HAYNES BOONE

Insurance Recovery

2022 YEAR IN REVIEW

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In some ways, 2022 marked a return to the relative normalcy of post-pandemic life. In other respects, 2022 will be remembered for its dramatic turn of events, including the war in Ukraine, surging inflation, and the overturning of *Roe v. Wade*. Developments in the world of insurance recovery have been less sensational, but nonetheless important for policyholders and insurers alike. Here is a high-level summary of important legal developments and trends relating to insurance coverage litigation in 2022 with a more detailed synopsis of significant legal decisions below.

- Appellate courts around the country have continued to address business interruption claims arising out of the COVID-19 pandemic, with the majority of reported decisions finding that viral contamination does not constitute "physical loss or damage."
- In other cases involving first party property coverage, federal circuit and state high courts addressed a range of procedural issues including the appealability of appraisal orders, the impact of external agreements on priority of coverage, and the calculation of depreciation and actual cash value.
- In addition to addressing issues of general applicability such as earth movement exclusions and extrinsic evidence in determining an insurer's duty to defend, several courts issued opinions relating to common issues involving: (1) the scope of a general liability policy's coverage for damages "because of" bodily injury; (2) the impact of financial responsibility laws on coverage determinations; and (3) assignment of claims and policy benefits. Other significant coverage decisions issued from the Second Circuit Court of Appeals related to the exhaustion of underlying limits of insurance and the waiver of coverage defenses, resulting from an untimely response to an insured's claim.
- D&O insurers and policyholders continued to litigate over timing and trigger issues relating to "claims made," "related claims," and "prior notice" provisions. Circuit courts of appeals also issued significant opinions relating to the reasonableness of unpaid defense costs and exculpation in bankruptcy reorganization plans.
- In the realm of network security and privacy liability coverage, courts issued significant decisions addressing coverage under general liability policies for a variety of privacy claims, including BIPA and TCPA violations. A district court in Minnesota also issued an important decision addressing the scope of business interruption coverage under a cyber policy.
- Other notable coverage decisions addressed: (1) aviation insurance coverage; (2) the impact of a *nolo contendere* plea on a criminal acts exclusion; and (3) the insurable interest rule for life insurance coverage.

PROPERTY & CASUALTY INSURANCE

I. Direct Physical Loss or Damage

Trial and appellate courts continue to address claims for business interruption coverage relating to the COVID-19 pandemic, with the majority of policyholder complaints being dismissed.[1] Although, notably, the Vermont Supreme Court in *Huntington Ingalls Industries v. Ace American Insurance Company*, 2022 Vt. LEXIS 47 (Vt. Sept. 23, 2022) did reverse a trial court's judgment on the pleadings denying a shipbuilder's claim for business interruption coverage, finding that the insured adequately alleged "physical loss or damage," including: (1) "[t]he virus causing COVID-19 has been continuously present at insured's shipbuilding facilities"; (2) "[t]he virus can 'adhere' to surfaces, transforming the surface into a fomite"; (3) "[t]his process of the virus 'adhering' to surfaces caused 'detrimental physical effects' that 'altered and impaired the functioning of the tangible, material dimensions' of the property. Because of this alteration, the property cannot function for its intended purpose and insured's business has had to operate at a reduced capacity"; and (4) "[t]o redress these physical alterations, insured took and will continue to take 'steps that involve physical alterations to its insured locations,' such as installing barriers and devices and redesigning physical spaces." *Id*. at *35-36.

II. Interlocutory Appeal of Appraisal Order

In *Fireman's Fund Insurance Company v. Steele Street Limited II*, the Tenth Circuit Court of Appeals ruled that the district court's order granting partial summary judgment, requiring the insurer to comply with the policy's appraisal provision was "substantively an injunctive order that would allow for the exercise of appellate jurisdiction" on an interlocutory basis. 2022 U.S. App. LEXIS 289 (10th Cir. Jan. 5, 2022). In

exercising its jurisdiction, the Court also ruled that factual-causation issues—in this case whether hail caused damage to the brick façade of an insured building—were properly subject to resolution in an appraisal proceeding under Colorado law. *Id*. at *22-23.

III. Priority of Coverage & External Agreements

The Sixth Circuit Court of Appeals in *Landmark American Insurance Company v. Heco Realty, LLC* considered the circumstances under which an external agreement could determine the priority of coverage between overlapping insurance policies. 2022 U.S. App. LEXIS 23643 (6th Cir. Aug. 22, 2022). The majority rule under Tennessee law allows for an "other insurance" clause to be circumvented by a contract, including an indemnity agreement, which shifts the loss to a particular insurer. *Id*. at *15. But only when "the particular facts of the case, such as the intentions and relationships of the parties' call for it" will courts conclude that "a *covered,*

[1] *See, e.g.*, *PS Bus. Mgmt., LLC v. Fireman's Fund Ins. Co.*, 2022 U.S. App. LEXIS 18688 (5th Cir. July 6, 2022); *Melcorp, Inc. v. W. Am. Ins. Co.*, 2022 U.S. App. LEXIS 15757 (7th Cir. 2022); *Colectivo Coffee Roasters, Inc. v. Soc'y Ins.*, 974 N.W.2d 442 (Wis. 2022); *Cherokee Nation v. Lexington Ins. Co.*, 2022 Okla. LEXIS 72 (Okla. Sept. 13, 2022); *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266 (Mass. 2022).

underlying agreement between two insured parties controls a coverage dispute." *Id*. at *18 (emphasis added). In this case, the Court concluded that the evidence did not show that the subject property insurer accepted the insured's contractual liability, and consequently, the "other insurance" clause was controlling. *Id*. at *24.

