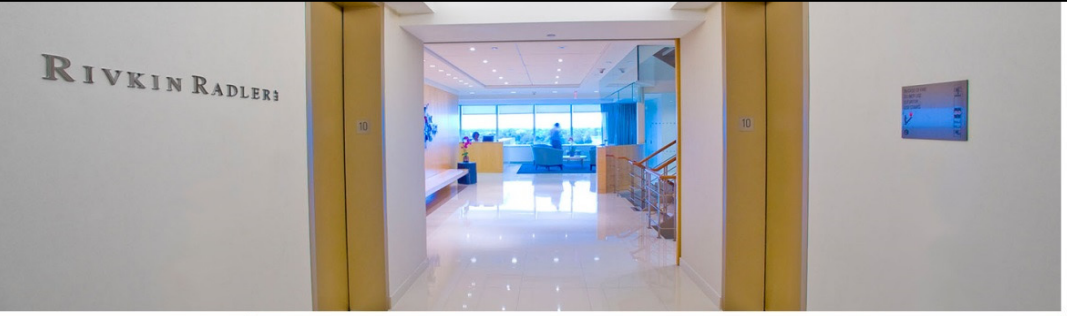

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South Carolina Supreme Court: Gunshot Injuries Did Not Arise Out of the Use of an Automobile, Uninsured Motorist Benefits Unavailable

To recover uninsured motorist benefits under an auto policy, the insured's damages must "arise out of the ownership, maintenance, or use" of the uninsured motor vehicle. The South Carolina Supreme Court took on the issue of whether the firing of a gun inside one vehicle into another vehicle arises out of the use of a motor vehicle.

While two vehicles were stopped at a red light, the driver of one vehicle took out a rifle and fired a shot through the passenger side window of the other vehicle, killing the driver. The victim's daughter sought to recover uninsured motorist benefits. The insurer denied on the basis that the victim's injury did not arise out of the use of the shooter's vehicle.

The South Carolina Supreme Court applied a three-part test in resolving the issue: (1) there must be a causal connection between the injury and the uninsured vehicle; (2) there must be no act of independent significance that breaks the chain of causation; and (3) the uninsured vehicle must be used for transportation at the time.

In assessing the first prong – causal connection – the court considered whether the shooter's vehicle was an active accessory to the victim's injuries and whether gunshot injuries are foreseeably identifiable with the normal use of a vehicle. There was no evidence that the shooter used his vehicle to pursue the victim. And the court found that it was not reasonable to conclude that gunshot injuries were intended to be covered by an auto policy.

Even so, there would be no coverage under the second prong because the act of firing a gun into another vehicle constitutes an act of independent significance that breaks the causal chain.

Thus, the South Carolina Supreme Court held that the gunshot injuries did not arise out of the use of an automobile. In so holding, the court clarified the state's conflicting jurisprudence on when injuries arise out of the ownership, maintenance, or use of an automobile.

The case is *Progressive Direct Ins. Co. v. Groves,* No. 28115 (S.C. Sept. 21, 2022).

Montana Supreme Court: Insurers Have No Duty to Defend Kidnapping Claim

A man kidnapped and assaulted his estranged wife. He held her against her will – at first in her own car, and then in his vehicle. Eventually, the man took his ex-wife to the emergency room before turning himself in to the Sheriff's Department. He pleaded guilty to aggravated kidnapping and partner or family member assault.

His ex-wife filed a civil suit alleging intentional tort and negligence. The man sought to be defended by his auto insurer and under a personal umbrella policy. The insurers defended under a reservation of rights and then sought a declaration that they had no duty to defend. The primary issue was whether the ex-wife's alleged injuries were caused by an "accident" under the auto policy, or an "occurrence" under the personal umbrella policy.

The man contended that he did not intend to harm his ex-wife and that the unintended consequences of his acts gave rise to an "accident" or "occurrence." The Montana Supreme Court disagreed. It found that the acts of kidnapping and assault were intentional and that the consequences were expected. The court rejected the man's defense that some of his ex-wife's

alleged facts were not true, explaining that the insured cannot create coverage where it does not exist by simply denying the claims against it. Nor did the alternative theory of negligence obligate the insurers to defend because no reasonable factfinder could determine that the incident was not intentional.

