy surrounding abductions of U.S. nationals overseas and explores some of the conflicts between those policies and certain aspects of K & R insurance. Part IV proposes that the insurance industry should voluntarily adopt a no-pay policy to encourage consistent application of U.S. “no concessions” policy and to discourage future kidnappings.

## I. THE RISE OF KIDNAPPING FOR MONETARY OR POLITICAL GAIN

In 2004, London-based insurance broker Willis Group estimated between 8,000 and 10,000 kidnap-for-ransom incidents occur worldwide each year.<sup>18</sup> Victims around the world include previously anonymous businesspeople,<sup>19</sup> high-profile political figures,<sup>20</sup> and humanitarian aid workers.<sup>21</sup> According to the National Counterterrorism Center,<sup>22</sup> 33 Americans were kidnapped in foreign countries in 2004 and 13 were killed.<sup>23</sup> In 2005, 12 Americans were reported kidnapped overseas and 6 perished.<sup>24</sup> One professional kidnap consultant believes the actual numbers are 40 to 50 each year.<sup>25</sup> Since the

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<sup>18</sup> Willis Group Holdings Limited Conference Call, Special Contingency Risks and DBA Coverage (Dec. 16, 2004) [hereinafter *Willis Conference Call*] (comments of Derek Rogers, Divisional Dir., Special Contingency Risks, Willis Group).

<sup>19</sup> See *Curtis v. Beatrice Foods*, 481 F. Supp. 1275 (S.D.N.Y. 1980). Beatrice Foods executive in Colombia kidnapped and held for eight months before being released upon payment of ransom. *Id.*

<sup>20</sup> JAMES ADAMS, *THE FINANCING OF TERROR: HOW THE GROUPS THAT ARE TERRORIZING THE WORLD GET THE MONEY TO DO IT* 187 (1986) (discussing the Red Brigade's kidnapping of Signor Ciro Cirillo, a senior politician in Italy's Christian Democrat party).

<sup>21</sup> Carlotta Gall, *Gunmen in Afghan Capital Kidnap Italian CARE Worker*, N.Y. TIMES, May 17, 2005, at A10.

<sup>22</sup> President George Bush established the National Counterterrorism Center (NCTC) in August 2004 to serve as the primary U.S. government repository for terrorism and counterterrorism intelligence. NCTC is “dedicated to eliminating the terrorist threat to US interests at home and abroad.” National Counterterrorism Center: About Us, [http://www.nctc.gov/about\\_us/about\\_nctc.html](http://www.nctc.gov/about_us/about_nctc.html) (last visited Nov. 17, 2006).

<sup>23</sup> National Counterterrorism Center, Worldwide Incidents Tracking System, <http://wits.nctc.gov/Incidents.do> (select filter “Kidnapping” under “Event Type”; then select filter 01/01/2004 to 01/01/2005; then choose “Western (American)” under the Victim Characteristics drop menu).

<sup>24</sup> *Id.* (select “Event Type”; double click “Kidnapping”; then select “Save”; then enter “Start Date”: 01/01/2005 and “End Date”: 01/01/2006; then select “Victim Characteristics”: Western (American); then select “Search”).

<sup>25</sup> Monica Perin, *Kidnapping for Ransom a Rising Risk Overseas*, HOUSTON BUS. J., Mar. 4, 2005, available at <http://houston.bizjournals.com/houston/stories/2005/03/07/story5.html>.

2003 American-led invasion of Iraq, the Iraqi Interior Ministry reports that at least 425 foreigners and 5,000 Iraqis have been taken hostage in Iraq.<sup>26</sup>

Although Iraq has recently received most of the attention, New York-based security company Kroll Risk Consulting estimates that half of all kidnappings in the world occur in Latin America.<sup>27</sup> Kidnapping is most prevalent in Colombia, where 1,411 abductions were reported in 2004.<sup>28</sup> Contrary to a Colombian government report, Kroll believes that approximately half of the incidents go unreported, and therefore the actual number is probably closer to 4,000.<sup>29</sup> Disturbingly, kidnappings are also on the rise in countries that were traditionally not considered dangerous, such as Mexico.<sup>30</sup>

In addition to a rise in the number of kidnapping victims, K & R insurance sales have increased significantly in recent years. Sales went up twenty percent following the terrorist attacks in 2001.<sup>31</sup> Although updated sales volumes are unavailable, insurance agents confirm that interest in K & R insurance has swelled tremendously since the U.S. invasion of Iraq<sup>32</sup> and the subsequent kidnappings there.<sup>33</sup> Both the frequency of incidents and the number of organizations purchasing K & R policies are probably greater than public statistics reveal because kidnapping victims, insurers, and policyholders have reasons not to report the information. Insurers do not want ransom values disclosed for fear of increasing future demands,<sup>34</sup> victims may stay silent because of threats of further harm, and multinational policyholders may want to avoid negative publicity.

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<sup>26</sup> Anthony Loyd & Ali Hamdani, *Five Bodyguards Killed as Iraq Bank Chief Kidnapped*, TIMES (London), Feb. 18, 2006, at 49.

<sup>27</sup> *Fear of Captivity; Crime in Mexico*, ECONOMIST, Jun. 19, 2004, at 37.

<sup>28</sup> *RMs Can Help Thwart Kidnappers*, NAT'L UNDERWRITER, PROP. & CASUALTY, June 13, 2005, at 31. According to Pais Libre, a victims' support group, Colombia is the only country in Latin America where kidnappings are actually decreasing. See Niko Price, *A New Type of Kidnapper Terrorizes Latin America; Brutal Crime Wave Overwhelms Region*, WASH. POST, Aug. 29, 2004, at A20, A24.

<sup>29</sup> *Fear of Captivity; Crime in Mexico*, *supra* note 27.

<sup>30</sup> Mark Fineman, *Rise in Kidnappings Sparks Pervasive Fears in Mexico*, L.A. TIMES, Aug. 15, 1996, at A1 ("Kidnapping is a growth industry in Mexico.").

<sup>31</sup> Wong, *supra* note 7.

<sup>32</sup> Peta Miller & Sarah Veysey, *K & R Coverage for Iraq Costly, Difficult to Secure*, BUS. INS., May 3, 2004, at 25.

<sup>33</sup> See, e.g., *Lonely Deaths in the Desert*, OBSERVER (London), Dec. 11, 2005, at 17 (discussing Nick Berg, a kidnapped civilian contractor, whose brutal beheading was broadcast on the internet by his captors).

<sup>34</sup> Perin, *supra* note 25.

While many recent incidents in the news have been politically motivated,<sup>35</sup> the kidnapping business has also proven to be a lucrative fundraising tool. Britain's Foreign Policy Center estimated that kidnappers netted \$500 million in ransom money in 2001 alone.<sup>36</sup> Other estimates claim that from 1978 to 1998, multinationals paid out more than \$1 billion in ransom to release kidnapped executives.<sup>37</sup>

Throughout the history of terrorism, guerilla and terrorist groups have used kidnap for ransom as a means of funding their operations.<sup>38</sup> In recent history, the Revolutionary Armed Forces of Colombia (FARC),<sup>39</sup> the Irish Republican Army (IRA),<sup>40</sup> and Al Qaeda-linked terrorist cells<sup>41</sup> all have adopted the tactic. Of these groups, Colombian guerrillas seem to be the most successful profiteers. Between 1995 and 2000, FARC received approximately \$632 million in ransom for freeing kidnapped foreigners,<sup>42</sup> most of whom were employees of multinational corporations.<sup>43</sup>

Huge ransoms have established precedent for modern-day extortionists.<sup>44</sup> In 1975, Sears paid over \$1 million dollars for the release of an executive held for three months in Colombia.<sup>45</sup> One year prior, Exxon paid \$14.2 million for the release of one of its executives.<sup>46</sup> An Argentine multinational corporation once paid a \$60 million ransom for the safe return of an abducted employee.<sup>47</sup>

More recently, following the end of the full-fledged military operation in Iraq, hundreds of foreigners have been kidnapped by Iraqi insurgents

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<sup>35</sup> See, e.g., *Lonely Deaths in the Desert*, *supra* note 33 (discussing Nick Berg).

<sup>36</sup> *Willis Conference Call*, *supra* note 18 (comments of Derek Rogers, Divisional Dir., Special Contingency Risks, Willis Group).

<sup>37</sup> Prochnau, *supra* note 14, at 136.

<sup>38</sup> ADAMS, *supra* note 20, at 201.

<sup>39</sup> U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2003 133-34 (2004), <http://www.state.gov/documents/organization/31921.pdf>. In addition to kidnapping for hefty monetary ransoms, "FARC also uses hostages as bargaining tools to negotiate the release of its members from Colombian prisons." Kristen McCallion, *War For Sale! Battlefield Contractors in Latin America and the "Corporatization" of America's War on Drugs*, 36 U. MIAMI INTER-AM. L. REV. 317, 346 (2005).

<sup>40</sup> U.S. DEPARTMENT OF STATE, *supra* note 39, at 148.

<sup>41</sup> See *id.* at 58.

<sup>42</sup> Nazih Richami *Multinational Corporations, Rentier Capitalism, and the War System in Colombia*, 47 LATIN AM. POL. & SOC'Y 113, 126 (Fall 2005).

<sup>43</sup> *Id.*

<sup>44</sup> See, e.g., ADAMS, *supra* note 20, at 192; *Colombia*, LATIN AM., Nov. 7, 1975, at 352; *Worldgram: From the Capitals of the World*, U.S. NEWS & WORLD REP., Aug. 18, 1975, at 35.

<sup>45</sup> *Colombia*, *supra* note 44, at 352.

<sup>46</sup> ADAMS, *supra* note 20, at 192.