IV. Depreciation & Actual Cash Value

In *Walker v. Auto-Owners Insurance Company*, the Arizona Supreme Court answered two certified questions from the United States District Court for the District of Arizona: "(1) When a homeowner's insurance policy does not define the terms 'actual cash value' or 'depreciation,' may an insurer depreciate the costs of both materials and labor in determining the actual cash value of a covered loss?; and (2) Is the broad evidence rule applicable in Arizona such that an insurer and/or fact finder may consider labor depreciation as a pertinent factor in determining actual cash value?" 2022 Ariz. LEXIS 306 (Sept. 27, 2022). In its negative response to the first question, the court first noted the practical implication of the question, *i.e.*, assuming roughly half of a typical claim relates to materials and the other half to labor, depreciating both materials and labor will result in twice the depreciation deduction of materials alone in determining an "actual cash value" that is equal to "replacement cost less depreciation." *Id*. at *6-7. The court then reasoned that (1) actual cash value is equal to "replacement cost less depreciation," *id*. at *8-9; and (2) without an express limitation on coverage, the insurer is precluded from depreciating labor when determining the actual cash value of the covered loss. *Id*. at *15. With regard to the second certified question, although under the subject policy, "actual cash value" was equal to "replacement cost less depreciation," the court did not preclude the application of the broad evidence rule in other cases. *Id*. at *16. Instead, borrowing from other authority, the court offered the following guidance: (1) "[w]here market value is easily determined [for a covered loss], actual cash value is market value"; (2) "if there is no market value, replacement or reproduction cost may be used"; and (3) "failing the other two tests, any evidence tending to formulate a correct estimate of value may be used." *Id*. at *17.

V. Extra Expense

In *North Star Mutual Insurance Company v. Miller*, the Nebraska Supreme Court ruled that expenses incurred, after a fire destroyed an insured premises, for electrical and plumbing improvements to convert a replacement property to a deli/grocery store were covered under a commercial property's "extra expense" provision, which insured costs incurred "during the 'period of restoration' that you would not have incurred if there had been no direct physical loss or damage to property at the described premises." 977 N.W.2d 195 (Neb. 2022).

VI. Machinery Breakdown Exclusion

The Washington Supreme Court ruled that a machinery breakdown exclusion in a builder's risk policy denying indemnity for "[l]oss of or [d]amage in respect any item by its own explosion mechanical or electrical breakdown,

failure breakage or derangement" was triggered by design defects in a tunnel boring machine that failed during construction of a tunnel to replace the Alaskan Way Viaduct in Seattle. *Seattle Tunnel Partners v. Great Lakes Reinsurance (UK), PLC*, 516 P.3d 796 (Wash. 2022). In the same case, the Court also ruled that (1) the subject policy's coverage for "direct physical loss" did not include costs resulting from project delays; and (2) while "direct physical loss" may include "physical loss of use," no such loss was alleged in this case.

GENERAL LIABILITY INSURANCE

I. Earth Movement Exclusion

In *Loendorf v. Employers Mutual Casualty Insurance Company*, the Montana Supreme Court reversed the trial court's grant of summary judgment in favor of an insured builder seeking defense and indemnity against an underlying construction defect suit for which the insurer had denied coverage in reliance on an "earth movement" exclusion. 513 P.3d 1268, 1270-71 (Mont. 2022). Relying on a 2012 decision from the Mississippi Supreme Court and finding the terms of the exclusion to be "unambiguous," Montana's high court refused to distinguish between "natural" and "human-caused" earth movements in applying the "earth movement" exclusion in the subject CGL policy. *Id*. at 1273 (citing *Hankins v. Md. Cas. Co./Zurich Am. Ins. Co.*, 101 So. 3d 645, 654 (Miss. 2012)).

II. Damages "Because Of" Bodily Injury

The Ohio Supreme Court in *Acuity v. Masters Pharmaceutical, Inc.*, ruled as a matter of law that a CGL insurer had no duty to defend underlying lawsuits brought by numerous state and local governments against a pharmaceutical company for losses relating to the opioid epidemic. 2022 Ohio LEXIS 1814 (Ohio Sept. 7, 2022). Affirming the trial court's grant of summary judgment for the insurer and reversing the intermediate court's holding, Ohio's Supreme Court narrowly construed the policy's grant of coverage for "damages because of bodily injury" and reasoned that the underlying government plaintiffs sought damages for their own economic injury, not for any "bodily injury" required to trigger the policy's duty to defend. *Id*. at *25-34.

