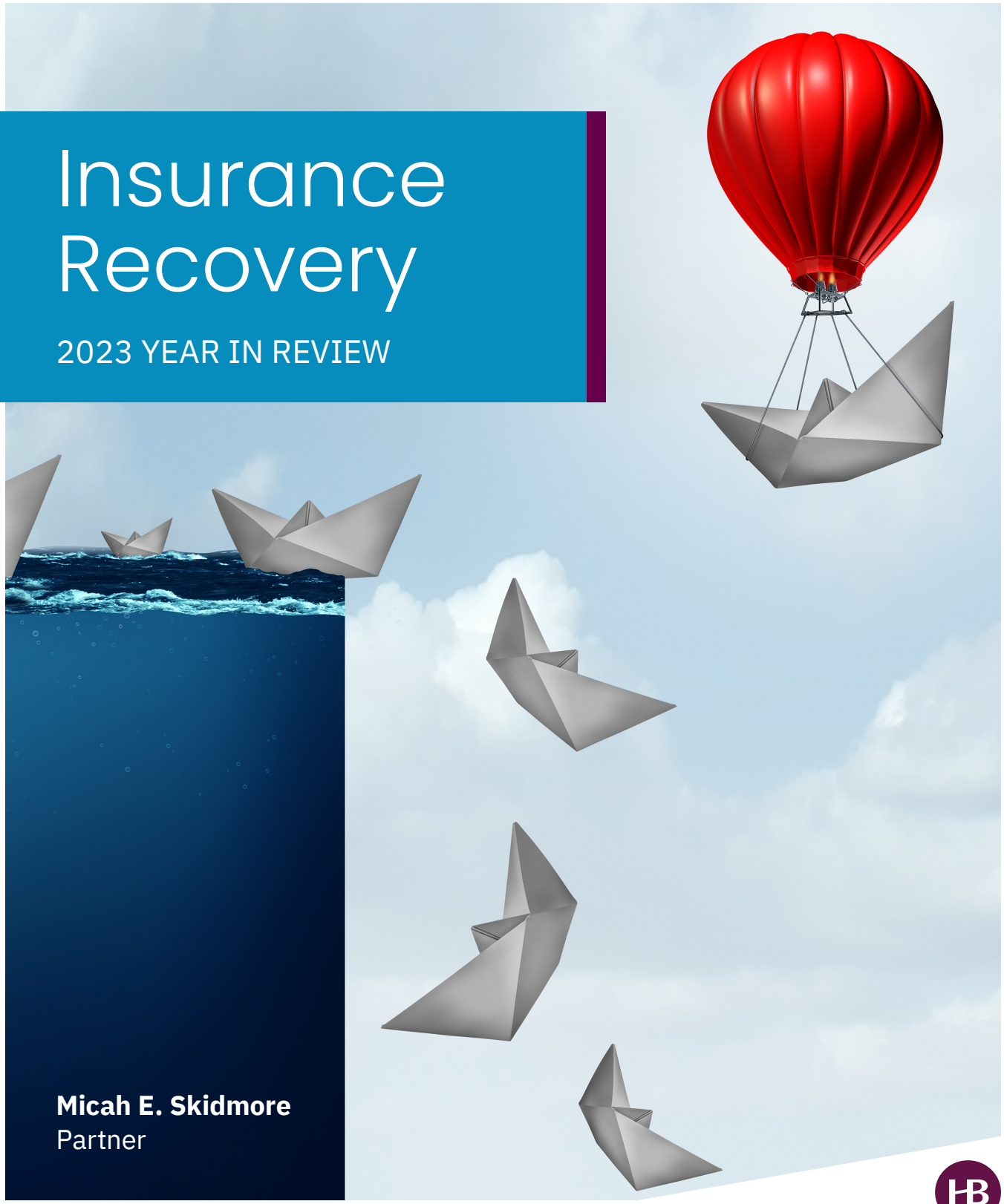
HAYNES BOONE

Insurance Recovery

2023 YEAR IN REVIEW



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CONTENTS

Like every other year in recent memory, 2023 proved another tumultuous year on the global stage. At home, 2023 will be remembered for, among other things, a Chinese spy balloon, bank failures, labor strikes, high interest rates, and devastating wildfires in Hawaii. Abroad, the war in Ukraine has continued, and a new conflict has erupted in Israel. Although in no way comparable to these world events, 2023 has also seen important developments in the area of insurance law. State and federal courts across the country have issued significant decisions impacting policyholders and insurers on claims involving, among other things, general liability, D&O, and property coverage. For this year-in-review, here are fifteen of the most important developments and decisions in insurance law from 2023.

I. The "Occurrence" Requirement In A General Liability Policy

General liability insurance policies (and first-party property insurance policies) require an "occurrence" as a condition of coverage. In the third-party liability context, underlying claims for "bodily injury" and "property damage" must be caused by "occurrence," which the ISO form defines as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." While the "occurrence" requirement has been part of general liability coverage for decades, over the past year, several courts have struggled with interpreting and applying this provision, particularly when it comes to distinguishing between intentional conduct and unintentional injury resulting from such conduct.