<sup>47</sup> *Worldgram: From the Capitals of the World*, *supra* note 44, at 35.

desperately seeking funds and media attention.<sup>48</sup> One of the most distressing cases is of British-born Margaret Hassan.<sup>49</sup> Mrs. Hassan was a 59-year old humanitarian aid worker for CARE International, a London-based NGO.<sup>50</sup> The fact that she was married to an Iraqi and acquired Iraqi citizenship did not stop her kidnapers from killing her.<sup>51</sup> Her abduction and murder led to the discontinuation of CARE International's operations in Iraq.<sup>52</sup>

In some cases, while the goal of the initial kidnapping may be financial, criminal gangs may actually sell their victims to militants with goals more ideological than mere fundraising.<sup>53</sup> "Experts believe that actually up to 90 percent of the kidnapping[s] in Iraq are carried out by criminal gangs, which if they do not get their ransom that they demand within the first few days, they will sell their victims up the chain to other groups."<sup>54</sup> "The gunmen who ambushed Mrs. Hassan are believed to have abducted her for money, but handed her on to a militant group when negotiations stalled after the British [g]overnment urged her employers not to offer any ransom."<sup>55</sup>

The prevalence of kidnapping incidents overseas has forced multinational organizations to consider how to manage the risk of employee abductions. It is neither practical nor desirable for many of these organizations to cease operations in high-risk environments; therefore, insurance products that transfer the financial risks of kidnapping or extortion to an insurer can offer an attractive risk-management vehicle. The problem with this vehicle is that ransom reimbursement provisions of K & R policies make paying ransoms easier for organizations that might not otherwise have the money. This fact may encourage multinationals to sidestep U.S. public policy and comply with

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<sup>48</sup> *Willis Conference Call*, *supra* note 18 (comments of Lisa Zanotelli, Exec. Dir., Special Contingency Risks, Willis Group).

<sup>49</sup> *Lonely Deaths in the Desert*, *supra* note 33.

<sup>50</sup> *Leaders Condemn 'Hassan's Murder'*, BBC NEWS, Nov. 17, 2004, <http://news.bbc.co.uk/1/hi/uk/4018335.stm>.

<sup>51</sup> *Id.*

<sup>52</sup> *Willis Conference Call*, *supra* note 18 (comments of Lisa Zanotelli, Exec. Dir., Special Contingency Risks, Willis Group).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Richard Owen & Daniel McGrory, *Secret Red Cross 'Deal' Freed Italians*, TIMES (London), Aug. 26, 2005, at 51. Another recent example involved a criminal organization that threatened to sell kidnapped Italian aid workers to militants like Al Qaeda if their demands were not met. *Willis Conference Call*, *supra* note 18 (comments of Lisa Zanotelli, Exec. Dir., Special Contingency Risks, Willis Group). Eventually, the victims were released after a reported \$1 million ransom payment. *Id.* But see Owen & McGrory, *supra*, at 51 (reporting that kidnapped Italians were freed "as the result of a deal in which four presumed Iraqi terrorists received life-saving treatment at the Italian hospital in Baghdad").

terrorist demands because conceding often seems to present the quickest way to secure the victim's release. Unfortunately, as the U.S. government has recognized, conceding to terrorist demands is only likely to lead to more and greater demands in the future.<sup>56</sup>

## II. HISTORY AND FEATURES OF KIDNAP AND RANSOM INSURANCE

The tumultuous international environment described above is fueling demand for K & R insurance—a means of transferring the costs associated with kidnapping, ransom, and extortion to a third party.<sup>57</sup> To understand the particulars of typical K & R policies, it is helpful to first explore the genesis of this type of insurance.

### A. *Traditional Insurance Products Do Not Cover the Risk of Employee Abductions and Related Extortion Overseas*

Corporations and nonprofit organizations often purchase an entire portfolio of insurance policies to manage traditional business and employee-related risks. For example, U.S. employers are required by statute to insure on-the-job employee injuries via workers' compensation.<sup>58</sup> Companies may also purchase life insurance policies for key employees; these policies benefit the employer and are triggered when the insured employee is disabled or killed on- or off-the-job.<sup>59</sup> However, these traditional insurance products do not provide coverage for the unique risks presented by kidnapping scenarios.

A corporation may have an insurable interest in the lives of its key employees, which allows it to purchase life insurance that benefits the company upon injury to or death of the employee.<sup>60</sup> Key person life insurance frequently is secured by organizations dependent upon the skills of leading executives, scientists, or technologists.<sup>61</sup> An organization may experience

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<sup>56</sup> *State Department Hostage Policy*, *supra* note 1.

<sup>57</sup> Simpson-Mills, *supra* note 15, at 32.

<sup>58</sup> *See, e.g.*, OR. REV. STAT. § 656.017 (2003).

<sup>59</sup> Sarah Goddard, *Versace Is Covered for Death of Designer*, BUS. INS., July 21, 1997, at 1.

<sup>60</sup> Norse N. Blazzard & Judith A. Hasenauer, *Insurable Interest: Is the Concept Dead or Alive?*, NAT'L UNDERWRITER, Sept. 9 1996, at 17.

<sup>61</sup> *See, e.g.*, Castle Brands, Securities Registration Statement (Form S-1), at 14 (Nov. 16, 2005) (discussing purchase of key person life insurance for its Chairman and CEO); Coley Pharmaceutical Group Inc., Quarterly Report (Form 10-Q), at 32 (Nov. 10, 2005) (discussing purchase of key person life insurance for its CEO and Chief Scientific Officer).

significant financial setbacks if it loses a key player.<sup>62</sup> Thus, key person life insurance is purchased to indemnify a corporation for that loss.<sup>63</sup> Key person life insurance reacts<sup>64</sup> even if the employee is lost when not on the job.<sup>65</sup> However, while key person life insurance indemnifies the company for an employee’s death, these policies generally exclude death due to terrorism or war and do not provide assistance to recover insured individuals who are kidnapped.<sup>66</sup>

Statutory workers compensation insurance is also unlikely to react to employee abductions overseas. American employees who usually live and work within the United States are covered by statutory workers’ compensation insurance for on-the-job injuries.<sup>67</sup> However, a worker generally is not considered to be on the job while commuting to and from work.<sup>68</sup> More important for the discussion in this Comment, American workers overseas may not be covered by statutory workers compensation.<sup>69</sup> As a result, many U.S. companies purchase foreign voluntary workers compensation (“FVWC”) insurance to cover domestic employees’ work-related injuries occurring outside the United States.<sup>70</sup> However, when an employee is on personal time<sup>71</sup> or commuting,<sup>72</sup> his employer’s FVWC policy is unlikely to be triggered.

K & R insurance emerged to fill gaps left by policies such as workers’ compensation and key person life insurance. It extends beyond insuring for injuries or death and provides added benefits not found in traditional insurance portfolios. One important distinguishing factor is the fact that most, if not all,

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<sup>62</sup> Goddard, *supra* note 59, at 1; Mark A. Teitelbaum, *Protecting a Business’s Most Valuable Employees*, NAT’L UNDERWRITER LIFE & HEALTH, Sept. 13, 2004, at 52.

<sup>63</sup> Debra S. Reypa, *How Much Key Employee Life Insurance Is Needed?*, NAT’L UNDERWRITER, LIFE & HEALTH, Feb. 23, 2004 (Financial Services Ed.), at 26.

<sup>64</sup> In insurance industry jargon, a policy “reacts” when it is triggered by a covered claim.

<sup>65</sup> Reypa, *supra* note 63, at 26.

<sup>66</sup> Michael Capozzi, *Protecting Key People; Disability*, RISK & INS., Apr. 15, 2002, at 36.

<sup>67</sup> See, e.g., OR. REV. STAT. § 656.017 (2003).

<sup>68</sup> E.g., *Croteau-Robinson v. Merrill Trust/Fleet Bank*, 669 A.2d 763, 764 (Me. 1996) (“According to the traditional ‘public streets’ or ‘coming and going’ rule, an employee could not recover for injuries occurring during a commute to and from work, unless the employer provided or controlled the transportation.” (citing *Boyce v. Potter*, 642 A.2d 1342, 1343–44 (Me. 1994); 1 A. LARSON, *THE LAW OF WORKMEN’S COMPENSATION* §§ 17.11, 17.40 (1993))).

<sup>69</sup> John Stites, *Going Forward with Global Investments*, RISK MGMT., Nov. 1995, at 12.

<sup>70</sup> See *id.* at 14 (recommending that employers provide employees abroad with FVWC).

<sup>71</sup> E.g., *Emory v. Miller*, 790 F. Supp. 368, 371 (D.R.I. 1992) (“The line between an employee’s personal and occupational activities determines whether or not workers’ compensation is available.”).

<sup>72</sup> *Croteau-Robinson*, 669 A.2d at 764.

K & R policies react to incidents regardless of whether the employee was engaged in personal or company business at the time of kidnapping.<sup>73</sup>

*B. Lloyd's of London: The First Insurer to Offer K & R Insurance*

It is not surprising that a Lloyd's of London syndicate<sup>74</sup> was the first insurer to offer kidnap insurance.<sup>75</sup> Since its inception, Lloyd's has served as the trailblazer of the insurance industry.<sup>76</sup> Underwriters at Lloyd's have insured almost every kind of risk, including "house-breaking, highway robbery, death by gin-drinking, the death of horses, and 'assurance of female chastity.'"<sup>77</sup> Lloyd's entered the K & R business following the highly publicized kidnapping of Charles Lindbergh's son in 1932.<sup>78</sup> However, the specific line of insurance did not gain prominence until the early 1960s, following a rash of kidnappings of bank executives' wives.<sup>79</sup>

From the mid-1970s to mid-1980s, K & R insurance was the "single most important growth area in Lloyd's, and the underwriting syndicates directly involved [experienced] both the greatest growth and the largest profits."<sup>80</sup> In 1971, Lloyd's was earning \$1.5 million from K & R insurance.<sup>81</sup> A decade later, 52% of the top 500 U.S. multinationals purchased K & R policies.<sup>82</sup> As of 2005, 80% of Fortune 500 companies bought K & R insurance<sup>83</sup> and annual K & R premium payments were estimated at more than \$250 million,<sup>84</sup> of

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<sup>73</sup> See American International Companies, *Corporate Kidnap and Ransom/Extortion Insurance*, Form 81760 (Dec. 2004) [hereinafter *AIG K & R Policy*] (on file with author) (waiving requirement that employee be on the job when an incident occurs).

<sup>74</sup> A syndicate is a group of underwriters who specialize in particular risk categories.

<sup>75</sup> ADAMS, *supra* note 20, at 5.

<sup>76</sup> See PETER L. BERNSTEIN, *AGAINST THE GODS: THE REMARKABLE STORY OF RISK* 90 (1996) (describing Lloyd's early history as integral to the development of the insurance industry).