The Delaware Supreme Court addressed a similar certified question in *Ace American Insurance Company v. Rite Aid Corp.*, 270 A.3d 239 (Del. 2022). Here, the court considered "whether insurance policies covering lawsuits 'for' or 'because of' personal injury require insurers to defend their insureds when the plaintiffs in the underlying suits expressly disavow claims for personal injury and seek only their own economic damages." *Id*. at 241. While the lower court granted summary judgment in favor of the policyholder, ordering the insurers to defend Rite Aid in underlying opioid lawsuits brought by various state counties in Ohio, *id*. at 243, the Delaware Supreme Court reversed because plaintiffs in the underlying lawsuits "disavow personal injury claims and seek to recover only their own economic damages from Rite Aid's alleged contribution to a 'public health crisis' of opioid addiction." *Id*. at 247.

In *Bliss Sequoia Insurance Risk Advisors, Inc. v. Allied Property & Casualty Insurance Company*, a risk advisor sought coverage under a general liability policy for underlying negligence and professional liability claims asserted by a water park, whose insurance limits proved insufficient to satisfy a personal injury claim against the park. 52 F.4th 417 (9th Cir. 2022). After the district court granted summary judgment to the insurer, the Ninth Circuit Court of Appeals considered whether the underlying negligence and professional liability claims were "because of bodily injury" for purposes of the risk advisor's coverage. *Id*. at *7. That court ruled that "because of bodily injury" includes "damages that reasonably or foreseeably result from bodily injury—not just any that may arise in a daisy chain of lawsuits connected in some way to someone's injury." *Id*. at *18. Applying this standard under Oregon law, the court concluded that while the negligence claims triggered coverage, the professional liability claims did not. *Id*.

III. Financial Responsibility Laws

The Indiana Supreme Court in *Progressive Southeastern Insurance Company v. Brown* considered whether the MCS-90 Endorsement applied to an underlying fatality claim. 182 N.E.3d 197, 200 (Ind. 2022). The MCS-90 Endorsement is often included in motor carrier liability policies to comply with Section 30 of the Motor Carrier Act of 1980, which requires motor carriers to demonstrate minimum levels of financial responsibility. *Id*. at 200. However, the statute applies "first, when a motor carrier transports property in foreign or interstate commerce; second, when a motor carrier transports hazardous property in foreign, interstate, or intrastate commerce." *Id*. at 201. Because (1) the motor carrier in this case was on an intrastate trip; (2) the motor carrier was not engaged in interstate commerce at the time of the accident; and (3) the Indiana Code does not expand financial responsibility requirements to motor carriers transporting non-hazardous property in intrastate commerce, the Court held that the MCS-90 Endorsement does not apply to the subject accident. *Id*. at 203.

In *Preferred Contractors Insurance Company v. Risk Retention Group, LLC*, the Washington Supreme Court answered the following certified question, reformulated by the court: "When a contractor's liability insurance policy provides only coverage for "occurrences" and resulting "claims-made and reported" that take place within the same one-year policy period, and provide no prospective or retroactive coverage, do these requirements together violate Washington public policy and render either the "occurrence" or "claims-made and reported" provisions unenforceable?" 514 P.3d 1230, 1233 (Wash. 2022). Before answering the question in the affirmative, the court reviewed Revised Washington Code Section 18.27.050, which requires contractors to maintain insurance or financial responsibility of $100,000 for injury or damage to afford protection to the public. *Id*. at 1234. After finding that this statutory provision does establish a public policy holding contractors financially responsible for protecting members of the public, *id*. at 1236, the Court further held that "a contractor's CGL policy that requires the loss to occur and be reported to the insurer in the same policy year and fails to provide prospective or retroactive coverage is unenforceable." *Id*. at 1238.

IV. Assignment of Policy Benefits and Claims

The South Carolina and Nebraska Supreme Courts both addressed issues relating to the assignment of insurance claims and benefits, respectively, in (1) *PCS Nitrogen, Inc. v. Continental Casualty Company*, 871 S.E.2d 590 (S.C. 2022); and (2) *Millard Gutter Co. v. Shelter Mutual Insurance Company*, 2022 Neb. LEXIS 115 (Neb. Oct. 14, 2022). In *PCS Nitrogen*, a policyholder's successor by asset sale sought coverage for underlying environmental litigation, notwithstanding the liability insurer's claims that consent was required for the assignment. *PCS Nitrogen*, 871 S.E.2d at 593. Reversing the circuit court's grant of summary judgment in favor of the insurer, the South Carolina Supreme Court held that (1) a post-loss assignment does not require consent from the insurer, *id*. at 594; and (2) the "loss" under a third-party liability policy takes place at the time of the occurrence. *Id*. at 598. In *Millard Gutter*, an assignee of various first-party policyholders asserted claims for bad faith in connection with a 2013 storm. *Millard Gutter*, 2022 Neb. LEXIS 115, at *6-7. Although under Nebraska law, an insured may assign a post-loss breach of contract claim, *id*. at *16, in response to trial court's grant of insurer's dismissal motion, the Nebraska Supreme Court ruled that "only a policyholder has standing to bring a first-party bad faith claim against an insurer." *Id*. at *21.