The case of *Acuity v. M/I Homes of Chicago, LLC*, 2023 IL 129087, at *P1-9 (Ill. 2023) exemplifies the "traditional" approach to applying the "occurrence" requirement. Here, a developer/general contractor sought coverage for underlying litigation brought by a homeowners association alleging faulty workmanship and related water intrusion damages under a policy insuring damages because of "property damage" caused by an "occurrence." The trial court granted summary judgment in favor of the insurer, Acuity, on the basis that "property damage resulting from the faulty work was not an 'occurrence,' because it was a natural and ordinary consequence of the construction project and not an accident as required under the policy." *Id*. at *P12. The appeals court reversed. *Id*. at *P16-17. After acknowledging that "the case law in this area is in flux" and "unsettled," *id*. at *P22, P26, the Illinois Supreme Court reasoned that "the term 'accident' in the policies at issue reasonably encompasses the unintended and unexpected harm caused by negligent conduct." *Id*. at *P47. And to the extent that the underlying lawsuit did not allege that "the subcontractors *intentionally* performed substandard work that led to the water damage," the Court concluded that the allegations were

sufficient to trigger Acuity's duty to defend. *Id*. at *P48, P65.

In contrast to *Acuity*, a series of decisions from various federal appeals courts have curtailed coverage based on a relatively narrow view of the "occurrence" term. For example, in *Discover Prop. & Cas. Ins. Co. v. Blue Bell Creameries USA, Inc.*, 73 F.4th 322, 325-26 (5th Cir. 2023), the directors and officers of an ice cream producer sought a defense in connection with an underlying shareholder derivative complaint alleging that the directors and officers breached their fiduciary duties to the producer by disregarding the risks associated with Listeria contamination and continuing to manufacture and distribute ice cream in spite of these risks. In an ensuing coverage lawsuit, the district court granted summary judgment in favor of the insurer, including on the basis that the underlying shareholder derivative suit did not allege damages because of "bodily injury" caused by an "occurrence." *Id*. at 327. On appeal, the Fifth Circuit Court of Appeals began with the premise that "[u]nder Texas law, a person's act is not an accident 'when [1] he commits an intentional act that [2] results in injuries that ordinarily follow from or could be reasonably anticipated from the intentional act.'" *Id*. at 329. Applying this

standard, the Court affirmed the ruling in favor of the insurer and against the insured directors and officers upon concluding that "the breach of fiduciary duties stemmed from intentional acts, and the Listeria outbreak and the resulting financial harm were natural and probable consequences that could be reasonably anticipated." *Id*. at 330.

The Fifth Circuit issued a similar opinion in *Gold Coast Commodities, Inc. v. Crum*, 68 F.4th 963, 965-67 (5th Cir. 2023), where an insured animal feed manufacturer sought coverage for a suit alleging that the insured discharged hot, acidic wastewaster from its production facility into public sewers under a pollution liability policy insuring an "occurrence" or "accident." Under Mississippi law, the "actions of the insured, not the resulting damages, [determine] whether there was an accident." *Id*. at 967 (citation omitted). Although the underlying complaint alleged "negligence" against the insured, the trial court determined that "the 'overarching' theme of the City's complaint, regardless of the accompanying 'legal labels,' is that Gold Coast deliberately dumped wastewater into the public sewers.'" *Id*. at 969. The Fifth Circuit Court of Appeals agreed and affirmed.

Again, in *Owners Ins. Co. v. Greenhalgh Planning*, 2023 U.S. App. LEXIS 20137, at *2-4, 2023 WL 4994512 (10th Cir. Aug. 4, 2023), a contractor sought a defense against a third-party complaint filed by property owners defending allegations that a residence the contractor remodeled did not comply with building code, including the requirement to install a fire-sprinkler system in the property's barn. In a subsequent declaratory judgment action filed by the contractor's insurer, the trial court entered judgment on the pleadings in favor of the insured and denied the insurer's motion for summary judgment to deny its duty to defend. *Id*. at *4. The Tenth Circuit Court of Appeals reversed upon finding that the underlying lawsuit did not allege an "occurrence" of property damage. As framed by the Utah Supreme Court, "harm or damage is not accidental if it is the natural and probable consequence of the insured's act or should have been expected by the insured." *Id*. at *7. And, according to the Tenth Circuit, "[b]ecause the natural and expected consequence of this alleged negligent construction is that the barn cannot be used as a legally habitable structure, the alleged property damage was not caused by an occurrence." *Id*. at *8.

Other appellate courts have dealt with similar disputes over whether an underlying lawsuit alleged an "occurrence" of "bodily injury" or "property damage." *See, e.g.*, *Blankenship v. Shelter Mut. Ins. Co.*, 2023 U.S. App. LEXIS 27637, at *8-9, 2023 FED App. 0445N (6th Cir. Oct. 16, 2023) (finding that underlying allegations of assault and abuse against a daycare director did not allege an "occurrence" or "accident" because (1) "[i]nherent in the plain meaning of 'accident' is the doctrine of fortuity,' which requires courts to analyze the insured's intent and control"; and (2) the insured director both intended harm to children and had the ability to control whether children at the daycare were free from abuse); *Am. Home Assur. Co. v. Superior Well Servs., Inc.*, 75 F.4th 184, 190 (3d Cir. 2023) (concluding that a lawsuit alleging that a hydraulic fracking contractor damaged natural gas wells by failing to

perform its services with reasonable skill and diligence did not allege an "occurrence" because "under Pennsylvania law, faulty workmanship, such as rendering a substandard service or causing damage by use of an unsuitable product, as was the case here, does not constitute an 'occurrence' when an insurance policy defines an 'occurrence' as an 'accident'"); *Berkley Specialty Ins. Co. v. Masterforce Constr. Corp.*, 2023 U.S. App. LEXIS 11563, at *5, 2023 WL 3378003 (3d Cir. May 11, 2023) (holding that faulty installation of metal roof panels resulting in extensive damage to related components, such as the roof sheathing and the wood blocking, were "entirely foreseeable" and not an "occurrence").