<sup>77</sup> *Id.*

<sup>78</sup> ADAMS, *supra* note 20, at 193. Prominent aviator Charles Lindbergh's son was kidnapped and held for ransom on March 1, 1932. Charles A. Lindbergh Jr. Kidnapping, <http://www.charleslindbergh.com/kidnap/index.asp> (last visited Oct. 20, 2006). After a series of ransom notes, investigators found the child's body and began a two year investigation. *Id.* The inquiry led investigators to the perpetrator, who was executed by electrocution. *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> GODFREY HODGSON, *LLOYD'S OF LONDON* 88 (1984).

<sup>82</sup> *Insuring Against Risk Abroad*, *BUS. WK.*, Sept. 14, 1981, at 59, 60.

<sup>83</sup> Perin, *supra* note 25.

<sup>84</sup> *Kidnap Insurance: A King's Ransom*, *ECONOMIST*, Aug. 26, 2006, at 58, 58.

which Lloyd’s of London syndicate Hiscox enjoyed a 60% to 70% market share.<sup>85</sup> Of Hiscox’s K & R clients, 70% are multinational corporations.<sup>86</sup>

Currently, every leading insurance company and several boutique insurers offer K & R policies,<sup>87</sup> but coverage grants differ among insurers. The next section describes a typical K & R policy and highlights some differences that K & R buyers should know.

### C. K & R Policies Provide Various Coverages and Limitations

The precise coverage provided by K & R policies varies among insurance companies.<sup>88</sup> Multinationals can purchase blanket coverage for all employees, or they may choose to limit coverage by only purchasing policies for key employees or employees working in high-risk locations.<sup>89</sup> A standard K & R policy includes:

1. “[D]irect loss: coverage for loss resulting from the payment of a ransom demand resulting from a kidnapping or extortion threat”;<sup>90</sup>
2. “[E]xpenses incurred: coverage for expenses incurred in obtaining the release of a kidnapped victim or resolution of an extortion threat”;<sup>91</sup>

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<sup>85</sup> Hiscox, Kidnap and Ransom, <http://www.hiscox.com> (follow “Personal Insurance” hyperlink; then follow “Kidnap and Ransom” hyperlink) (last visited Nov. 18, 2006).

<sup>86</sup> Maria O’Brien, *Preparing for the Worst*, LATIN FIN., June 2001, at 42.

<sup>87</sup> See, e.g., American International Underwriters, Crisis Management, [http://www.aiu.com/BusinessLine/aiuCDA\\_bizline\\_fprod/0,1618,10,00.html](http://www.aiu.com/BusinessLine/aiuCDA_bizline_fprod/0,1618,10,00.html) (last visited Oct. 20, 2006); Chubb Group of Insurance Companies, Kidnap/Ransom & Extortion Insurance, <http://www.chubb.com/businesses/csi/chubb979.html> (last visited Oct. 20, 2006); Norfolk Mobility Benefits, Kidnap and Ransom Insurance, <http://www.norfolkgrp.com/plans/kidnapinsurance.htm> (last visited Nov. 18, 2006).

<sup>88</sup> Generally, K & R policies insure only an organization’s employees, but coverage for family members of employees also may be available. Carolyn H. Rosenberg & J. Andrew Moss, *Covering the Catastrophe: It’s a Matter of Insurance*, BUS. L. TODAY, Aug. 13, 2004, at 33, 37. In addition, insurers may offer specialty coverage for unique types of extortion, such as threat of contamination or malicious product tampering and hijacking of electronic files. See Miller & Veysey, *supra* note 32 (discussing various insurers restricting K & R coverage terms following spate of kidnappings in Iraq); see also Chubb Insurance Company, *Executive Protection Portfolio, Kidnap/Ransom and Extortion Coverage Section*, Form 14-02-7308 (Ed. 11/2002), at 3 [hereinafter, *Chubb K & R Policy*] (on file with author) (defining “Contaminate” and offering coverage for “Cyber Extortion”); *Computer’s Files Held for Ransom; Hacker Can Abduct the Documents by Encrypting Them*, KANSAS CITY STAR, May 25, 2005, at C3 (describing practice of “kidnapping” computer files). Several policies will indemnify kidnapping victims for personal financial losses that result from their detention. E.g., *AIG K & R Policy*, *supra* note 73, at 4; *Chubb K & R Policy*, *supra*, at 2.

<sup>89</sup> HODGSON, *supra* note 81, at 90–91.

<sup>90</sup> See ISO.com, ISO’s Kidnap/Ransom and Extortion Insurance Program, <http://www.iso.com/products/2200/prod2243.html> (last visited Oct. 20, 2006).

<sup>91</sup> *Id.*

3. "Detention or hijack: coverage for various costs and fees associated with securing the release of a detained or hijacked person";<sup>92</sup>
4. "In-transit delivery of property: coverage for loss of money being delivered as ransom while in the care and custody of a messenger";<sup>93</sup> and
5. "Risk-management and response services": access to experienced security consultants and experts in hostage negotiation, crisis response, and crime risk management.<sup>94</sup>

In addition to these standard provisions, many insurers offer legal liability coverage to pay attorneys' fees and damages if a kidnapped employee or his family or both allege wrongdoing in the course of negotiations.<sup>95</sup> By adding legal liability coverage to K & R policies, insurers have implicitly recognized the possibility of well-meaning employers being held responsible for botched negotiations.<sup>96</sup> This coverage may provide peace of mind to employers, but it seems to reduce the incentive for employers and security consultancies to exercise the utmost diligence during negotiations. If the negotiation goes awry and a lawsuit arises, the insurance company will pick up the tab.

Quotes for K & R insurance are available from numerous insurers. In 2006, almost forty insurers offered K & R policies in the state of New York alone.<sup>97</sup> To obtain a quote for K & R insurance, an organization must

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> The Insurance Services Office Incorporated (ISO) creates standardized insurance policy wording that is adopted by many insurers. Gene Rappe, *The Role of Insurance in the Battle Against Terrorism*, 12 DEPAUL BUS. L.J. 351, 361 n.24 (2000). ISO is a New York-based company that "publishes common insurance policy language, promulgates loss costs that carriers use to help determine their rates, establishes rules for classifying business operations, and provides other generic insurance services to the insurance industry." *Id.* Not all insurance companies use ISO policy language, but it is often considered the industry baseline because "court interpretations of standard coverage forms assure consistent treatment of claimants. Once a court determines the meaning of a word, phrase, or clause in a standard coverage form, that interpretation has far more meaning and scope than if every insurer's policy form used different wording for the same idea." ISO, ISO Line-of-Insurance Programs, <http://www.iso.com/products/2200/prod2201.html> (last visited Oct. 20, 2006).

<sup>95</sup> *Chubb K & R Policy*, *supra* note 88, at 7.

<sup>96</sup> *See, e.g., AIG K & R Policy*, *supra* note 73, at 6 (insuring judgments, settlements, and defense costs resulting from a kidnapping); *Chubb K & R Policy*, *supra* note 88, at 7 (insuring legal liability costs resulting from suits alleging negligence or incompetence).

<sup>97</sup> The Insurance Marketplace, <http://www.insurancemarketplace.com> (follow "I Agree" hyperlink; follow "Search for Companies by a Category and State" hyperlink; select Category: "Kidnap/Ransom Insurance" and State: "New York;" select "Search") (last visited Sept. 25, 2006). In the United States, insurance is currently regulated by state governments. Eileen M. Dacey, *Insurance Law: Understanding the ABCs 2000*, 629 PLI/LIT 9, 12 (Apr. 2000). Therefore, insurers must seek approval by each state insurance commission in order to offer coverage. *Id.*

complete an application.<sup>98</sup> A typical application requests information about the number of employees, countries in which employees work, employee travel patterns, and what precautions might be taken to prevent incidents.<sup>99</sup> American International Group (AIG) also considers the insured’s industry and revenues.<sup>100</sup> K & R may be offered on a stand-alone basis or as part of a broader insurance package.<sup>101</sup> Many insurers offer K & R in combination with directors and officers liability (D & O) coverage.<sup>102</sup>

The cost of K & R insurance varies significantly based on the risk insured.<sup>103</sup> On the low end, companies can buy \$1 million of coverage for \$700 per year.<sup>104</sup> However, the cost for a policy “can range from thousands of dollars to hundreds of thousands of dollars based on the country risk, the nature of the business and the employee’s profile.”<sup>105</sup> For example, insurance premiums for hot spots such as Colombia can cost as much as \$20,000 per year for a \$1 million policy limit.<sup>106</sup> Not surprisingly, the price of K & R insurance may increase considerably if the buyer has a history of kidnapping incidents.<sup>107</sup>

### *1. K & R Insureds Are Encouraged to Act Prudently*

Today’s K & R policies do more than provide benefits; they are also designed to deter insureds from acting irresponsibly. For example, AIG’s Corporate Kidnap and Ransom/Extortion policy will not pay if an insured fails to “evacuate from the host country within ten days after issuance of an advisory by the appropriate authorities.”<sup>108</sup> Thus, if an employee is specifically advised by the U.S. Department of State, the Foreign Offices of the

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<sup>98</sup> Victor O. Schinnerer & Co., PlanetKandR.com Product Information, Frequently Asked Questions, [http://www.schinnerer.com/product\\_info/kidnap\\_ransom/k\\_r\\_faqs.html](http://www.schinnerer.com/product_info/kidnap_ransom/k_r_faqs.html) (last visited Oct. 20, 2006).

<sup>99</sup> Chubb Public Company Kidnap/Ransom & Extortion Insurance Application, <http://www.chubb.com/businesses/csi/chubb3857.pdf>.

<sup>100</sup> AIG WorldSource Kidnap, Ransom & Extortion Insurance Brochure (Feb. 2005), <http://www.aigworldsource.com/worldsource/public/wsfileDownload/0,1375,1153,00.pdf?>

<sup>101</sup> See ForeFront Portfolio—NFP Orgs Kidnap/Ransom and Extortion Insurance, <http://www.chubb.com/businesses/csi/chubb3736.html> (last visited Oct. 20, 2006) (discussing Chubb’s modular insurance policy for nonprofit organizations).

<sup>102</sup> See *id.*

<sup>103</sup> O’Brien, *supra* note 86, at 42.

<sup>104</sup> Perin, *supra* note 25.

<sup>105</sup> O’Brien, *supra* note 86, at 42.