Coverage was unavailable under the personal umbrella policy for the additional reason that the man's ex-wife was a named insured under that policy and coverage was barred for injuries to named insureds.

The case is *21st Century N. Am. Ins. Co. v. Frost*, No. DA 22-0073 (Mont. Sept. 6, 2022). The court chose not to designate this opinion for publication, but the case illustrates how courts will look beyond "negligence" labels when assessing coverage for certain types of intentional acts; that is, where injury is reasonably expected by virtue of the act itself.

Vermont Supreme Court Finds That Shipbuilding Company Alleged Sufficient Facts of Direct Physical Loss from Covid to Survive Motion to Dismiss

The insured, Huntington Ingalls Industries, Inc., a military shipbuilding company, made changes to its operations to comply with CDC and Defense Department Covid-19 guidelines. These changes included modifying and staggering work to reduce crowding, sanitizing, and cleaning at its facilities, and placing physical barriers to restrict virus transmission. Huntington and its captive insurer sued reinsurers for a judgment declaring that they were entitled to coverage under the policy for property damage, business interruption, and other losses related to Covid. The reinsurers argued that the insured had not sufficiently alleged "direct physical loss or damage to property" under the policies.

The case made its way to the Vermont Supreme Court. The court held that "direct physical damage" requires a distinct, demonstrable, physical change to property and "direct physical loss" means persistent destruction or deprivation, in whole or in part, with a causal nexus to a physical event or condition. Pure economic harm is not sufficient.

The court held that the underlying complaint alleged enough facts of "direct physical loss or damage to property" to survive a motion for judgment on the pleadings. The court noted that the complaint alleged that the virus "adheres" to property, thus "altering and impairing" it in a tangible way. When discussing "property," the court was not limiting itself to materials for ship-making, but property generally.

The court emphasized that it was not reaching an ultimate conclusion that what occurred in insured's shipyards was "direct physical loss or damage to property" under the policy. It was merely holding that the complaint satisfied Vermont's "extremely liberal" notice pleading standards.

The case is *Huntington Ingalls Industries v. Ace Am. Ins. Co.*, No. 21-173 (Vt. Sep. 23, 2022).

Oklahoma Supreme Court Finds No Business Interruption Coverage Under All-Risks Policy for Covid-19 Economic Losses

The Cherokee Nation filed a declaratory judgment action for business interruption insurance coverage for economic losses it incurred when it temporarily closed its properties due to Covid-19.

The Oklahoma Supreme Court ruled for the insurer. The court held that an "all risk policy" does not extend coverage to every conceivable loss. Because the policy insured "all property of every description both real and personal," the court found, the policy only covered losses to

tangible property. The court further noted that the policy's business interruption coverage form limited coverage to "direct physical loss or damage." The court held that they were not covered under the business interruption section of the insurance policy at issue on the basis the Cherokee Nation did not sustain an immediate tangible deprivation or destruction of property.

The court observed that nearly all jurisdictions deciding this issue in the context of business interruption claims for Covid-19 interpreted "direct physical loss or damage" similarly.

The court added that the policy's language limiting business interruption to things that have been rebuilt, repaired, or replaced further supported the conclusion that business interruption coverage required an actual, tangible deprivation of property.

The case is *Cherokee Nation v. Lexington Ins. Co*., Case No. 119359 (Okla. Sep. 13, 2022).

Third Circuit Determines Citizenship of Reciprocal Insurance Exchanges by the Citizenship of their Members for Diversity Jurisdiction Purposes

A group of insurers settled a wrongful death cause of action. The insurers were reciprocal insurance exchanges, unincorporated associations whose subscribers exchange contracts and pay premiums to insure themselves and each other. The exchanges were distinct legal entities that could sue or be sued in their own name, but unlike traditional mutual insurance companies, had no corporate existence.

The exchanges sued the alleged tortfeasor to recoup the settlement payments. The alleged tortfeasor's motion to dismiss was denied and the case was certified to the Third Circuit.