II. "All Sums" Allocation & Contribution from the Insured

When a single "occurrence" spans multiple years triggering potential liability coverage under a series of primary (and umbrella/excess) policies, disputes may arise over how coverage for an otherwise indivisible liability will be apportioned among all responsible carriers. To resolve such disputes, many jurisdictions have adopted an "all sums" approach, allowing the insured to select from among the responsible carriers to recover the entire liability, subject to policy limits. The chosen carrier, who is presumptively better equipped to allocate liability than the insured, may seek contribution from other responsible carriers. This "all sums" process was affirmed this year by the Sixth Circuit Court of Appeals in *Chemical Solvents, Inc. v. Greenwich Ins. Co.*, 2023 U.S. App. LEXIS 868, 2023 FED App. 0032N (6th Cir. Jan. 13, 2023), which also considered whether the insured could bear responsibility during the apportionment process. Here, a chemical company settled an underlying long-tail personal injury suit and recovered the settlement amount under three policies. *Id.* at *2. However, one of the policies at issue was reinsured by a captive, which was owned by the insured, Chemical Solvents. *Id.* Chemical Solvents sued to prevent the insurers from allocating any portion of the settlement to its captive. After the district court ruled in favor of the insurers, the Sixth Circuit affirmed, reasoning that (1) the "all sums" doctrine promotes efficiency without absolving the insured from responsibility for any part of the loss or liability at issue; (2) despite the fact that the insurers' contribution claims are "equitable" in nature, "no Ohio caselaw indicates that equity favors the insured's financial interests over equitable contribution"; and (3) case law from other jurisdictions exempting the insured from contribution does not apply where the insured becomes only indirectly liable for "financial consequences down the line." *Id.* at *5-7.

In a conceptually related case, the Second Circuit Court of Appeals in *Insurance Company of the State of Pennsylvania v. Equitas Insurance Ltd.*, 68 F.4th 774 (2d Cir. 2023) addressed the scope of a reinsurer's obligations to a carrier subject to an "all sums" allocation. Here, homeowners sued the successor-in-interest to a petroleum company for benzene contamination. *Id.* at 777. The successor-in-interest, Dole, settled with homeowners and obtained recovery for the settlement from an umbrella carrier, ICSOP, under California's "all sums" rule. *Id.* at 777-78. ICSOP then sought recovery from its reinsurer, Equitas, who refused coverage on the basis that English law, which governs its reinsurance policy, does not

adhere to the "all sums" rule. *Id*. at 778. In the subsequent coverage lawsuit filed by ICSOP, the district court granted summary judgment in favor of ICSOP against Equitas. *Id*. at 779. On appeal, the Second Circuit affirmed, finding that English law "recognizes a 'strong' — though not conclusive — presumption that 'liability under a proportional facultative reinsurance is co-extensive with the insurance'" such that "it will 'almost invariably be the case' that losses falling within the original insurance policy will also fall within the reinsurance, 'even if the losses are payable under a foreign law . . . which takes a view different from English law' on liability." *Id*. at 786, 791.

III. Incorporation of Extrinsic Documents when Interpreting an Insurance Policy

In *ExxonMobil Corporation v. National Union Fire Insurance Company of Pittsburgh, Pa.*, 672 S.W.3d 415, 417-18 (Tex. 2023), an oil and gas company, ExxonMobil, sought coverage as an additional insured from umbrella liability insurer, National Union, for underlying settlements with two contractor employees injured in a refinery accident. Despite the fact that the umbrella policy followed the form of an underlying primary policy that paid its limits on behalf of ExxonMobil, National Union refused indemnity for the settlements by asserting that terms in Exxon's agreement with contractor, Savage, avoided any additional insured coverage under the umbrella policy. *Id*. After a summary judgment ruling in favor of ExxonMobil in the trial court, which was reversed by the Houston Court of Appeals, *id*. at 418, the Texas Supreme Court reiterated the following key principles governing incorporation-by-reference into an insurance policy: "we begin with the text of the policy at issue; we refer to extrinsic documents only if that policy clearly requires doing so; and we refer to such extrinsic documents only to the extent of the incorporation and no further. Any venture beyond the four corners of an insurance policy must be carefully limited to the scope of that policy's clearly authorized reference." *Id*. at 418-19. Applying these principles, the Court reasoned that (1) the umbrella policy's coverage for "any person or organization" … "included as an additional insured under Scheduled Underlying Insurance" did incorporate the primary policy, which unquestionably insured Exxon, for the limited purpose of identifying who is an insured; (2) the umbrella policy's disclaimer of "broader coverage" than allowed by the primary policy did not invite resort to the Savage agreement, nor did the Savage agreement limit ExxonMobil's coverage in the manner argued by National Union. *Id*. at 419-20. Accordingly, the Court found ExxonMobil to be an "insured" under National Union's umbrella policy. *Id*. at 421.