<sup>106</sup> Kevin M. Quinley, *Risk Managing Kidnap and Ransom Exposures*, RISK REP. (Int’l Risk Mgmt. Inst., Dallas, Tex.), Apr. 1999, at 6.

<sup>107</sup> Nancy Egan, *Kidnap/Ransom: High Profile Figures Most at Risk*, ROUGH NOTES, Mar. 1993, at 12.

<sup>108</sup> *AIG K & R Policy*, *supra* note 73, at 8.

U.K. or Canada, or an equivalent authority that he should leave the host country and does not do so, his abduction will not trigger the K & R policy.<sup>109</sup>

Another noteworthy clause in AIG's K & R policy is that criminal acts by an insured are excluded, but the exclusion does not apply "in a situation where local authorities have declared [the payment of ransom monies] illegal."<sup>110</sup> In other words, AIG will reimburse the insured for ransom payments, even if the payments were made illegally. The harsh realities facing multinationals have become so commonplace that AIG brazenly and openly states its willingness to reimburse for illegal ransom payments. Not only is AIG enabling multinationals to ignore U.S. government policy, but the insurance company is also condoning breaking local country laws.

### 2. *Certain Policies May Not Cover Politically Motivated Abductions*

K & R buyers should be attentive to the types of incidents covered by—and excluded from—their particular policy. Some insurers distinguish between politically motivated kidnappings and kidnap for ransom.<sup>111</sup> Chubb's Executive Protection Portfolio policy covers expenses related to "political threat," while AIG's policy will not react to a kidnapping unless ransom monies are demanded.<sup>112</sup> Thus, if abductors demand the release of prisoners in exchange for a kidnapped employee, a multinational with an AIG-type policy would find itself without coverage. However, if even a nominal ransom were demanded, the AIG-type policy would be triggered.

### 3. *The Existence of K & R Should Not Be Disclosed*

Disclosing the existence of a K & R policy is dangerous because kidnappers will often choose victims who are known to be insured.<sup>113</sup> The U.S. Embassy in Honduras states that "[i]ndividuals have been targeted specifically because they were known to carry kidnap insurance."<sup>114</sup> In fact, FARC maintains a database of information on potential targets and tracks the

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<sup>109</sup> *Id.* at 2, 8.

<sup>110</sup> *Id.* at 8.

<sup>111</sup> *See id.* at 2 (defining "Kidnapping"); *Chubb K & R Policy*, *supra* note 88, at 7–8 (defining "Political Threat").

<sup>112</sup> *AIG K & R Policy*, *supra* note 73, at 2 (defining "Kidnapping"); *Chubb K & R Policy*, *supra* note 88, at 8 (defining "Political Threat").

<sup>113</sup> Quinley, *supra* note 106, at 7.

<sup>114</sup> Embassy of the United States, Tegucigalpa, Honduras, Kidnap Threat and Policy Capabilities, <http://honduras.usembassy.gov/english/mission/sections/RSO/kidnap.htm> (last visited Nov. 18, 2006).

awards of large contracts for work in Colombia.<sup>115</sup> In response to this strategy, the risk manager of a Mexican-based company does not purchase K & R insurance because “[t]hat would be like placing our executives in a showcase to be kidnapped.”<sup>116</sup> Several news sources have reported that if a buyer of K & R insurance discloses the existence of the policy, it becomes void.<sup>117</sup> That may have been true in the past, but current policies are not so severe.<sup>118</sup> Instead, as a condition of the policy, insured organizations must “use all reasonable efforts not to disclose the existence of [the K & R policy].”<sup>119</sup>

Despite this reasonable diligence requirement, since January 2004, several public companies have disclosed details of their K & R policies in the “Material Contracts” section of their periodic reports filed in compliance with Securities and Exchange Commission regulations.<sup>120</sup> To comply with regulations intended to supply vital information to investors, a multinational may go so far as to list its insurance company, policy term, and even the policy limits.<sup>121</sup> One company even discussed the hiring of a Vice President of Risk Management whose responsibilities would include purchasing a K & R policy and managing relations with the related security consulting firm.<sup>122</sup> By publishing K & R policy details, companies allow kidnappers to learn how much insurance a company has obtained and to estimate the company’s access to funds that can be used to pay a ransom. To reduce the risk of becoming targets and to improve their strategic positions in advance of kidnapping negotiations, multinationals would be best served by keeping the existence of their K & R insurance secret. Insurers should not unfairly void K & R policies whose existence is unintentionally disclosed and insurance professionals and buyers should employ stringent practices to keep the insurance confidential.

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<sup>115</sup> O’Brien, *supra* note 86, at 42.

<sup>116</sup> Gloria Gonzalez, *Latin American Risk Management Expands*, BUS. INS., May 2, 2005, at 20.

<sup>117</sup> See, e.g., Prochnau, *supra* note 14, at 145; Quinley, *supra* note 106, at 7; Lori Widmer, *Post-War Risk: The War in Iraq Turned the Spotlight on Kidnap and Ransom Coverage*, RISK & INS., July 2003, at 31.

<sup>118</sup> See, e.g., *AIG K & R Policy*, *supra* note 73, at 10 (requiring only reasonable efforts to maintain confidentiality). In my personal experience as an insurance broker, K & R policies were labeled like any other file and kept in the same cabinet as a client’s property and casualty insurance policy files.

<sup>119</sup> *AIG K & R Policy*, *supra* note 73, at 10.

<sup>120</sup> Avado, Alliance Laundry, Brightpoint, Commerce Group, El Paso Electric Company, Stonemor Partners, and Simpson Manufacturing each listed their insurer, limits of liability, and effective dates of coverage in 10-Ks filed since January 2004. See, e.g., Alliance Laundry Systems LLC, Annual Report (Form 10-K) (Mar. 9, 2006).

<sup>121</sup> See, e.g., Danielson Holding Corp., Annual Report (Form 10-K), Exhibit 10, Material Contracts, at 16 (Mar. 15, 2004).

<sup>122</sup> *Id.*

*D. Insurance Companies Retain Security Consultants to Negotiate for the Release of Abducted Individuals*

A K & R policyholder is securing more than just indemnity for ransom and recovery expenses. Perhaps the most valuable benefit of K & R insurance is the access it provides to professional kidnap consultants.<sup>123</sup> Retaining a security consultant out of pocket can cost up to \$3,000 per day plus expenses.<sup>124</sup> Usually, K & R policies cover these fees and expenses on an unlimited basis.<sup>125</sup> Most insurance companies retain a single firm to manage all of their K & R negotiations. For example, the services of Control Risks Group—the “first ever kidnap consultancy”—accompany K & R policies issued by Lloyd’s syndicate Hiscox.<sup>126</sup>

Control Risks Group (CRG) was created in 1975 by then twenty-six-year-old Oxford University graduate Julian Radcliffe.<sup>127</sup> London-based CRG consultants advise policyholders on how to prevent kidnappings and how to handle an incident should one occur.<sup>128</sup> In creating CRG, Radcliffe launched a private corporation into the gray area where business, law enforcement agencies, and terrorist groups overlap.<sup>129</sup>

*1. Security Consultants Are Expert Kidnap Negotiators*

Security consultants are adept at negotiating with kidnapers in part because of their wealth of knowledge about the perpetrators. For example, Kroll Risk Consulting maintains a database with information about more than 1,000 kidnappings.<sup>130</sup> This institutional knowledge helps security firms advise the victim’s family and the insured on what information might change the kidnapers’ preferences or convince the criminals that their alternatives to reaching a negotiated agreement are less desirable than previously believed.

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<sup>123</sup> Widmer, *supra* note 117, at 31–32.

<sup>124</sup> *Willis Conference Call*, *supra* note 18 (comments of Derek Rogers, Divisional Dir., Special Contingency Risks, Willis Group).

<sup>125</sup> *Id.*

<sup>126</sup> AUERBACH, *supra* note 5, at 206; Hiscox, *supra* note 85.

<sup>127</sup> AUERBACH, *supra* note 5, at 206.

<sup>128</sup> *Id.* at 207.

<sup>129</sup> *Id.* at 206–07.

<sup>130</sup> Egan, *supra* note 107, at 12.

Security consultants may deal with more than thirty abduction and extortion cases each year.<sup>131</sup> Interestingly, the consultants themselves do not actually negotiate with the kidnappers.<sup>132</sup> The consultant usually will identify someone close to the victim, such as a family member or friend, to interact with the criminals. This strategy prevents the kidnappers from discovering that the cost of the kidnapping could be paid by an insurance company, which, as discussed above, could lead to an increased ransom demand.<sup>133</sup>

## 2. *Various Strategies May Be Adopted to Prevent Kidnappings and to Recover Victims*

Multinationals can avail themselves (and their employees) of various means to prevent kidnapping, but those methods are not failsafe, and they often present their own dilemmas, including expense. A kidnap and extortion prevention program may include employee education, implementation of strict travel guidelines, and risk alerts delivered by e-mail.<sup>134</sup> K & R insurance does not include the cost of bodyguards or armored vehicles, but many multinationals buy such services separately.<sup>135</sup> Protection comes at a price; for example, the head of corporate security for Kroll Inc. in Brazil estimates that the bare-minimum security costs for a corporate vice president amount to \$80,000 for the first year.<sup>136</sup>

Besides hiring and training personnel to protect employees, security firms offer basic kidnapping prevention advice: “[D]ress down, forget the Jaguar, and don’t flash your corporate logo overseas.”<sup>137</sup> One basic strategy is “to train chauffeurs in how to evade roadblocks.”<sup>138</sup> Recently, a journalist in Iraq said that avoiding kidnappers is “like a game of dodge ball.”<sup>139</sup>

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<sup>131</sup> Sheri Merkling & Elaine Davis, *Kidnap & Ransom Insurance: A Rapidly Growing Benefit*, COMPENSATION & BENEFITS REV., Nov./Dec. 2001, at 44.

<sup>132</sup> See Prochnau, *supra* note 14, at 145.

<sup>133</sup> See, e.g., *id.*; see also *supra* Part II.C.3.

<sup>134</sup> AIG Private Client Group—Kidnap and Ransom, [http://www.aigpcg.com/kidnap\\_ransom.htm](http://www.aigpcg.com/kidnap_ransom.htm) (last visited Oct. 17, 2006).

<sup>135</sup> HODGSON, *supra* note 81, at 93–94.

<sup>136</sup> Price, *supra* note 28.