V. Extrinsic Evidence & The Duty to Defend

In *Monroe Guaranty Insurance Company v. BITCO General Insurance Corporation*, two liability insurers fought over Monroe's duty to defend an underlying lawsuit that alleged a drilling contractor negligently drilled an irrigation well, causing damage to farmland, without alleging when the damage occurred. 640 S.W.3d 195, 197-198 (Tex. 2022). The two insurers—BITCO and Monroe—stipulated that the damage occurred before Monroe's policy incepted. But the trial court hearing BITCO's suit to compel Monroe's contribution to the drilling contractor's defense ultimately ruled that the stipulation was extrinsic evidence that improperly exceeded Texas' eight-corners rule. *Id*. at 198. After Monroe appealed the trial court's order finding that property damage could have occurred during Monroe's policy period, the Fifth Circuit certified two questions to the Texas Supreme Court, including the following: "[i]s the exception to the eight-corners rule articulated in [*Northfield*] permissible under Texas law?" *Id*. In response to this question, the Texas Supreme Court recognized a qualified exception to the "eight corners" rule. The exception will not apply if, as a threshold matter, the pleadings contain facts necessary to resolve the question of whether the claim is covered. "But if the underlying petition states a claim that could trigger the duty to defend, and the application of the eight-corners rule, due to a gap in the plaintiff's pleading, is not determinative of whether coverage exists, Texas law permits consideration of extrinsic evidence provided the evidence (1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved." *Id*. at 202. In responding to a second certified question—dealing with the application of the exception to evidence of the date of an occurrence—the Texas Supreme Court reasoned that in this particular case, evidence of "when" property damage occurred necessarily overlaps with "whether" property damage occurred. While there is no categorical prohibition against evidence of the date of an occurrence, here, the evidence improperly intersects with the merits of the underlying liability claim in *Monroe*. *Id*. at 204.

VI. Delayed Response & Waiver of Coverage Defenses

In *Golden Insurance Company v. Ingrid House, LLC*, the Second Circuit Court of Appeals reviewed a district court's decision to grant summary judgment in favor of a policyholder, finding that the insurer waived defenses to

coverage for an underlying personal injury lawsuit by delaying its denial of coverage for more than two years after receiving notice of the claim. 2022 U.S. App. LEXIS 16343, at *1-4 (2d Cir. June 14, 2022). Under New York law, insurers are required to "give written notice as soon as is reasonably possible of [a] disclaimer of liability or denial of coverage" for certain claims involving accidents occurring within the state. *Id.* at *5 (quoting NEW YORK INSURANCE LAW § 3420(d)(2)). And, "[i]f the insurance carrier fails to disclaim coverage in a timely manner, it is precluded from later successfully disclaiming coverage." *Id.* (citations omitted)). Here, the Second Circuit Court of Appeals affirmed the district court's decision after observing that (1) the facts supporting the insurer's denial did not require prolonged investigation, *id.* at *7-8; (2) the insurer failed to offer evidence explaining why it could not have pursued declaratory relief sooner, *id.* at *9; (3) but for an exclusion, the underlying liability claim fell within the policy's coverage, *id.* at *10; and (4) the insurer waived arguments that Section 3420(d) did not apply to a non-domiciliary risk retention group. *Id.* at *11-12.

VII. Exhaustion of Underlying Insurance

The Second Circuit Court of Appeals in *Fireman's Fund Insurance Company v. OneBeacon Insurance Company* reviewed an excess liability insurer's claim for reinsurance coverage against a carrier that refused payment for lack of exhaustion after the district court granted summary judgment in favor of the excess insurer. 49 F.4th 105, 111-112 (2d Cir. 2022). The "Payment of Loss" provision in the subject policy stated only that the policy "shall apply only after all underlying insurance has been exhausted." *Id.* at 113. Following prior precedent, the court held

that this language does not unambiguously require actual payment of the underlying limits of insurance by the underlying insurers; instead, a below limits settlement was sufficient to exhaust the underlying insurance and trigger the excess policy's coverage. *Id.* at 114. The court likewise ruled that the subject policy's limit of liability provision, which referenced "exhaustion of the applicable aggregate limit or limits of liability under said underlying policy or policies solely by reason of losses paid thereunder," did not compel exhaustion by actual payment from an underlying insurer. *Id.* at 115. Rather, the provision only describes the attachment point of the excess policy once underlying limits have been exhausted by prior claims. *Id.* at 115-116. The court also rejected the reinsurer's argument that Fireman's Fund was estopped from claiming that its policy's exhaustion provision was ambiguous. *Id.* at 117-118.