IV. New York's Anti-Subrogation Rule

Although unrelated to "all sums" allocation, the Second Circuit in *Zurich American Insurance Co. v. Certain Underwriters at Lloyd's of London Subscribing to Policy No. B12630308616*, 2023 U.S. App. LEXIS 32724, 2023 WL 8594052 (2d Cir. 2023) also addressed an important issue pertaining to subrogation against an insured under New York law. New York's anti-subrogation rule provides that "[a]n insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered." *Id*. at *5. As applied to the facts of this case, Zurich, Arch and Lloyds together provided $300 million coverage under a contractors controlled insurance program (CCIP) insuring the owner (Port Authority of New York and New Jersey), developer (LGA) and contractor (Skanska) for liability in connection with a construction project at LaGuardia Airport. *Id*. at *3. When a Skanska employee sued the Port Authority and LGA for injuries sustained while working on the project, Lloyds was not entitled to subrogate against Skanska for the employee's injuries—notwithstanding the fact that Skanska had otherwise agreed to indemnify the Port Authority and LGA for personal injury claims arising from Skanska's negligence. *Id*. at *3, 6.

V. An Insurer's Standing To Challenge An Insured's Bankruptcy Plan

In *Hanson Permanente Cement, Inc. v. Kaiser Gypsum Co.*, 60 F.4th 73, 77-79 (4th Cir. 2023), the manufacturers of certain asbestos containing products (hereafter "Kaiser") sought confirmation of a Chapter 11 reorganization plan, which was intended to address thousands of current and future asbestos claims through the establishment of a trust. The plan obtained unqualified approval from claimants and other stakeholders, except for one insurer, Truck. Truck objected on the basis that the proposed plan did not provide for sufficient disclosures and anti-fraud protections. *Id*. at 80. When Kaiser proceeded with confirmation of the plan, Truck objected further that the plan was collusive and violated Kaiser's obligations of assistance and cooperation under the relevant policies. *Id*. The district court overruled Truck's obligations on the grounds that to the extent that the proposed plan was "insurance neutral," Truck was not a "party in interest" with standing to challenge the plan under Section 1109(b) of Chapter 11. *Id*. at 81. Ultimately, the Fourth Circuit affirmed in concluding that (1) "[b]ecause the Plan does not impair Truck's policy rights or otherwise alter Truck's quantum of liability but simply maintains Truck in its pre-petition position with all its coverage defenses intact, the Plan is insurance neutral"; and (2) "Truck, in its capacity as an insurer, is not a party in interest under § 1109(b) and therefore lacks standing to challenge the Plan in that capacity." *Id*. at 87. The Supreme Court has granted certiorari and is expected to render a decision later this year. In the meantime, the question of an insurer's standing to object to an insured's bankruptcy plan is significant, not only in terms of the insured's ability to obtain plan confirmation with or without the insurer's consent. By implication, the degree to which the insurer's standing to object is limited may also affect the degree to which the insurer may be bound by liabilities arising out of the plan and its subsequent execution.

VI. The "Bump Up" Exclusion

Many D&O policies include some version of a "bump up" exclusion, which is intended to limit the insurer's exposure to certain liability claims arising out of corporate transactions dealing with the consideration paid. In the recent era of SPAC and De-SPAC transactions, litigation over the scope of such "bump up" exclusions has become increasingly common. In *Towers Watson & Co. v. National Union Fire Insurance Co.*, 67 F.4th 648, 650-51 (4th 2023) the Fourth Circuit addressed a particular "bump up" exclusion providing that "[i]n the event of a Claim alleging that the price or consideration paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all the ownership interest in or assets of an entity is inadequate, Loss with respect to such Claim shall not include any amount of any judgment or settlement representing the amount by which such price or consideration is effectively increased." This exclusion became relevant when former shareholders of Towers Watson filed suits against the company and its former chairman and CEO, John Haley ("Haley"), alleging that Haley's compensation package created a conflict of interest that ultimately led to Haley accepting less than fair market value for Towers Watson shares in a recently completed reverse-triangular merger with Willis. *Id*. at 652. Although Towers Watson D&O insurer, National Union, defended the shareholder suits, National Union refused indemnity for settlements paid to shareholders on the basis of the policy's "bump up" exclusion. Towers Watson filed suit and obtained summary judgment against National Union in district court after arguing that the transaction at issue was not an "acquisition" for purposes of the exclusion, but rather a merger of equals. *Id*. The Fourth Circuit Court of Appeals reversed, finding that (1) an "acquisition" is not limited to a particular form of transaction, but occurs when another entity

gained "possession" or "control" of "all or substantially all the ownership interest in or assets of" Towers Watson; and (2) Willis did, in fact, obtain possession and control of Towers Watson shares in the reverse-triangular merger. *Id*. at 654-57. Importantly, the Court did not conclusively rule against coverage for Towers Watson's settlement of the underlying shareholder litigation. Instead, to the extent that the district court did not rule on all arguments against the application of the "bump up" exclusion, the Court remanded for consideration of these alternative grounds. *Id*. at 657.