<sup>137</sup> Prochnau, *supra* note 14, at 145.

<sup>138</sup> HODGSON, *supra* note 81, at 94.

<sup>139</sup> Rick Jervis, Peter Johnson & Jim Drinkard, *Iraq Bombing Highlights Dangers Journalists Face*; *ABC News Anchor, Cameraman Injured in Explosion Weeks After Insurgents Kidnap Newspaper Writer*, USA TODAY, Jan. 30, 2006, at 1A.

Some multinationals will cooperate with criminals by purchasing a *vacuna*, or vaccination, directly from the kidnappers. In Bogotá, a \$60,000 *vacuna* will protect you from a half-million-dollar kidnapping.<sup>140</sup> Of course, such a payment may violate local laws or, worse, may be considered aiding and abetting criminals.

Where preventative techniques do not work, technology may provide assistance. For example, VeriChip introduced subdermal microchips to help find kidnapping victims.<sup>141</sup> These inexpensive chips (\$200 each) carry identification numbers and important medical information about their hosts.<sup>142</sup> VeriChip products can also include global positioning system (“GPS”) tracking devices. In fact, one Brazilian politician pressed to be the first person in South America to receive a chip implant because he hoped it would save his life if he were abducted.<sup>143</sup>

Proponents of the chips suggest that “[a] VeriChip might have helped prevent the death of Daniel Pearl, the *Wall Street Journal* reporter who was kidnapped and murdered in Pakistan.”<sup>144</sup> Critics warn that implantable homing devices “aren’t worth the effort and leave a telltale bruise.”<sup>145</sup> Chips implanted under the skin may actually result in additional harm to the victim. As an illustration, in a recent episode of the hit television show *24*, terrorists simply carved an implanted chip out of the skull of their hostage.<sup>146</sup>

### 3. *The Reactive Focus of K & R Does Little to Reduce Kidnappings*

A significant problem with the K & R industry’s current form is that it “is there to step in *afterward* and give its customers the best chance of coming out alive—with as little derring-do as possible.”<sup>147</sup> K & R is currently designed as a “defensive device” as opposed to a prevention tool.<sup>148</sup>

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<sup>140</sup> Prochnau, *supra* note 14, at 145.

<sup>141</sup> Jane Black, *Roll Up Your Sleeve—for a Chip Implant*, BUS. WK. ONLINE, Mar. 21, 2002, [http://www.businessweek.com/bwdaily/dnflash/mar2002/nf20020321\\_1025.htm?chan=search](http://www.businessweek.com/bwdaily/dnflash/mar2002/nf20020321_1025.htm?chan=search).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Prochnau, *supra* note 14, at 136.

<sup>146</sup> *24*, Episode Guide 9:00 p.m. to 10:00 p.m., <http://www.fox.com/24/episodes/season4/9pm.htm>. Portrayals of terrorism and counterterrorism tactics in the media are helping to shape the public’s view of crimes like kidnapping. This particular scene in *24* suggests that high technology solutions like GPS chips may be easily foiled by low technology, such as the knife used in the show.

<sup>147</sup> Prochnau, *supra* note 14, at 145.

<sup>148</sup> *Id.*

As the U.S. Department of State recognizes, [G]ood security practices, relatively modest security expenditures, and continual close cooperation with embassy and local authorities can lower the risk to Americans living in high-threat environments.”<sup>149</sup> By purchasing K & R insurance, organizations get access to excellent security consulting services.<sup>150</sup> To reduce the odds of abduction, experts from organizations such as CRG and Kroll should be training every individual working in a high-threat environment. Regardless of training and technology, until kidnapping becomes a fruitless crime, kidnappings are likely to continue.<sup>151</sup> Hence, there will still be a need for organizations to manage the financial risk of employee abductions. K & R insurance provides a mechanism to do so, but as it exists now, it conflicts with U.S. government policy. The next Part discusses some areas of conflict.

### III. LEGAL AND PUBLIC POLICY ISSUES SURROUNDING K & R INSURANCE AND THE ADOPTION OF A NO-PAY POLICY

#### A. *Paying Ransoms Contravenes Both U.S. Government Policy and Federal Law Addressing Abductions of U.S. Nationals Abroad*

Congress has enacted laws pertaining to the abduction of U.S. nationals overseas.<sup>152</sup> In addition, the State Department has published its policy on dealing with abductors: No concessions shall be made.<sup>153</sup> Thus, paying ransoms is inconsistent with U.S. policy and may violate federal law. K & R insurers could conform to U.S. policy directives by adopting a no-pay policy, i.e., discontinuing their reimbursement of ransom payments.

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<sup>149</sup> *State Department Hostage Policy*, *supra* note 1.

<sup>150</sup> HODGSON, *supra* note 81.

<sup>151</sup> *Cf.* Prochnau, *supra* note 14, at 136–40.

<sup>152</sup> *See, e.g.*, 18 U.S.C. § 1203 (2000).

<sup>153</sup> *State Department Hostage Policy*, *supra* note 1.

1. *Acts of Terror Have Prompted the Enactment of Federal Kidnapping and Hostage-Taking Laws*

In 1984, three years after the end of the Iranian hostage crisis,<sup>154</sup> Congress followed in the footsteps of the United Nations<sup>155</sup> by criminalizing the kidnapping of a U.S. national, regardless of where the crime occurs, by enacting the Hostage Taking Act.<sup>156</sup> As a result, the kidnapping of a U.S. national overseas is subject to investigation by the Federal Bureau of Investigation.<sup>157</sup> Because of the Act's broad reach, the State Department has warned that "[a]ctions by private persons or entities that have the effect of aiding or abetting the hostage taking, concealing knowledge of it from the authorities, or obstructing its investigation may themselves be in violation of U.S. law."<sup>158</sup> Therefore, multinationals and K & R insurers that quietly pay ransoms and conceal those payments from authorities may violate the Hostage Taking Act. Likewise, one could argue that K & R insurers are aiding or abetting kidnappers by creating a mechanism to negotiate with kidnappers and by providing resources to pay ransoms. In these ways, multinationals and insurers may be undermining U.S. public policy embodied in the Hostage Taking Act and current counterterrorism initiatives.

Generally, crimes affecting U.S. citizens while working or traveling abroad are outside the jurisdiction of U.S. authorities. However, Congress has opted to extend extraterritorial jurisdiction to apprehend abductors in certain cases.<sup>159</sup> The federal law definition of "kidnapping" does not grant jurisdiction to the U.S. government for incidents occurring overseas except in special circumstances.<sup>160</sup> However, "hostage taking" as defined in the Act includes most, if not all, abductions of U.S. nationals "whether inside or outside the

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<sup>154</sup> On November 4, 1979, sixty-six U.S. diplomats and citizens were taken captive by a group of Iranian student militants loyal to the new Iranian government. Fifty-two of the captives were held inside the U.S. Embassy in Tehran for 444 days while the other fourteen were released earlier. Richard Harwood & T.R. Reid, *U.S. Announces Resolution of Dispute Blocking Return of Hostages from Iran*, WASH. POST, Jan. 20, 1981, at A1.

<sup>155</sup> U.N. International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205. The U.N. Convention was itself a response to the Iranian hostage crisis.

<sup>156</sup> Act for the Prevention and Punishment of the Crime of Hostage-Taking (Hostage-Taking Act), Pub. L. No. 98-473, 98 Stat. 2186 (1984) (codified as amended at 18 U.S.C. § 1203 (2000)).

<sup>157</sup> *State Department Hostage Policy*, *supra* note 1.

<sup>158</sup> *Id.*

<sup>159</sup> §§ 1203, 2332b(e). The issues surrounding the extradition of international criminals and the U.S. government's power to grant extradition jurisdiction are beyond the scope of this Comment.

<sup>160</sup> § 1201(e).

United States.”<sup>161</sup> This Comment assumes that all hostage takings occurring outside the United States where ransom or other action is demanded are considered kidnappings. The statutory distinction is that a “kidnapping” generally occurs within the United States, whereas a “hostage taking” occurs outside the United States.<sup>162</sup> Codified in 18 U.S.C. § 1203, the Act states:

[W]hoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.<sup>163</sup>

Section 1203 applies to a crime outside the United States if either the hostage taker or the victim is a U.S. national, if the hostage taker is found within U.S. territory, or if the hostage taker demands action by the U.S. government.<sup>164</sup> Therefore, § 1203 applies when American workers are kidnapped overseas. Thus, K & R policies also cover hostage takings as defined by § 1203.

## 2. *Abducting an American Abroad Is an Act of Terrorism as Defined by the USA Patriot Act*

Similar to the fallout from the Iranian hostage crisis<sup>165</sup> that led to the Hostage Taking Act of 1984, the September 11, 2001 attacks prompted the passage of the USA Patriot Act.<sup>166</sup> This legislation recharacterized many existing crimes as terrorist acts, including kidnapping of U.S. nationals overseas.<sup>167</sup> In late 2005, Congress reauthorized the Patriot Act,<sup>168</sup> which defines “federal crime[s] of terrorism.”<sup>169</sup> Kidnapping and hostage taking are now considered acts of terror if the crime “involv[es] conduct transcending

<sup>161</sup> § 1203.

<sup>162</sup> §§ 1201, 1203.

<sup>163</sup> § 1203(a).

<sup>164</sup> § 1203(b)(1)(A)–(C).

<sup>165</sup> *See generally* Am. Int’l Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. 522 (D.D.C. 1980).

<sup>166</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>167</sup> § 2332b(g)(5).

<sup>168</sup> USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006).

<sup>169</sup> *Id.*

national boundaries”<sup>170</sup> and is “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”<sup>171</sup> Maximum penalties for kidnapping include life imprisonment and, if the victim is killed, the death penalty.<sup>172</sup> Because certain kidnappings now fall within the definition of terrorism, it is critical that American reactions to such incidents are strong and consistent. By providing multinationals with the financial means to comply with terrorist demands, K & R insurers are contravening U.S. counterterrorism policy.