D&O INSURANCE

I. Presumed Reasonableness of Unpaid Defense Costs

In *USA Gymnastics v. Liberty Ins. Underwriters, Inc.*, the 7th Circuit Court of Appeals had an occasion to consider and apply the so-called *Thomson* presumption to defense costs incurred by USA Gymnastics, Inc. ("USAG") in response to sexual assault lawsuits and investigations involving Larry Nassar. 46 F.4th 571, 576-580 (7th Cir. 2022). Under *Thomson Inc. v. Ins. Co. of N. Am.*, 11 N.E.3d 982, 1023-24, 1031 (Ind. Ct. App. 2014), defense costs incurred after an insurer breaches its duty to defend are "market tested and are presumed to be reasonable and necessary." In finding that the *Thomson* presumption applied to defense costs sought by USAG from Liberty, the court rejected Liberty's argument that USAG failed to adequately supervise the outside counsel, by ruling that "a litigant may supervise its outside counsel without refusing to pay portions of legal bills or engaging in hairsplitting about those bill[s]." *Id*. at 580. The court similarly rejected Liberty's argument that the *Thomson* presumption should not apply when the insured paid less than all of defense counsel's bills, reasoning that "as here, the policyholder may lack sufficient funds to pay fees that are reasonable and necessary to its defense," "[b]ut if the policyholder does pay a significant percentage of its fees—particularly when it has difficulty covering its day-to-day operating expenses—that is strong evidence of market incentives to economize, rendering the presumption applicable." *Id*. at 581. The court also rejected Liberty's related arguments regarding "special circumstances," which allegedly avoided the *Thomson* presumption, as well as Liberty's arguments to rebut the presumption. *Id*. at 582-587.

II. "Related Claims" & Claims "First Made"

In *Hanover Insurance Company v. R. W. Dunteman Company*, the 7th Circuit Court of Appeals considered whether an amended complaint in a pending lawsuit qualified as a claim "first made" under a directors and officers liability policy when the amendment (1) contained new allegations; and (2) added new defendants as parties to the lawsuit. 2022 U.S. App. LEXIS 29532, at *13 (7th Cir. Oct. 24, 2022). On the first issue, because the subject D&O policy included a "related wrongful acts" provision, the court reasoned that all logically connected wrongful acts—including the new allegations in the amended complaint—are deemed to be a "single wrongful act" first alleged in the original complaint. *Id*. at *14-16. With respect to the second issue, the court similarly found that based on the subject policy's "related claims" provision, the amended complaint arose out of a common set of facts and circumstances, such that it was deemed to be first made at the time of the original complaint—although the amended complaint added new defendants. *Id*. at *17-19. However, the court also stated in *dicta* that "[h]ad the original complaint named an unaffiliated defendant or raised unrelated wrongful acts, Hanover's position would be on shakier ground." *Id*. at *17.

The Delaware Supreme Court in *First Solar, Inc. v. National Union First Insurance Company* examined whether a securities class action and a follow-on lawsuit were "related claims" for purposes of establishing when a claim was "first made" under a D&O policy. 274 A.3d 1006 (Del. 2022). Stockholders filed the securities class action—the Smilovits Action—alleging false and misleading public disclosures regarding the manufacture of solar panels and photovoltaic power plants. *Id*. at 1007-1008. Opt-outs from

the Smilovits Action filed a follow-on lawsuit—the Maverick Action—alleging similar claims under both state and federal securities laws. *Id*. at 1008. The Delaware Superior Court applied the "fundamentally identical" test to conclude that the Smilovits Action and the Maverick Action were "related" because they involved more than "thematic similarities" but shared the "same subject" and "common facts, circumstances, transactions, events, and decisions." *Id*. at 1010. On appeal, the Delaware Supreme Court held that the "fundamentally identical" standard was inconsistent with the terms of the policy. *Id*. at 1012. Nonetheless, applying a less stringent standard, the Court affirmed the dismissal of First Solar's claims after concluding that the Maverick Action raises claims that arise out of, are based upon or attributable to facts or Wrongful Acts that are the same or related to the Smilovits Action. *Id*. at 1014-1017.