But the Third Circuit, recognizing the exchanges' unique structure, questioned whether federal jurisdiction even existed over the dispute. If the exchanges' subscribers were customers of the exchange, the exchange would only be, for diversity jurisdiction purposes, a citizen of the state

in which it was formed or had its principal place of business. If, however, the subscribers were "members" or owners of the exchange, the exchange would be citizens of each state in which its members were citizens.

The court held that the exchanges' subscribers are its members or owners. Based on the law of the jurisdictions in which the exchanges were organized (Vermont and Washington D.C.), the court determined that the subscribers (along with their joint agent, an attorney-in-fact) comprised the exchange, were considered a single entity as to all of the exchanges' operations, had the authority to set the exchanges' rules, had to satisfy the exchanges' liabilities when the exchange could not do so, and were entitled to the remaining assets once the exchange discharges its liabilities. The court remanded for further fact-finding on the actual citizenship of the exchanges' members.

The case is *Peace Church Risk Retention Grp. v. Johnson Controls Fire Prot. LP*, No. 21-2923 (3rd Cir. Sep. 20, 2022).

Eleventh Circuit Rules that Cybercrime Endorsement Does Not Cover Mortgage Title Fraud Claim

Star Title, a settlement agent, was hired to close a residential real estate transaction. A bad actor impersonating a mortgage lender tricked Star Title's representatives to wire funds to a fraudulent account. The scheme involved emails and faxes. Star Title sought coverage under the Cybercrime Endorsement of its Cyber Protection policy, and specifically, the Deceptive Transfer Fraud clause.

To qualify for coverage, Star Title had to show that the funds were transferred as the direct result of an intentional misleading of its employee, through a misrepresentation: (1) relied upon

by the employee; (2) sent by a telephone call, email, text, or other means; (3) by a person purporting to be an employee, customer, client, or vendor; and (4) the authenticity of the transfer request was verified in accordance with Star Title's internal procedures.

The insurer denied coverage because CMS, the lender and lienholder on the seller's home, (1) was not an employee, customer, client, or vendor of Star Title, and (2) Star Title failed to verify the transfer request according to its procedures. Star Title sued and the case made its way to the Eleventh Circuit. The dispute centered on CMS's status.

The court observed that the fraudster who sent the email and fax pretended to be a representative of CMS. But CMS was a mortgage lender, not an employee, customer, client, or vendor of Star Title. Star Title did not employ CMS for any purpose or control CMS's work performance in any manner. Nor did it sell CMS any particular product or provide it any particular service.

For its part, Star Title argued that it provided a service to CMS by holding the payoff funds in its escrow account and delivering those funds to CMS on behalf of the seller. Also, in receiving the payoff funds and applying them to the seller's account, CMS provided a service to Star Title.

But the court was unpersuaded. CMS's customer was the seller of the residential home who had obtained the loan, not Star Title. By contract, Star Title's client was also the seller of the residential home. CMS did not have any contract or agreement with Star Title, and owed an obligation only to the seller, with whom it had a lien on the subject property. And Star Title was tasked *by the seller* to identify liens and execute payoff funds.

As the court could not construe CMS to be a customer, client, or vendor of Star Title, it held that this fraudulent transfer was not covered by the Deceptive Transfer Fraud clause.

The case is *Star Title Partners of Palm Harbor, LLC v. Illinois Union Ins. Co.,* No. 21-13343 (Sept. 6, 2022).

Illinois Federal Court Finds No Coverage for BIPA Claim

A former employee of a premium cheese processing company sued the company, Cheese Merchants of America, alleging that its practice of requiring employees to have their hands scanned to enroll in a hand geometric database violated the Illinois Biometric Information Privacy Act (BIPA). Cheese Merchant's commercial general liability carrier, Continental Western Insurance Company, got wind of the case and filed a federal lawsuit in Illinois for a declaratory judgment that it owed no coverage under its policies.

The district court granted Continental's motion for judgment on the pleadings based on an exclusion for "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."