### 3. *U.S. State Department Counterterrorism Policy Is Clear: No Concessions*

The U.S. government has adopted a clear stance for dealing with hostage takers: “no concessions” shall be made.<sup>173</sup> The Department of State contends that “[b]ased upon past experience . . . making concessions that benefit hostage takers in exchange for the release of hostages increase[s] the danger that others will be taken hostage.”<sup>174</sup> Although this policy prohibits concessions to terrorist demands, it does not prohibit negotiation with terrorists as it does allow for “contact with representatives of the captors.”<sup>175</sup>

The policy mandates a clear course of action to be followed if a U.S. government employee is abducted, but the manner in which American companies choose to deal with abductions of their own employees is subject to a certain level of autonomy.<sup>176</sup> Clearly, multinationals cannot compel the U.S. government to release prisoners or withdraw troops if demanded in exchange for a private kidnapped employee, but companies can pay ransoms. While the U.S. government “strongly urges American companies and private citizens not to accede to hostage-taker demands,” it does not prohibit payment of ransoms by private entities.<sup>177</sup> The State Department warns:

U.S. private organizations . . . must understand that if they wish to follow a hostage resolution path different from that of U.S. government policy, they do so without U.S. government approval. In the event a hostage-taking incident is resolved through concessions,

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<sup>170</sup> § 2332b(a)(1).

<sup>171</sup> § 2332b(g)(5)(A).

<sup>172</sup> § 2332b(c).

<sup>173</sup> *State Department Hostage Policy*, *supra* note 1.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

U.S. policy remains steadfastly to pursue investigation leading to the apprehension and prosecution of hostage takers who victimize U.S. citizens.<sup>178</sup>

The statement above reflects the State Department’s recognition that currently no law requires private organizations to comply with U.S. “no concessions” policy. Hence, unless paying ransom violates local country law, those payments do not violate U.S. federal law, and K & R insurers are enabling the process and profiting from the premiums.

### *B. K & R May Create a Market for Extortion*

Critics of K & R insurance argue that the product is helping to fuel a market for extortion. The U.S. State Department contends that concessions to terrorists, such as the payment of ransom, increase the danger that others will be kidnapped.<sup>179</sup> The U.S. position is supported by the fact that insured multinationals now can pay (and be reimbursed by their insurer) more in ransom than the organizations could have afforded without insurers’ assistance. Terrorists, in response to this reality, target victims known to be insured.<sup>180</sup>

Refuting this argument, CRG founder Julian Radcliffe stated that kidnap insurance increases neither ransom demands nor the number of kidnappings.<sup>181</sup> He claims that expert negotiators can resist the knee-jerk reaction of immediately succumbing to terrorist demands, thereby lowering the ransom price.<sup>182</sup> Furthermore, when an organization purchases K & R that includes security consulting services, the organization is often required to take precautionary measures as a condition of the policy—precautions that result in fewer kidnappings.<sup>183</sup>

Despite Radcliffe’s contention that kidnap consultants can reduce ransom demands, CRG has implicitly contradicted this contention in its own strategies for dealing with kidnappers.<sup>184</sup> CRG typically uses an intermediary, usually

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*; see *supra* notes 113–22 and accompanying text.

<sup>180</sup> Joe Sharkey, *Global Economy Is Leading to More Dangerous Places*, N.Y. TIMES, Apr. 19, 2005, at C6.

<sup>181</sup> AUERBACH, *supra* note 5, at 212.

<sup>182</sup> *Id.*

<sup>183</sup> See, e.g., *AIG K & R Policy*, *supra* note 73, at 11 (requiring insureds to do “all things reasonably practicable to avoid or diminish any loss[]”).

<sup>184</sup> ADAMS, *supra* note 20, at 200.

related to the victim, to interact with the kidnappers rather than having the consultants negotiate directly with the abductors.<sup>185</sup> Theoretically, this strategy prevents the kidnappers from learning that the victim is insured and thus adjusting their ransom demands upward.<sup>186</sup> On the other hand, CRG's strategy may be interpreted as a recognition by both CRG and kidnappers that the availability of K & R insurance may in fact lead to payment of larger ransoms.<sup>187</sup>

*C. Several Governments Have Questioned Whether K & R Should Be Legal*

Several countries have recognized that the existence and availability of K & R insurance may be contributing to the prevalence of kidnap for ransom as an industry.<sup>188</sup> Thus far, however, none have outlawed the insurance product.<sup>189</sup>

Following the kidnap for ransom of a member of the "famed Guinness brewing family"<sup>190</sup> in the 1980s, Control Risks Group and K & R insurers were subjected to scrutiny by the British government.<sup>191</sup> The kidnappers admitted that they never intended the Guinness family to "pay the ransom money—it was understood that [the money] would come from an insurance policy."<sup>192</sup> The kidnappers' statement suggests that perpetrators may be less hesitant to execute their plans if they believe that an insurance company will bear the cost of the ransom. Labour Party representatives in the British Parliament claimed that "[k]idnap insurance acts as an incentive to the IRA to kidnap" and subsequently asked the British Attorney General to prosecute CRG for "breaching prevention of [British] terrorism legislation."<sup>193</sup> Notably, throughout the bad publicity, "CRG's only comment to the press was, 'We will not officially confirm or deny that we are involved. It would not be company policy to do so.'"<sup>194</sup> Ultimately, the British Attorney General determined that

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> See also *supra* notes 113–22 and accompanying text.

<sup>188</sup> AUERBACH, *supra* note 5, at 215; see also *Hargrove v. Underwriters at Lloyd's, London*, 937 F. Supp. 595, 600 (S.D. Tex. 1996) ("[T]he Colombian Congress concluded that the most effective means to combat abductions is to increase the penalties for abduction and kidnapping, and to prevent the negotiation for the payment of ransom.").

<sup>189</sup> AUERBACH, *supra* note 5, at 215.

<sup>190</sup> *Id.* at 214.

<sup>191</sup> Richard Evans, *Call to Prosecute Kidnap Advisers*, *TIMES* (London), Apr. 15, 1986, at 2.

<sup>192</sup> *Guinness Kidnap Brothers Are Jailed*, *TIMES* (London), June 24, 1986, at 3.

<sup>193</sup> Evans, *supra* note 191.

<sup>194</sup> AUERBACH, *supra* note 5, at 214.

K & R insurance was legal and that neither CRG nor the insurer had violated the law.<sup>195</sup>

Although Britain did not enact laws prohibiting negotiation with abductors, at least one country has done so.<sup>196</sup> In Colombia,<sup>197</sup> the legislature acted in response to “public pressure to reduce the numbers of abductions” by enacting the Anti-Abduction Act of 1993, which criminalized the negotiation or payment of ransom.<sup>198</sup> The Act went so far as to declare that “any person who, ‘knowing that money is going to be destined to pay a ransom for the release of an abducted individual, participates in the transaction thereof,’ is considered to have aided and abetted the kidnapper, and faces up to five years in prison.”<sup>199</sup> The Act also criminalized the procurement of K & R insurance:<sup>200</sup> “[W]hoever participates in an insurance contract the purpose of which is to guarantee payment of a ransom in possible abduction cases, or *who participates in the negotiation or intermediation of the ransom demanded thereof,*’ faces up to two years in prison.”<sup>201</sup> The Colombian legislation “declare[d] insurance contracts intended to cover the risk of payment of ransom to be null and void.”<sup>202</sup> Apparently, the legislative treatment was unsuccessful, because portions of the Colombian legislation prohibiting ransom payments were declared unconstitutional.<sup>203</sup>

Despite the Act’s failure, the Colombian legislature’s reasoning was sound. The Colombian government recognized that ransom insurance is contributing to the existence of a healthy kidnapping industry and that this relationship is a cause for concern. Surprisingly, U.S. legislators have not raised similar concerns about K & R insurance, but some scrutiny may be in order because current K & R insurance violates clearly stated U.S. government policy and permits insurers to collect premiums to pay sometimes illegal ransoms.

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<sup>195</sup> Richard Evans, *Minister Reviews Ransom Insurance*, TIMES (London), Apr. 17, 1986, at 1.

<sup>196</sup> See, e.g., *Hargrove v. Underwriters at Lloyd’s*, London, 937 F. Supp. 595, 600 (S.D. Tex. 1996).

<sup>197</sup> O’Brien, *supra* note 86, at 42. Drug trafficking is the leading source of funding for the FARC. *Id.*

<sup>198</sup> Act 40 of 1993; see *Hargrove*, 937 F. Supp. at 599–600.

<sup>199</sup> *Id.* at 600 (quoting Act 40 art. 12 (emphasis added)).

<sup>200</sup> *Id.* (citing Act 40 art. 26).

<sup>201</sup> *Id.* (quoting Act 40 of 1993, article 12).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 601.

*D. Litigation Arising from Kidnapping Incidents Indicates that Multinationals Probably Would Not Be Held Liable for Refusing to Pay Ransoms*

If multinationals were to adopt the U.S. government's "no concessions" policy, they might fear lawsuits brought by victims and their families. Companies and NGOs may indeed have certain legal duties to their employees, but based on the outcomes of lawsuits arising from kidnapping incidents, employers are not likely to be held liable for failing to pay a ransom.<sup>204</sup>

*1. Hargrove v. Lloyd's: Employers Generally Have No Duty to Rescue Kidnapped Employees*

In *Hargrove v. Underwriters at Lloyd's, London*, Thomas Hargrove, an American employee of a company in Colombia, sought \$100 million in damages after he was kidnapped by FARC.<sup>205</sup> Hargrove's employer, Centro Internacional de Agricultura Tropical (CIAT), adopted a different strategy for release than the victim's family would have liked.<sup>206</sup> On advice from the Colombian government and CRG, whose services were attached to CIAT's K & R policy, CIAT "adopted a public position refusing to pay ransom."<sup>207</sup> This strategy was partly grounded in the fear that additional kidnappings would occur if ransoms were paid.<sup>208</sup> CIAT attempted to appeal to the kidnappers' sense of reason by informing them of CIAT's efforts to "improv[e] the lives of Colombians by increasing agriculture production, and to portray CIAT as a publicly funded nonprofit institution that could ill afford to pay ransom."<sup>209</sup>

In contrast, the victim's family wanted to go ahead and pay the ransom FARC demanded.<sup>210</sup> The family "contend[ed] that because [CIAT] flatly refused to negotiate with FARC, the kidnappers contacted Hargrove's wife and demanded that she negotiate with them, or they would not even let her have Hargrove's cadaver."<sup>211</sup> However, the Hargrove family could not afford to pay the multi million dollar ransom.<sup>212</sup> As a result, their attorney demanded that both CIAT and its insurer disclose the terms and conditions of the applicable K

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<sup>204</sup> See, e.g., *Curtis v. Beatrice Foods*, 481 F. Supp. 1275, 1293 (S.D.N.Y. 1980).