VII. Coverage for PFAS Liability

Per-and poly-fluoroalkyl substances, also known as "PFAS," have been used in wide range of consumer and commercial products for decades. In recent years, litigation over the health effects of exposure to PFAS has also become increasingly widespread. By one account, "[l]awsuits accusing major chemical companies of polluting U.S. drinking water with toxic PFAS chemicals led to over $11 billion in settlements in 2023 …."[1] With the scale and magnitude of this potential liability,

[1] Clark Mindock, *'Forever chemicals' were everywhere in 2023. Expect more litigation in 2024*, REUTERS (Dec. 28, 2023), *available at* https://www.reuters.com/legal/litigation/forever-chemicals-were-everywhere-2023-expect-more-litigation-2024-2023-12-28/.

significant interest has been paid to insurance coverage for PFAS liability. In *Admiral Ins. Co. v. Fire-Dex, LLC*, 2023 U.S. App. LEXIS 14822, 2023 FED App. 0275N (6th Cir. Jun. 13, 2023), the Sixth Circuit Court of Appeals underscored the significance of this issue by declining to exercise jurisdiction over a dispute involving an issue of Ohio insurance law: "are illnesses arising from exposure to PFAS in a manufacturer's finished products an 'occupational disease' under Ohio law?" Here, a manufacturer of clothing for firefighters sought defense and indemnity in connection with underlying personal injury lawsuits alleging that PFAS in the manufacturer's products led to injuries, including cancer. *Id*. at *1-2. The manufacturer's general liability insurer, Admiral, sought a declaration that it had no obligation to defend or indemnify because of an "occupational disease" exclusion in its policies. *Id*. at *3. The district court declined to exercise jurisdiction over Admiral's declaratory judgment claim, and the Sixth Circuit Court of Appeals affirmed after reasoning that "States ... are the masters of their own law, subject to certain federal constitutional and statutory restraints," and "when unanswered questions of state law raise their heads, state courts are best suited to answer them." *Id*. at *7-8. In the meantime, insurers and insureds alike will watch with anticipation both the development of PFAS liability suits and direction from state courts on insurance coverage for such claims.

VIII. Crime Coverage for Loss Resulting "Directly from Employee Theft

In *National Union Fire Insurance Co. of Pittsburgh, Pennsylvania v. Cargill, Inc.*, 61 F.4th 615 (8th Cir. 2023), the Eighth Circuit Court of Appeals provided important guidance on the scope of "employee theft" coverage under a crime/fidelity policy. Here, the insured, Cargill, sought coverage for losses arising from an eight-year scheme perpetrated by an employee in Albany, New York, whereby, among other things, Cargill shipped vast quantities of grain to Albany to be sold, based on the employee's misrepresentations regarding the price at which the grain could be sold. *Id*. at 617-18. The employee's fraud cost Cargill, not only $3 million in funds embezzled by the employee, but more than $29 million in related freight costs incurred to transport grain to New York. *Id*. at 618. National Union's crime policy provided coverage for loss resulting "directly from" employee "theft," which was defined as "the unlawful taking of property to the deprivation of the Insured." *Id*. at 620. While National Union acknowledged its obligation to pay for the $3 million in funds diverted by the employee, National Union sought declaratory relief confirming its denial of coverage as to the remaining shipping costs incurred by Cargill. *Id*. at 619. On a motion for judgment on the pleadings, the district court ruled in favor of Cargill. The Eighth Circuit affirmed, finding that (1) while the employee never had physical possession of the grain at issue, the employee did exercise sufficient "control" to constitute a "taking" for purposes of coverage; and (2) the $29 million freight costs paid by Cargill were the direct result of the employee's fraud. *Id*. at 621.

IX. Federal Appellate Jurisdiction Over Non-Final Orders

Unrelated to any particular substantive coverage decision, over the past year, federal appellate courts have issued a series of decisions clarifying the scope of federal appellate review for non-final orders from federal district courts. Under 28 U.S.C. § 1291, circuit courts of appeal have appellate jurisdiction over "all final decisions of the district courts of the United States ...." Circuit courts also have appellate jurisdiction over "[i]nterlocutory orders of the district courts of the United States ... granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1). Orders granting or denying motions for partial summary judgment on claims for declaratory relief are not, as the Third Circuit Court of Appeals found, the functional equivalent of an injunction that could confer jurisdiction. *See Zurn Indus., LLC v. Allstate Ins. Co.*, 75 F.4th 321, 329 (3d Cir. 2023). Likewise, an order compelling

appraisal and staying further proceedings regarding coverage pending appraisal is neither a final decision nor an order on injunctive relief for purposes of the Court's statutory grant of appellate jurisdiction. *See, e.g.*, *Positano Place at Naples I Condo. Ass'n, Inc. v. Empire Indem. Ins. Co.*, 84 F.4th 1241, 1248 (11th Cir. 2023) (holding that an order compelling appraisal was not a final order reviewable under § 1291 because (1) the order contemplated further proceedings, (2) appraisal existed for the limited purpose of determining the amount of loss, and (3) "all issues other than those contractually assigned to the appraisal panel are reserved for determination in a plenary action"); *Brar Hosp. Inc. v. Mt. Hawley Ins. Co.*, 2023 U.S. App. LEXIS 30425, 2023 WL 7704742 (11th Cir. Nov. 15, 2023) (following *Positano Place*). Note that these decisions nominally contrast with the Tenth Circuit's decision in 2022 ruling 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. *Fireman's Fund Insurance Company v. Steele Street Limited II*, 2022 U.S. App. LEXIS 289 (10th Cir. Jan. 5, 2022).