The court rejected Cheese Merchant's argument that the examples given in the exclusion showed it was meant to apply to information traditionally associated with a company's protectable commercial secrets. The court reasoned that even if the catch-all phrase "any other type of nonpublic information" picked up meaning from the preceding list, the entire list was non-exhaustive because it began with the word "including." Even then, the list included "health information." The court also reasoned that even if a person's handprints are not "confidential information," they were clearly personal information. The court observed that the company

wanted the hand scans for precisely that reason – they are unique to specific person. The court mused: "People don't always keep their hands to themselves, but hand scans are a different story."

The case is *Cont'l Western Ins. Co. v. Cheese Merchants of Am., LLC*, 21-cv-1571 (N.D. Ill. Sep. 27, 2002).

SDNY Holds That Downing of Airplane Was Part of an Insurrection, Applies War Exclusion

In 2014, the Donetsk People's Republic (DPR), a Russian-backed separatist group in eastern Ukraine, shot down a Malaysia Airlines flight. The family of an American college student who was onboard sued Western Union and other financial institutions for providing ongoing and essential financial support to the DPR from around the world.

Western Union tendered the suit to its CGL insurer, Hartford, who denied under the war exclusion. The exclusion applies if bodily injury arises out of "war," "warlike action," or "insurrection, rebellion, revolution, [or] usurped power." Hartford filed a declaratory judgment action.

The dispute centered on the meaning of "insurrection." The court found that the term means "a violent uprising by a group acting for the specific purpose of overthrowing the constituted government and seizing its powers." Western Union did not dispute that DPR was engaged in a violent uprising to overthrow the government in eastern Ukraine to seize its powers. It instead argued that there were other allegations in the complaint that did not rule out the possibility that the DPR also may have been acting out of other motivations. But the court said that even if DPR had additional motivations for shooting down the plane, that did not matter.

Insurrection may exist even if the group intended to cause commotion, embarrassment, or spread propaganda, so long as it also had in mind the maximum objective of overthrowing the government.

Thus, the war exclusion applied, and Harford had no duty to defend or indemnify Western Union in the action. The court also found that a second policy exclusion – the Financial Services Exclusion – applied because the complaint accused Western Union of facilitating money transfers to the DPR, an activity squarely within the exclusion.

The case is *Hartford Fire Ins. Co. v. Western Union Co.*, No. 22-cv-0557 (JMF) (Sept. 22, 2022) (applying Colorado law).

Washington Federal Court Finds Insurer Had No Duty to Defend Claim Arising from Treasure Hunt

The S/S Islander sank in 1901 with $6 million worth of gold onboard. In 2012, Rodger May assembled a team to salvage the gold. The salvage rights, however, were held by Ocean Mar, Inc. (OMI), so May and his partners entered into an agreement to fund the treasure hunt in exchange for an interest in the salvage proceeds. The expedition wasn't a success; it pulled in less gold than the cost to look for it.

May maintained the right to continue the treasure hunt alone, but claimed his team prevented him from accessing the intellectual property needed to search the ocean. Eventually, the agreement with OMI expired and the right to search was assigned to another company.

May sued for a declaration that he was the rightful owner of the intellectual property. The business partners sought coverage under their CGL policy, but the insurer denied because the claim did not involve tangible property, and thus, did not qualify as "property damage." Nor did it

involve an "occurrence." May and the partners ultimately settled their dispute, and May was assigned their insurance rights.

In the suit against the insurer, May argued that his claim conceivably included tangible property in the form of printed charts and maps. The court disagreed, noting that 35 times in his complaint he described the property as "intellectual property." The court found that May's complaint, "in no uncertain terms," alleged that his injuries flowed from the loss of access to data describing the S/S Islander's location and contents, not the tangible vessel the data may have been stored in. By definition, data is intangible property.

The court also found the partners refusal to remit the intangible property was not an "occurrence" because they were aware of the consequences of their failure to turn over the intellectual property, yet willfully elected not to do so.

The case is *Great Am. Ins. Co. v. May,* No. C21-1002-JSC (W.D. Wash. Sept. 7, 2022).