<sup>205</sup> 937 F. Supp. at 597, 599.

<sup>206</sup> *Id.* at 598.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 599.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

& R policy to the family.<sup>213</sup> After the family paid two ransoms totaling more than \$250,000 (down from \$6 million) and almost eleven months of captivity, Mr. Hargrove was released.<sup>214</sup> Subsequently, the Hargrove family filed a \$100 million lawsuit<sup>215</sup> against the insurer, alleging negligence and breach of duty “‘to prudently and reasonably negotiate’ with the FARC” for the victim’s release.<sup>216</sup>

The Hargrove family contended that it was a third-party beneficiary of the K & R policy and should be reimbursed for the ransom payments.<sup>217</sup> The family’s assertions present an interesting question because the family neither procured nor paid the premium for CIAT’s K & R policy.<sup>218</sup> In light of the fact that companies do not usually disclose the existence of K & R policies to their employees and their families, Mr. Hargrove could not argue that the existence of the K & R policy affected his willingness to work in Colombia. Hargrove could only have contended that he was willing to go to Colombia because of the K & R insurance if he conceded that he only assumed that his employer held such an insurance policy; he did not have actual or constructive knowledge.

The *Hargrove* court explained that “if, under Colombian law, the payment of ransom were illegal under any circumstances, it is clear that the bulk of the [Hargrove’s] claims would be premised on the [employer’s] failure to violate that law.”<sup>219</sup>

The *Hargrove* case illustrates how the involvement of a security firm may, in fact, lead to lesser ransoms being paid. Because a hefty ransom was initially demanded by a terrorist group, the insured and its security advisors may have viewed the proposal as unreasonable. In contrast, because their loved one’s life was at stake, the family was willing to pay the ransom, regardless of whether the demand was reasonable. In the end, it seems that nobody won in the *Hargrove* case: Hargrove and his family suffered months of agony, while the eventual payment—rendering the kidnapping profitable—probably did little to discourage future kidnappings.

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 598–99; AUERBACH, *supra* note 5, at 186.

<sup>215</sup> The family sought \$25 million in actual damages and \$75 million in punitive damages. *Hargrove*, 937 F. Supp. at 599.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *See id.* at 598.

<sup>219</sup> *Id.* at 602.

## 2. *Employees Who Accept Positions in Dangerous Locales May Assume the Risk of Abduction*

The first sentence of Thomas Hargrove's book chronicling his abduction reads, "I knew that Colombia was notorious for kidnapping."<sup>220</sup> In light of the extensive publicity surrounding kidnapping incidents involving foreigners abroad, employees may be assuming the risk of kidnap by accepting positions in dangerous locations. The U.S. Department of State, U.K. Foreign Office, and several other foreign ministries "regularly release both worldwide warnings and specific country risk advisories stressing that . . . citizens are at risk of being kidnapped."<sup>221</sup> The court's opinion in *Curtis v. Beatrice Foods* stands for the proposition that, generally, employers have no duty to rescue abducted employees who were warned they might be a kidnapping target.<sup>222</sup> Despite the court's ruling, Gustavo Curtis's tale is a harrowing example of the repercussions of ignoring a K & R insurer's anti-abduction training and advice.

On September 28, 1976, Curtis was on his way home from work when his driver turned off the principal highway into a rather narrow street and a car coming towards them struck their car. Soon another car came behind them and blocked the street in that direction. When Curtis got out of the car to see if he could get things moving, he had a gun put to him and was forced into a car . . . . [Curtis] was taken by his abductors to an unknown location, lowered down a long shaft into a 4' x 8' bare cell. He stayed there until May 18, 1977, approximately eight months.<sup>223</sup>

Curtis had worked as the manager of a Beatrice Foods subsidiary in Colombia for many years and was married to a local television personality.<sup>224</sup> In July 1976, Steven Gibson, a U.S. Embassy official, became concerned that Curtis might be a potential kidnapping target after confiscating a photograph thought to be of him from an "underworld figure."<sup>225</sup> Curtis was summoned to the U.S. Embassy, where he was shown the photograph and advised that he might be at risk.<sup>226</sup> In addition to receiving this direct warning, Curtis had attended a

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<sup>220</sup> THOMAS R. HARGROVE, *LONG MARCH TO FREEDOM* xiii (2001).

<sup>221</sup> *Willis Conference Call*, *supra* note 18 (comments of Lisa Zanotelli, Exec. Dir., Special Contingency Risks, Willis Group).

<sup>222</sup> 481 F. Supp. 1275, 1289 (S.D.N.Y. 1980).

<sup>223</sup> *Id.* at 1281.

<sup>224</sup> *Id.* at 1277-78.

<sup>225</sup> *Id.* at 1280.

<sup>226</sup> *Id.* Curtis's failure to leave the country following specific warnings would probably negate coverage under the AIG policy discussed above. *See supra* notes 108-09 and accompanying text.

security briefing by CRG in the fall of 1975.<sup>227</sup> The CRG representative advised executives like Curtis to vary their routes to and from work and to avoid predictable behavior patterns.<sup>228</sup> While Curtis did ask for an immediate transfer out of Colombia, he failed to change his daily patterns and was kidnapped on his way to work a few months later.<sup>229</sup>

Within a few hours of the abduction, Curtis’s employer was informed of the kidnapping.<sup>230</sup> Shortly thereafter, the kidnappers demanded \$5 million from Curtis’s employer, and Beatrice’s Director of Corporate Insurance, Employee Benefits, and Safety was notified.<sup>231</sup> The company decided to offer assistance because it had secured K & R insurance to deal with this type of scenario.<sup>232</sup> The company triggered its policy and eventually secured Curtis’s release with the assistance of professional kidnap consultants (CRG) paid for by the insurer.<sup>233</sup>

After Curtis’s release, he and his wife filed multiple claims totaling more than \$200 million<sup>234</sup> against Beatrice Foods, alleging failure to exercise due diligence and breach of duty.<sup>235</sup> Curtis’s claim was denied, citing lack of evidence showing that Beatrice failed to exercise due diligence or breached any duty to Curtis.<sup>236</sup>

The kidnapping was not a “work accident,” and therefore Beatrice had no duty to rescue Curtis.<sup>237</sup> The court noted that Curtis was not kidnapped because of his employment.<sup>238</sup> Instead, he was kidnapped because “of what he represented—a well-to-do corporate executive with a high public profile.”<sup>239</sup> The court concluded that the kidnappers directed their demands to Curtis’s employer only because it was able to pay a large ransom<sup>240</sup>

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<sup>227</sup> *Curtis*, 481 F. Supp. at 1280.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 1277.

<sup>230</sup> *Id.* at 1281.

<sup>231</sup> *Id.*

<sup>232</sup> *See id.*

<sup>233</sup> *Id.* at 1277, 1281.

<sup>234</sup> AUERBACH, *supra* note 5, at 211.

<sup>235</sup> *See Curtis*, 481 F. Supp. at 1285.

<sup>236</sup> *Id.* at 1294.

<sup>237</sup> *Id.* at 1289.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

Furthermore, Beatrice Foods “voluntarily undertook to negotiate for [Mr. Curtis’s] release from captivity,” although the company had no duty to rescue him.<sup>241</sup> The court stated that “[f]aced with a staggering demand for \$5 million, Beatrice could have washed its hands of the whole affair without incurring any legal liability.”<sup>242</sup> Therefore, it seems an employer could decide not to be involved in kidnap negotiations at all and could deprive the victim and his family of access to its commercial K & R policy.<sup>243</sup>

*Curtis* involved an incident thirty years ago.<sup>244</sup> Since kidnappings have now become extremely high-profile occurrences, overseas workers may now be expected to contemplate the possibility of becoming a victim when deciding whether to accept an overseas assignment.<sup>245</sup> Accordingly, it is not uncommon for employees or aid workers to dictate in advance the negotiation strategy they wish to be adopted if they are kidnapped, conveying that strategy before their deployment to a high-risk area.<sup>246</sup> One aid worker in Iraq even wrote a message to be sent to friends in the event of an incident and told her family, “[I]f we are kidnapped we don’t want any violent repercussions, we don’t want any ransom paid, we don’t want any military rescue.”<sup>247</sup> Considering the widespread media coverage of international kidnapping incidents in dangerous places such as Colombia and Iraq, it would be unreasonable for Americans to claim that they are unaware of the risk of kidnapping overseas.

*E. Negotiating with Kidnappers May Decrease Individual Ransom Demands, but Encourages Future Kidnappings*

When dealing with an individual kidnapping scenario, a terrorist group may wield power by threatening to kill the hostage.<sup>248</sup> Kidnappers wishing to gain empathy from others who share their religious or political ideology face a

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<sup>241</sup> *Id.* at 1277 (emphasis added).

<sup>242</sup> *Id.* at 1293.

<sup>243</sup> The only case dealing with whether a victim’s family is a third-party beneficiary of a commercial K & R policy was dismissed on other grounds. See *Hargrove v. Underwriters at Lloyd’s, London*, 937 F. Supp. 595 (S.D. Tex. 1996).

<sup>244</sup> *Curtis*, 481 F. Supp. at 1275.

<sup>245</sup> See, e.g., Stephen Farrell, *Iraq’s Last Aid Workers Defy Death*, *TIMES* (London), Dec. 3, 2004, at 47.

<sup>246</sup> *German Appeal to Kidnappers*, *TORONTO SUN*, Dec. 5, 2005, at 4.

<sup>247</sup> Farrell, *supra* note 245; see also *German Appeal to Kidnappers*, *supra* note 246.

<sup>248</sup> See, e.g., Dan Murphy, *Deadline Passes: Iraqi Minister Thinks Jill Carroll Is Alive*, *CHRISTIAN SCI. MONITOR*, Feb. 28, 2006, at 4 (Kidnappers threatened to kill kidnapped American journalist Jill Carroll if certain Iraqi prisoners were not released by February 26, 2006.).

dilemma when governments refuse to deal with them.<sup>249</sup> If they kill the victim, they are breaching their “self-proclaimed role as heroic Davids fighting the evil Goliath.”<sup>250</sup> Conversely, if they establish themselves as murderers who prey on helpless victims, they may have difficulty securing the resources necessary to support their activities in the future.