X. Damages "Because Of" Bodily Injury/Property Damage

In 2022, the Delaware Supreme Court and the Ninth Circuit Court of Appeals issued decisions interpreting language in the ISO form general liability grant of coverage insuring damages "because of" bodily injury and property damage. *See, e.g.*, *Ace American Insurance Company v. Rite Aid Corp.*, 270 A.3d 239 (Del. 2022); *Acuity v. Masters Pharmaceutical, Inc.*, 2022 Ohio LEXIS 1814 (Ohio Sept. 7, 2022); *Bliss Sequoia Insurance Risk Advisors, Inc. v. Allied Property & Casualty Insurance Company*, 52 F.4th 417 (9th Cir. 2022). In 2023, the Sixth Circuit Court of Appeals issued a similar decision in *Westfield National Insurance Co. v. Quest Pharmaceuticals, Inc.*, 57 F.4th 558 (6th Cir. 2023). Here, a wholesale distributor of pharmaceuticals, including opioids, sought defense and indemnity from its liability insurers for a portfolio of underlying lawsuits filed by a variety of public and private entities alleging the distributor, Quest, contributed to the nationwide opioid epidemic. *Id.* at 560. Quest's insurers filed declaratory judgment claims denying any liability to Quest, including on the basis that the underlying lawsuits do not allege damages "because of" bodily injury, as required by the relevant policies' terms. *Id.* at 561. The district court granted summary judgment in favor of the insurers. *Id.* Following *Acuity* and *Rite Aid*, cited above, but distinguishing *Cincinnati Insurance Co. v. H.D. Smith*, 829 F.3d 771, 775 (7th Cir. 2016), the Sixth Circuit affirmed. *Id.* at 562 ("The underlying plaintiffs seek purely economic damages, which, like punitive damages, are not meant to compensate for a particular bodily injury."). At the end of 2023, a Circuit Court in Arkansas reached the opposite conclusion, ruling that liability insurers have a duty to defend Walmart in a portfolio of underlying opioid-related lawsuits. *See Walmart Inc. v. ACE American Insurance Company*, Case No. 04CV-22-2835-4, in the Circuit Court of Benton County, Arkansas (Dec. 29, 2023).

XI. Reimbursement of Policy Proceeds from an Insured

In addition to adjudicating claims for subrogation against insureds, 2023 saw more than one dispute over an insurer's right to seek reimbursement of policy proceeds from an insured. In *Continental Casualty Co. v. Winder Labs., LLC*, 73 F.4th 934, 938-39 (11th Cir. 2023), a generic pharmaceutical manufacturer sought defense and indemnity from its general liability insurers, Continental and Valley Forge, for underlying false advertising claims. The insurers agreed to defend subject to a reservation of rights, including a "right to seek reimbursement of defense costs incurred on [the insureds'] behalf for all claims which are not potentially covered …." *Id*. at 939. The insureds subsequently signed an acknowledgement of Continental's reservation of rights. *Id*. During the course of the underlying litigation, the insurers filed suit both to deny any coverage to the insured, Winder Labs, and to obtain reimbursement of the defense costs expended to date. *Id*. The district court granted summary judgment in favor of Winder Labs and against the insurers on the reimbursement claim. *Id*. at 939-40. On appeal, after concluding that the insurers had no continuing duty to defend, the Eleventh Circuit held that (1) the insurers' reservation of rights letter did not create a contractual right of reimbursement for which there was no consideration; (2) the insureds were not unjustly enriched by the insurers' defense of the underlying litigation; and (3) Georgia law does not otherwise recognize an extracontractual claim for reimbursement of defense costs from an insured. *Id*. at 947-50.

In contrast to the *Winder Labs* case, the Ninth Circuit Court of Appeals in *Massachusetts Bay Ins. Co. v. Neuropathy Solutions, Inc.*, 2023 U.S. App. LEXIS 11078, at *2, 2023 WL 3267845 (9th Cir. May 5, 2023) found that an insurer was entitled under California law to reimbursement of settlement proceeds paid under a reservation of rights. There, an underlying plaintiff sued the insured, Neuropathy Solutions, for injuries arising out of the advertising and administration of stem cell injections. *Id*. at *6. Neuropathy Solutions' general liability insurer, Massachusetts Bay, agreed to defend the suit and pay a settlement, provided that Neuropathy Solutions approve Massachusetts Bay's reservation of rights. *Id*. at *2-3. "To seek reimbursement under California law, an insurer must provide (1) a timely and express reservation of rights; (2) an express notification to the insured of the insurer's intent to accept a proposed settlement offer; and (3) an express offer to the insured that it may assume its own defense in the event that the insured does not wish to accept the proposed settlement." *Id*. at *2. After Massachusetts Bay filed suit to exercise its claim for reimbursement, the district court granted judgment on the pleadings to Neuropathy Solutions. *Id*. at 2. However, upon finding that (1) the underlying claims against Neuropathy Solutions were precluded from coverage under a professional services exclusion, *id*. at *5-7; and (2) Massachusetts Bay had "satisfied the prerequisites for seeking reimbursement of the amount it paid to settle the [underlying] *Bernal* action on Neuropathy's behalf," *id*. at *2, the appellate court reversed and rendered judgment in favor of Massachusetts Bay. *Id*. at *7.