III. Exculpation of Non-Debtors in Bankruptcy Reorganization

Nexpoint Advisors, L.P. v. Highland Capital Mgmt., L.P., 48 F.4th 419 (5th Cir. 2022) addresses an evolving area of the law—the statutory bar on non-debtor discharge in bankruptcy—which intersects with D&O insurance coverage. Highland Park Capital Management filed for Chapter 11 bankruptcy protection in 2019. *Id*. at 424. The reorganization plan, under which the debtor emerged, purports to provide exculpation to certain non-debtor third parties for specified claims relating to the reorganization plan, other than certain bad faith and gross negligence claims. *Id*. at 427. One of the debtor's co-founders appealed the order confirming the reorganization plan, including on the basis that the exculpation or "protection" provisions for non-debtor third parties violates Section 524(e) of the Bankruptcy Code. *Id*. Under Section 524(e), "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." *Id*. at 435. However, the scope and application of this provision has been the subject of disputes, which have resulted in a split among circuit courts. The Fifth and Tenth Circuits "hold § 524(e) categorically bars third party exculpations absent express authority in another provision of the Bankruptcy Code." *Id*. at 436. On the other hand, "the Ninth Circuit joins the Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits in reading § 524(e) to allow varying degrees of limited third-party exculpations." *Id*. While the debtor urged that controlling case law—*Pacific Lumber*—allowed limited exculpation of non-debtors for post-petition liability, the Fifth Circuit ultimately ruled that (1) exculpation in a Chapter 11 reorganization plan must be limited to the debtor, the creditors' committee and its members for conduct within the scope of their duties, and the trustees (in this case including the Independent Directors) for conduct within the scope of their duties; and (2) exculpation of other non-debtors is unlawful. *Id*. at 438.

IV. Prior Notice Exclusion

In *Ashland Hospital Corporation v. Darwin Select Insurance Company*, a medical center sought coverage under D&O and professional liability policies for underlying claims alleging unnecessary cardiac operations and lack of informed consent. 2022 Ky. LEXIS 331, at *5-6 (Ky. Oct. 20, 2022). After the district court granted summary judgment in favor of the medical center, the court of appeals held that the D&O policy's "prior notice" exclusion was triggered by a DOJ subpoena served years prior to the civil litigation against the medical center, which shared a "common nexus." *Id*. at *8-9. The Kentucky Supreme Court reversed, based on the fact that when the subpoena was originally noticed in 2011, the insurers took the position that it did not constitute notice of a circumstance that might give rise to a claim. *Id*. at *14. And, reasoned the Court, if "the subpoena did not constitute adequate notice of circumstances giving rise to a claim in 2011, it cannot be covered by Exclusion 15 in the professional liability policy and excess policy of 2012-13." *Id*. at *16. The Court also ruled that the Court of Appeals lacked jurisdiction to consider the recoupment of expenses incurred in defending the underlying litigation. *Id*. at *22-23.

V. "Arising Out Of" Exclusion

In *Sentynl Therapeutics v. United States Specialty Ins. Co.*, a company engaged in marketing prescription opioid pain relievers sought coverage under a D&O policy for costs incurred to comply with subpoenas from the U.S. Attorney's office investigating potential violations of federal law relating to opioids. 2022 U.S. App. LEXIS 6088, at *1-2 (9th Cir. Mar. 9, 2022). The district court granted summary judgment in favor of the insurer, finding that the subject policy's exclusion for "[l]oss in connection with a Claim arising out of, based upon or attributable to any goods or products manufactured, produced, processed, packaged, sold, marketed, distributed, advertised or developed by [Sentynl]" relieved the insurer of coverage. The Ninth Circuit Court of Appeals affirmed, reasoning that (1) the "arising out of" terms in the exclusion were broadly construed, even in the context of an exclusion, to mean "originating from," "having its origin in," "growing out of" or "flowing from" or in short, "incident to, or having connection with", *id*. at *2-3; and (2) the subpoenas and the government's investigation of the insured "originat[es] from, ha[s] its origin in, grow[s] out of or flow[s] from" the insured's opioid products. *Id*. at 3-4.

CYBER & PRIVACY INSURANCE

I. Scope of Insured "Business Operations"

In *Fishbowl Solutions, Inc. v. The Hanover Insurance Company*, a consulting and software development firm sought coverage under a Technology Professional Liability Policy for damages that occurred when an unknown third-party infiltrated the firm's email and directed clients to pay firm invoices to the third-party. 2022 U.S. Dist. LEXIS 200210, at *3-4 (D. Minn. Nov. 3, 2022). The subject policy insured the "actual loss of 'business income' and additional 'extra expense' incurred by you during the 'period of restoration' directly resulting from a 'data breach' which is first discovered during the policy period' and which results in an actual impairment or denial of service of 'business operations' during the 'policy period.'" *Id*. at *5. On cross-motions for summary judgment, the district court ruled that for purposes of the policy's coverage for "business income" that "would have been earned or incurred if there had been no

impairment or denial of 'business operations," (1) "business operations" is not restricted to income generating activities, but included communication with and invoicing of clients; and (2) the funds diverted from the insured to the third-party represent income that "would have been earned" regardless of the insured's accrual accounting system. *Id*. at *10-17. Where Hanover argued that the loss of income did not result "directly" from the data breach, but rather from the intervening conduct of the client, who followed the fraudulent payment instructions of the third-party, the court held that Hanover failed to prove that the client's conduct constituted an "intervening agency." *Id*. at *19-23. The court also rejected Hanover's arguments that (1) the insured's business operations did not suffer "impairment"; and (2) finding coverage for the insured's claim was contrary to the "purpose" of the policy. Importantly, the court affirmed the principle that the specific language of the policy takes precedence over its "general purpose." *Id*. at *27 ("[N]otwithstanding the general purpose of business interruption insurance, the Court must pay heed to the actual language of the TPL Policy.").