Families and employers may feel helpless when faced with unreasonable terrorist demands, but the outcome of the Curtis kidnapping illustrates that some kidnapers react to offers for compromise by negotiators. The *Curtis* decision outlines the series of ransom demands and offers in the Curtis kidnapping.<sup>251</sup> While at first blush, the concept of fairness might seem to play no part in kidnapping scenarios, this presumption is rebutted by the reality that kidnapers are willing to negotiate at all, and that victims often are released for much smaller ransoms than initially demanded. By accepting a lesser ransom to release Curtis, the kidnapers implicitly admitted that their initial demand was higher than they were willing to accept.

The involvement of professional kidnap consultant CRG may have helped decrease the ransom payment.<sup>252</sup> Absent CRG’s involvement, the Curtis family may have pressed the employer to pay the initial ransom amount.<sup>253</sup> On the other hand, the fact that, despite CRG’s assistance, a ransom was paid at all proved to the kidnapers that the crime was worthwhile.

Governments, like kidnapers, face significant dilemmas in kidnapping scenarios. Official refusals to negotiate with kidnapers who broadcast heartbreaking pleas from abused hostages almost inevitably result in public pressure from constituents.<sup>254</sup> Nevertheless, despite the direct, localized harm inflicted on victims and their families when a government refuses to negotiate, conceding to terrorist demands can lead to disastrous consequences on a global level. “Negotiations also legitimize the hostage-takers and prove that violence works.”<sup>255</sup> Receiving ransoms simply motivates kidnapers to stage more

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<sup>249</sup> Dan Byman, *Why We Can’t Help Margaret Hassan*, SLATE, Oct. 29, 2004, <http://www.slate.com/id/2108861>.

<sup>250</sup> *Id.*

<sup>251</sup> *Curtis v. Beatrice Foods*, 481 F. Supp. 1275, 1282 n.5 (S.D.N.Y. 1980).

<sup>252</sup> See *supra* note 233 and accompanying text.

<sup>253</sup> *Curtis*, 481 F.Supp at 1282.

<sup>254</sup> Byman, *supra* note 249. For example, kidnapped American Jill Carroll was forced to make a video pleading for the release of a Jordanian prisoner while she was detained in Iraq. Dan Murphy, *Evidence Points to One Ring for Five Abductions in Iraq*, CHRISTIAN SCI. MONITOR, Aug. 16, 2006, at 1.

<sup>255</sup> Byman, *supra* note 249.

hostage takings and to increase their demands.<sup>256</sup> By paying ransoms, insurance companies are supporting the kidnapping industry.

#### IV. PUTTING THE BITE BACK INTO U.S. NO CONCESSIONS POLICY: A CALL FOR K & R INSURERS TO STOP PAYING RANSOMS

U.S. counterterrorism policy will have teeth only when it is applied consistently by government actors and private entities alike. The insurance industry has an opportunity to take a stand against terrorism by adopting a no-pay policy with respect to ransom demands. Adopting such a policy is difficult in the face of the plight of individual kidnap victims, but it is necessary for achieving the greater good: deterring criminals from kidnapping. The proliferation of kidnapping as a profitable activity is disturbing, but the fact that insurance companies and their customers are putting funds directly into the hands of criminals is reprehensible. Furthermore, insurance companies are collecting premiums for K & R when the policies are premised on an act—paying a ransom—that is contrary to U.S. policy.

Given that kidnapers may secure upwards of half a billion dollars in ransom monies annually,<sup>257</sup> it is hard to believe that both the United States and Great Britain in fact comply with their “no concessions” policies for negotiating with terrorists. Likewise, private companies must be secretly paying ransoms, although information about the fate of most kidnapping victims abroad is difficult to uncover.<sup>258</sup> While the details of most hostage release negotiations are understandably not publicly available, these facts make it nearly impossible to determine whether the U.S. government’s actions coincide with its own policy and whether antiterrorism laws are regularly broken or ignored.

However, regardless of the extent to which the United States enforces its stated policy against concessions, that policy stands in direct conflict with the actions of private insurers and multinationals. Admittedly, K & R insurance does provide meaningful coverage for its buyers by providing preventative advice and post-incident damage control. Organizations should be allowed and encouraged to transfer, by means of insurance coverage, the cost of losing a

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<sup>256</sup> *Id.*

<sup>257</sup> *Willis Conference Call*, *supra* note 18 (comments of Derek Rogers, Divisional Dir., Special Contingency Risks, Willis Group).

<sup>258</sup> *Italy Debates Price of Freeing Hostages: \$1 Million Cited—Some Fear Payoffs Embolden Captors*, SEATTLE TIMES, Sept. 30, 2004, at A1.

key employee for an extended period or indefinitely. However, insurance companies should not be selling insurance coverage for which the payment of a claim would violate U.S. government policy or federal law or both. If insurance companies are ignoring government mandates and local country laws by paying ransoms, they are undermining both U.S. and local country antikidnapping policies. If, on the other hand, insurance companies are charging premiums to insure claims for ransom that will never in fact be paid, then they should be punished for bilking policyholders and making unconscionable profits.

Legislating a solution to this problem probably is not the best approach, as evidenced by the Colombian government’s failed attempts to legislate consistent application of a no-concessions policy by attempting to ban ransom payments. Legislation may also present practical problems that could lead to strange results. For example, if extortion payments were criminalized in all instances, a person accosted on the street may be prohibited from handing over her purse.<sup>259</sup> On the other hand, setting a threshold value for ransoms would simply encourage terrorists to adjust their initial demands upwards. Furthermore, parents of kidnapped children may not be deterred from paying ransoms secure the release of their child, regardless of the punishment. Existing federal laws such as the Hostage Taking Act and the USA Patriot Act—both of which include severe punishments for convicted kidnappers—have proven ineffective in deterring kidnappers; a mere three percent of kidnappers are caught.<sup>260</sup>

Because legislation is not the answer, a voluntary no-pay policy is the best solution. Insurance companies should not condone the payment of ransoms by continuing to reimburse such expenses, and multinational corporations and organizations should refuse to pay kidnappers. As tragic as each individual kidnapping case may be, conceding to criminal demands is only likely to lead to more crime.

Victims need not be left with no assistance and no hope: the K & R industry must shift away from merely reacting to incidents and toward providing more kidnap prevention tools. K & R should continue to exist as an insurance product with emphasis on the prevention of kidnapping. A version of K & R that indemnifies for the costs of anti-abduction training, enhanced security in the event of a known kidnapping threat, and security consulting

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<sup>259</sup> AUERBACH, *supra* note 5, at 213.

<sup>260</sup> Newton Emerson, *Soon We Could All Be Hostages to Fortune*, MIRROR (London), Jan. 27, 2006, at 31.

would not conflict with U.S. counterterrorism policy but would benefit potential and actual victims.

A no-pay policy will not eliminate kidnappings entirely, but it is a step in the right direction for several reasons. First, by reducing the funds available to companies to pay ransoms, a no-pay policy will slow the inflation of ransom demands, making terrorist fundraising via kidnapping more difficult. Second, it will encourage organizations and individuals working in dangerous locations to take affirmative efforts to reduce their risk of abduction. Finally, it will promote the consistent application of the U.S. “no concessions” policy by ensuring that both public and private entities refuse to deal with terrorists.

Of course, an insurance industry no-pay policy has potential pitfalls. First, faced with smaller payouts, criminals may increase the number of kidnappings. Second, when kidnappers learn that U.S. entities will not pay to release American hostages, criminals may increasingly target local citizens, who have less money but will in fact pay ransoms. Third, the kidnap-for-ransom business is already shrouded in secrecy, and a publicly declared no-pay policy may encourage more cloak-and-dagger transactions. Even if a victim is insured, the family and employer may not report the abduction to their insurer if they believe a secret ransom payment would result in a quick release. Finally, U.S. workers could be discouraged from taking positions in certain foreign countries if they know their employers will not pay a ransom to secure their release.<sup>261</sup>

Despite those potential problems, the bottom line is that the K & R insurance industry is directly financing, arguably inducing, and simultaneously profiting from criminal activity. That should stop. In the face of a clearly articulated U.S. government policy, K & R buyers purchase policies so as to enable themselves to pay a ransom if the need arises. Although the issue has not yet been addressed by the judiciary, a U.S. court would likely find ransom reimbursement insurance provisions void as against public policy. “[T]he law will not enforce contracts and agreements that are against the public good, and,

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<sup>261</sup> In addition to these issues, there would likely be practical problems if insurers adopted no-pay policies at different times. Employers may gravitate towards K & R insurers that will provide ransom reimbursement, creating an undesired economic consequence where one insurer has a majority of the business. The purpose of this Comment is not to delve into the economic argument for and practical implications of the implementation of an industry-wide no-pay policy; it is instead to point out a business practice that is inconsistent with U.S. law and start a conversation about possible solutions.

therefore are forbidden by public policy.”<sup>262</sup> Because ransom reimbursement provisions tend “to endanger the public interests” and “injuriously affect the public good” by inducing further kidnappings, those provisions should not be available from insurers.<sup>263</sup> The insurance industry could, and should, lead the fight against terrorist abductions by voluntarily adopting a no-pay policy and emphasizing kidnap prevention strategies.

## CONCLUSION

Kidnapping for ransom and its related public policy dilemmas have been a topic of debate for decades, but no solution has been reached.<sup>264</sup> The U.S. government’s hard-line approach of refusing to negotiate with kidnappers has not reduced the frequency of the crime in part because private entities and their insurers continue to undermine this approach.<sup>265</sup> The U.S. no-concessions policy should not be a toothless threat: insurance companies and multinationals should help put the bite back in it by refusing to pay terrorist demands, by obeying U.S. law, and by complying with counterterrorism policy.

MEADOW CLENDENIN\*

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<sup>262</sup> *Ritter v. Mutual Life Ins. Co.*, 169 U.S. 139, 158 (1898) (holding that insurance company did not have to pay life insurance policy when insured committed suicide).

<sup>263</sup> *Cf. Nw. Mutual Life Ins. Co. v. McCue*, 223 U.S. 234, 246 (1911) (denying life insurance benefits when insured was legally executed for committing a crime).

<sup>264</sup> M. CHERIF BASSIOUNI, *INTERNATIONAL TERRORISM AND POLITICAL CRIMES* 308 (1975).

<sup>265</sup> *Id.*

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