XII. D&O Coverage for Disgorgement/Restitution

In *Astellas US Holding, Inc. v. Federal Insurance Co.*, 66 F.4th 1055, 1058-60 (7th Cir. 2023), a pharmaceutical manufacturer, Astellas, sought coverage for $100 million settlement (including $50 million expressly designated as "restitution to the United States") paid to resolve allegations that contributions made by Astellas to so-called patient assistance plans violated the federal Anti-Kickback Statute and the federal False Claims Act. One of Astellas' insurers, Federal Insurance Company, refused payment under its $10 million excess liability policy, in relevant part, on the basis that the settlement did not constitute a "loss," which the subject policy defined to exclude "matters which may be deemed uninsurable under applicable law." In an ensuing coverage suit

between Astellas and Federal, the federal district court ruled on cross-motions for summary judgment that Illinois law and public policy did not prohibit insurance coverage for at least $10 million of the settlement.

On appeal, the Seventh Circuit Court of Appeals addressed the specific question of whether Illinois law prohibits coverage for settlement payments that are "restitutionary in character." *Id*. at 1063. The Court confirmed that a settlement payment is restitutionary if (1) "the payment disgorges 'something that belongs of right not to the defendant but to the plaintiff'"; or (2) "the payment 'seeks to deprive the defendant of the net benefit of the unlawful act.'" *Id*. at 1064. In applying these principles, the Court noted that the "restitutionary" label applied by the parties to the settlement—whether for tax purposes or otherwise—"isn't important" in deciding whether the settlement was "restitutionary" for purposes of coverage. *Id*. at 1065. Moreover, even if part of the settlement qualified as restitution, under Illinois law, "[i]n cases where an insured enters into a settlement that disposes of both covered and non-covered claims, the insurer's duty to indemnify encompasses the entire settlement if the covered claims were 'a primary focus of the litigation.'" *Id*. at 1065.

As applied to the particular facts of Astellas' settlement, the Court rejected Federal's argument that the settlement must have been focused on uninsurable restitution because the underlying Anti-Kickback allegation required proof of knowing and willful conduct. As the Court noted, "proving fraud does not necessarily prove restitution," and Federal failed to offer sufficient evidence of either fraud or disgorgement of profits. *Id*. at 1074. Furthermore, the Court recognized that "an insurance coverage dispute is not a forum for trying the merits of the potential claims against the insured" as this would "have a chilling effect on settlements." *Id*. at 1070. And substantively, the False Claims Act "allows only for civil penalties and compensatory damages, not for restitution." *Id*. at 1074. As a result, the Seventh Circuit affirmed the district court's ruling to hold that Federal failed to demonstrate that the $10 million in coverage afforded by its excess policy applied to an uninsurable and restitutionary portion of the settlement between Astellas and the DOJ.

XIII. Coverage for BIPA Liability

Since its enactment in 2008, public and private companies have sustained untold millions in liability claims under Illinois' Biometric Information Privacy Act ("BIPA"). These BIPA liability claims have, in turn, generated countless disputes with liability insurance carriers over coverage for BIPA liability. In 2023, the Seventh Circuit Court of Appeals issued two landmark decisions addressing coverage for BIPA claims under Illinois law. First, in *Citizens Ins. Co. of Am. v. Wynndalco Enters., LLC*, 70 F.4th 987, 990-91 (7th Cir. Jun. 15, 2023), an information technology services firm sought coverage from its liability carrier in connection with two putative class action lawsuits alleging that the firm's role in the distribution of a facial recognition database violated BIPA. The firm's carrier, Citizens, refused coverage in reliance on an exclusion stating that "[t]his insurance does not apply to … 'personal and advertising injury' arising directly or indirectly out of any action or omission that violates or is alleged to violate (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or (2) The CAN-SPAM Act of 2003, including any amendment or addition to such law; or (3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transaction Act (FACTA); or (4) Any other laws, statutes, ordinances, or regulations, that address, prohibit or limit the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information." *Id*. at 993. In a declaratory judgment action filed by Citizens, the district court granted summary judgment against Citizens and in favor of the technology services firm, Wynndalco. Reviewing the coverage issue *de*

novo, the Seventh Circuit Court of Appeals concluded that the exclusion was ambiguous, and to adopt the reading advocated by Citizens would "swallow a substantial portion of the coverage that the policy otherwise explicitly purports to provide in defining a covered 'personal or advertising injury,' and arguably all of the coverage for certain categories of wrongs—copyright infringement, to take one example—that are entirely statutory in nature." *Id*. at 999. In responding to Citizens' coverage arguments, the Court acknowledged that "[w]here a violation-of-statutes exclusion has a title or heading that points to a particular category of statutes, where the statutes expressly identified in the exclusion fall within that very same category, and where there is some doubt about the reach of a broad catch-all provision immediately following the expressly-identified statutes, it is an appropriate application of *ejusdem generis* to construe the more general language of the catch-all provision as encompassing only that same category of statutes." *Id*. at 1001. However, the Court did not find, in this case, that *ejusdem generis* (or *noscitur a sociis*) resolved the ambiguity in the subject exclusion because "here is nothing in the language of the exclusion—be it in the title or in any of the provisions that follow—which points to privacy as the focus of the exclusion." *Id*. at 1003. Accordingly, the Court affirmed the district court's grant of summary judgment to Wynndalco.