II. Personal & Advertising Injury and "Recording & Distribution" Exclusion

The district court in *Citizens Insurance Company of America v. Banyan Tree Management, LLC* ruled on cross-motions for summary judgment that a general liability insurer had a duty to defend an insured hotel owner and manager against an underlying lawsuit alleging that a hotel employee made unauthorized, explicit video recordings and issued related extortion and blackmail demands to a hotel guest. 2002 U.S. Dist. LEXIS 199176, at *5-7 (D. Ga. Sept. 22, 2022). Specifically, the district court reasoned that the underlying allegations were sufficient to allege "personal and advertising injury," including the "wrongful … invasion of the right of private occupancy of a room." *Id*. at *25. Moreover, the court concluded that the "personal and advertising injury" was caused by an offense arising out of the insured's business, whether or not the conduct at issue was deemed normal or legitimate, which the policy's terms did not require. *Id*. at *26-30. The district court also held that the subject policies' "recording and distribution" exclusions—which preclude coverage for injuries that violate any state law "that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information"—did not relieve the insurer of its obligation to defend. Rather, applying the principle of *ejusdem generis*, the court construed the "recording and distribution" exclusion to apply to "unwanted commercial solicitations or the improper collection and distribution of financial information." *Id*. at *31-34.

III. Employment Practices Exclusion & BIPA

The district court in *Continental Western Insurance Company v. Cheese Merchants of America, LLC* addressed insurance coverage for an employee's claim against his employer under Illinois's Biometric Information Privacy Act ("BIPA"). 2022 U.S. Dist. LEXIS 174275, at *1 (N.D. Ill. Sept. 27, 2022). In the underlying BIPA lawsuit, the employee alleged that the employer's practice of scanning the back of its employees hands to track employee hours used the employee's biometric information without his consent in violation of BIPA. *Id*. at *2. In response to the liability insurer's motion for judgment on the pleadings, the district court ruled that (1) consistent with the law established in other, similar cases, the subject commercial general liability policy's "employment-related practices" exclusion did not apply to the underlying BIPA claims, *id*. at *7-9; (2) the policy's exclusion for injury arising out of any access to or disclosure of confidential or personal information did apply under the facts alleged in the underlying proceeding, *id*. at *10-22; and (3) the policy's "violation of law" exclusion also precludes coverage for the underlying BIPA lawsuit. *Id*. at *22-41.

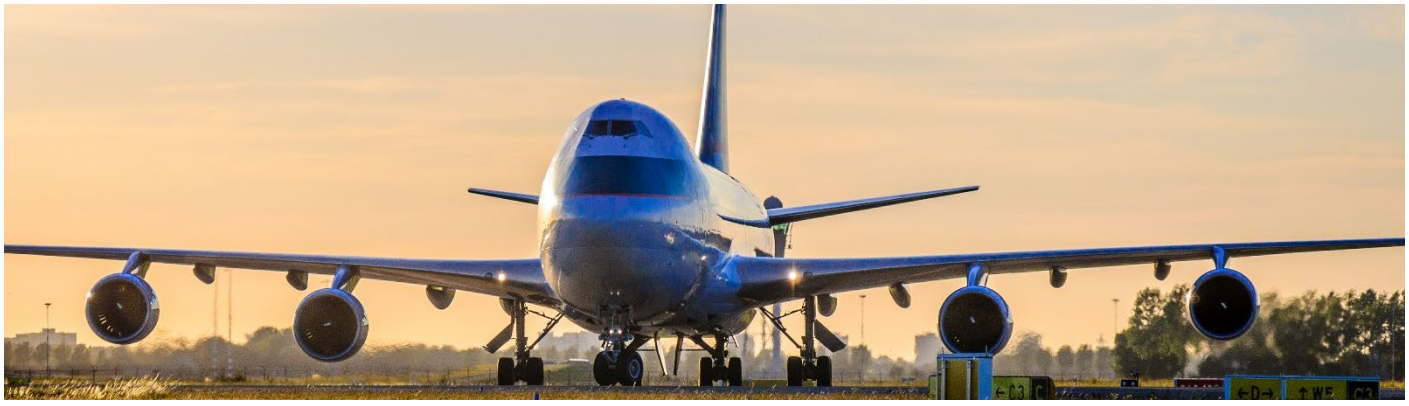
IV. General Liability Coverage for TCPA Violations

In *Yahoo, Inc. v. National Union Fire Insurance Company of Pittsburgh, Pa.*, an insured sought defense and indemnity from its general liability carrier for underlying putative class action lawsuits alleging that unsolicited text messages from the insured violated the Telephone Consumer Protection Act of 1991 ("TCPA"). 2022 Cal. LEXIS 6887, at *3 (Cal. Nov. 17, 2022). The trial court granted the insurer's motion to dismiss on the grounds that the TCPA claims did not allege an injury arising out of the "publication of material that violates a person's right of privacy" for purposes of the subject policy's personal injury coverage. *Id*. at *6. The Ninth Circuit Court of Appeals certified the following question: following question: "Does a commercial general liability insurance policy that provides coverage for 'personal injury,' defined as 'injury … arising out of … [o]ral or written publication, in any manner, of material that violates a person's right of privacy,' and that has been modified by endorsement with regard to advertising injuries, trigger the insurer's duty to defend the insured against a claim that the insured violated the [TCPA] of 1991 (47 U.S.C. § 227) by sending unsolicited text message advertisements that did not reveal any private information?" *Id*. at *7. After concluding that the terms of the coverage grant were ambiguous, the California Supreme Court ruled that the policy terms at issue (1) "can cover liability for violations of the right of seclusion if such coverage is consistent with the insured's objectively reasonable expectations"; and (2) "can also trigger the insurer's duty to defend the insured against a claim that the insured violated the TCPA by sending unsolicited text messages that did not reveal any private or secret information, provided that the alleged TCPA violation amounts to a right-of-seclusion violation under California law." *Id*. at *26.

OTHER NOTABLE INSURANCE CASES

I. Aviation Coverage

In *Nuebert Aero Corp. v. Starstone Nat'l Ins. Co.*, the 11th Circuit Court of Appeals considered whether (1) the insured violated a special condition in an aircraft policy by allowing a pilot to fly the insured aircraft without a multiengine rating; and (2) whether the aircraft policy qualified as a "wet marine or transportation insurance policy" for purposes of Florida's anti-technicality statute. 2022 U.S. App. LEXIS 27433, at *1-2 (11th Cir. Sept. 30, 2022). On the first issue, the court affirmed the district court's conclusion that the insured breached the special condition under the policy. However, on the second issue, the court held that the district court should have followed prior precedent applying Florida's anti-technicality statute to aircraft insurance. *Id*. at *9-10.



II. Criminal Acts Exclusion & Nolo Contendere Plea

In *Allstate Insurance Company v. Tenn*, an insurer sought a declaratory judgment action seeking to avoid defense and indemnity for a civil assault complaint on the basis that the insured's plea of *nolo contendere* in a related criminal case triggered the criminal acts exclusion in the insured's homeowners' policy. 271 A.3d 1014, 1016 (Conn. 2022). The district court certified the following question to the Connecticut Supreme Court: "Whether a plea of nolo contendere and the resulting conviction can be used to trigger a criminal acts exclusion in an insurance policy." *Id*. at 1019. Relying on common law and statute, the Connecticut Supreme Court acknowledged that "the general rule is that a plea of nolo contendere in a criminal case is inadmissible in a subsequent proceeding to prove the occurrence of a criminal act." *Id*. at 1019-1021. The Court further noted that, while the plea of *nolo contendere* "does not act as an absolute privilege prohibiting all collateral consequences arising from the resulting criminal conviction," *id*. at 1022, it is intended to "facilitate the efficient disposition of criminal cases by encouraging plea bargaining", *id*. at 1021, and affording the defendant the opportunity to "avoid[] the potentially harsher penalties occasioned when a defendant proceeds to trial." *Id*. "[T]he nolo plea [also] facilitates the expeditious administration of criminal justice." *Id*. at 1022. Because "[a]llowing the use of nolo contendere pleas as proof of underlying criminal conduct in subsequent civil litigation would, thus, undermine the very essence of the nolo contendere plea itself," *id.*, the Connecticut Supreme Court ruled that "Tenn's plea of nolo contendere is inadmissible as proof of criminal acts under § 4-8A (a) of the Connecticut Code of Evidence and our case law." *Id*. at 1023.

III. Insurable Interest for Life Insurance

The Georgia Supreme Court in *Crum v. Jackson National Life Insurance Company* answered certified questions from the Eleventh Circuit Court of Appeals addressing the legality of life insurance policies sold to a third-party with no insurable interest in the policyholder's life. 2022 Ga. LEXIS 274, at *1 (Ga. Oct. 25, 2022). After reviewing the history and terms of Georgia's statutory insurable interest rule, which does not address the intent of an insured policyholder to later transfer the policy to someone without an insurable interest, *id*. at *20-21, the court ruled that "a life insurance policy taken out by the insured on his own life with the intent to sell the policy to a third party with no insurable interest, but without a third party's involvement when the policy was procured, is not void as an illegal wagering contract." *Id*. at *26-27.

In a similar case, the Seventh Circuit Court of Appeals in *Sun Life Assurance Company of America v. Wells Fargo Bank, N.A.*, applied similar principles, *i.e.*, (1) "Illinois law prohibits the initial sale of a life insurance policy to someone who has no insurable interest in the life of the insured"; (2) "pure wager by contrast exists when a policy is first purchased or controlled by a party without an insurable interest," to hold that the specific life insurance policy in that case constituted an illegal wager. 44 F.4th 1024, 1031-1032, 1035 (7th Cir. 2022).

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