The Seventh Circuit adopted a similar analysis in *Citizens Ins. Co. of Am. v. Mullins Food Prods.*, 2023 U.S. Dist. LEXIS 131973, at *2-4 (7th Cir. July 31, 2023), where a food company, Mullins, sought coverage for an underlying lawsuit brought by an employee alleging that Mullins violated BIPA by using and distributing biometric information used to clock the employee's hours without the

employee's consent. In addition to addressing an exclusion for "Recording And Distribution Of Material Or Information In Violation Of Law," similar to the exclusion addressed in Wynndalco, the liability policy at issue in Mullins included an "Access Or Disclosure Of Confidential Or Personal Information Exclusion," "which excludes from coverage, 'Personal and advertising injury' arising out of any access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information or any other type of nonpublic information." *Id*. at *22-23. Despite the nominal difference in the terms of the exclusion, the Court arrived at the same conclusion that "where the Access Or Disclosure Of Confidential Or Personal Information Exclusion broadly construed would eliminate a vast swath of privacy violation claims based on the publication of personal information that the insuring agreement otherwise purports to cover, the exclusion is ambiguous." *Id*. at *29-30. Moreover, absent "readily discernable clues in the list [of excluded information] that point to any particular feature as a harmonizing factor," the Court was unable to resolve the ambiguity by resort to either *ejusdem generis* or *noscitur a sociis*. *Id*. at *32-33. Therefore, the Court concluded that neither exclusion precluded Citizens' duty to defend Mullins in the underlying BIPA suit.

XIV. Policy Language Controls Coverage For Windstorm Damage

In *Shiloh Christian Ctr. v. Aspen Specialty Insurance Co.*, 65 F.4th 623, 625-26 (11th Cir. 2023), a Florida church, Shiloh Christian, sought coverage for water damage caused by Hurricane Matthew in 2016 and Hurricane Irma in 2017. Shiloh's property insurer, Aspen, refused coverage on the basis that the underwriting for the property policies issued in both 2016 and 2017 manifested an intent to exclude windstorm coverage. *Id*. at 625-27. Shiloh sued for breach of contract, contending that the terms of the policies, as

issued, did cover and not exclude named windstorms. *Id*. at 626. The district court ruled on cross-motions for summary judgment in favor of Aspen, concluding that "Aspen's evidence regarding the parties' intent [was] overwhelming: '[T]he explicit bargaining to remove named windstorm coverage, the reduced premiums that resulted from that bargaining, and the explicit language in the subsequent policy quotes' all proved to the district court's satisfaction that 'named windstorm coverage would not be included.'" *Id*. at 626-27. However, the Eleventh Circuit reversed on the grounds that (1) "a policy's text is paramount"; (2) "[w]hatever the extrinsic evidence may suggest about the parties' intentions or expectations, the Irma Policy unambiguously covers named windstorms"; and (3) "the Matthew Policy contains a broad coverage clause, and a detailed 'Exclusion' provision that includes all manner of specific exclusions but, conspicuously, does not mention 'Named Windstorms.'" *Id*. at 627-630.

XV. COVID-19 Business Interruption Claims

In 2023, courts in many jurisdictions have continued to address claims for business interruption and related loss arising out of the COVID-19 pandemic. *See, e.g.*, *Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, 175 N.H. 744 (N.H. 2023); *Cajun Conti LLC v. Certain Underwriters at Lloyd's*, 359 So. 3d 922 (La. 2023); *Starr Surplus Lines Ins. Co. v. Eighth Jud. Dist. Ct.*, 535 P.3d 254 (Nev. 2023). While most of these decisions have concluded that the insureds' real and personal property did not sustain "physical loss or damage" from the coronavirus, these rulings happen to coincide with another notable trend in 2023—organized labor strikes on a scale not seen in years.[2] By some estimates, the big three domestic automakers lost more than $9 billion as a result of massive work stoppages staged by the UAW during the summer and fall.[3] Like business interruption loss arising from the COVID-19 pandemic, it is unlikely that losses sustained by Detroit's automakers (or other businesses affected by striking labor unions) will be compensated by traditional commercial property or business interruption insurance. But, in the case of organized labor strikes, the lack of coverage is not because absent employees have not inflicted direct "physical loss" on factories and other corporate property. Instead, most commercial property policies include a specific exclusion for loss resulting from picketing, work stoppage or other action by striking employees. Of course, such exclusions would be unnecessary and meaningless unless collective action by a labor union could cause "physical loss or damage" in the first place. Although for most insureds, there is no longer any prospect for business interruption coverage relating to the pandemic, the coverage implications of massive work stoppages in 2023 should not be lost on insurers, insureds or the courts: events that remove employees from insured property can cause direct physical loss to the insured.

[2] Max Zahn, Unions made 2023 the year of the strike. What will happen next?, ABC News (Dec. 26, 2023), *available at* https://abcnews.go.com/Business/unions-made-2023-year-strike-happen/story?id=105556127.
[3] Sara Powers, Economic losses exceed $9.3 billion as UAW strike continues, CBS News (Oct. 23, 2023), *available at* https://www.cbsnews.com/detroit/news/economic-losses-exceed-9-3-billion-as-uaw-strike-continues-economic-group-says/.

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