Simpson Thacher

Insurance Law Alert

September 2025

In This Issue

Delaware Supreme Court Rules That Defense Costs Paid By Parent Company Do Not Satisfy Self-Insured Retention In Subsidiary's Policies

Defense costs paid by a parent company do not satisfy the self-insured retention in policies issued to its subsidiary. *In re Aearo Technologies LLC Ins. Appeals*, 2025 Del. LEXIS 309 (Del. Aug. 12, 2025). (Click here for full article)

Illinois Appellate Court Says Trial Court Properly Considered Insured's Sworn Statement In Concluding That Insurer Had No Duty To Defend

A trial court did not err in considering an insured's sworn statement in ruling that the insurer had no duty to defend, notwithstanding that the four corners of the complaint did not include any allegations that would have negated coverage. *Certain Underwriters at Lloyd's London v. Galey Consulting, LLC*, 2025 Ill. App. Unpub. LEXIS 1286 (Ill. App. Ct. July 28, 2025). (Click here for full article)

"Excellent, responsive, and professional firm. A cut above..."

– The Legal 500
(quoting a client)

Fifth Circuit Rules That Two-Year Delay In Notice To Reinsurer Was Unreasonable And Material As A Matter Of Law

A ceding insurer's delay in providing notice to a reinsurer was objectively unreasonable and material, and therefore the reinsurer had no duty to indemnify the underlying claims. *United States Fire Ins. Co. v. Unified Life Ins. Co.*, 2025 U.S. App. LEXIS 20768 (5th Cir. Aug. 14, 2025). (Click here for full article)

Texas Court Rules That Policyholder's Alleged Payment To Terrorist Organization Is Not An Occurrence Under Liability Policy

Claims alleging that the policyholder made protection payments to a terrorist organization constitute only intentional acts rather than an "occurrence" under the policies. *Travelers Prop. Cas. Co. of Am. v. Ericsson Inc.*, 2025 U.S. Dist. LEXIS 159243 (E.D. Tex. Aug. 18, 2025). (Click here for full article)

Texas Court Denies Reinsurer's Motion To Dismiss Claims Brought By Original Insured

A reinsurer's motion to dismiss was denied because the complaint alleged a potential basis for a direct right of action by the original insured against the reinsurer based on the parties' course of conduct. *Indorama Ventures Holdings L.P. v. Factory Mutual Ins. Co.*, No. 1:24-cv-00404 (E.D. Tex. Aug. 7, 2025). (Click here for full article)

New York Appellate Court Rules That Plaintiffs' Promise Not To Execute On Judgment In Exchange For Assignment Of Insurance Rights Does Not Extinguish Insurer's Duty To Indemnify

An underlying settlement agreement together with consent judgment and assignment of insurance rights did not eliminate the insured's liability for purposes of triggering the insurer's duty to indemnify. *Geiger v. Hudson Excess Ins. Co.*, 2025 N.Y. App. Div. LEXIS 4664 (App. Div. 1st Dep't Aug. 7, 2025). (Click here for full article)

Sixth Circuit Rules That Fatal Shooting Of Unintended Victim Is Not A Covered Occurrence

Fatal injury due to a shooting incident was not caused by an "occurrence." *State Farm Fire & Casualty Co. v. Giannone*, 2025 U.S. App. LEXIS 19854 (6th Cir. Aug. 5, 2025). (Click here for full article)

Eleventh Circuit Affirms Dismissal Of Coverage Suit Based On Tolling Period, Late Notice And Failure To Establish Business Income Loss

An insurer had no duty to indemnify losses during three consecutive years based on the policy's limitation period, late notice and the failure to establish coverage under a business income provision. *Transworld Food Service, LLC v. Nationwide Mutual Ins. Co.*, 2025 U.S. App. LEXIS 21762 (11th Cir. Aug. 26, 2025). (Click here for full article)

Second Circuit Affirms That Policyholder Is Entitled To Coverage For Audit Expenses Under "Extra Expense" Policy Provision

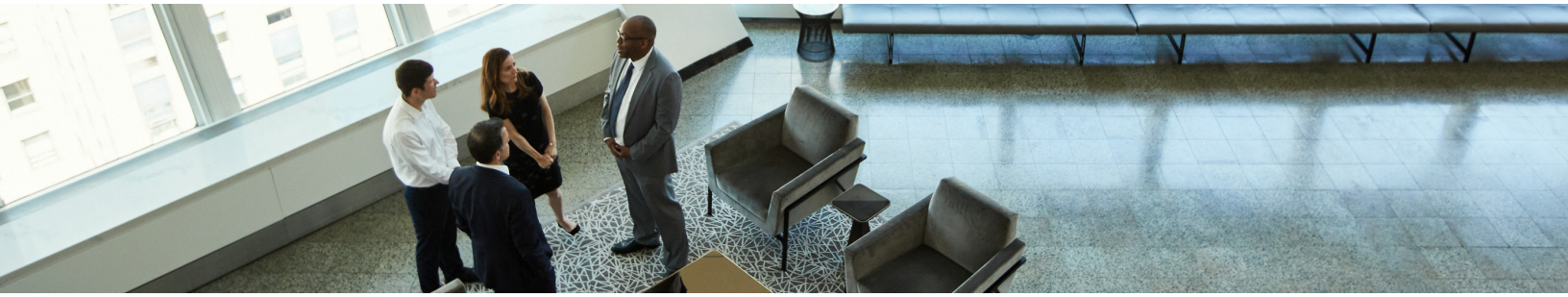
A policyholder is entitled to "Extra Expense" coverage for audit expenses incurred after a power surge caused a breakdown to the company's computer system. *Arizona Beverages USA, LLC v. Hanover Ins. Co.*, 2025 U.S. App. LEXIS 22456 (2d Cir. Sept. 2, 2025). (Click here for full article)

Eleventh Circuit Addresses Abstention Standard For Mixed Action Seeking Declaratory Relief and Rescission

A Florida district court erred in dismissing an insurer's duty to defend claim for lack of ripeness and in refusing to exercise jurisdiction over a rescission claim based on an incorrect abstention standard. *Nautilus Ins. Co. v. Captain Pip's Holdings, Inc.*, 2025 U. S. App. LEXIS 18911 (11th Cir. July 29, 2025). (Click here for full article)

See Us At Upcoming Conferences

Connect with Simpson Thacher at upcoming Insurance conferences.
(Click here for more information)



Delaware Supreme Court Rules That Defense Costs Paid By Parent Company Do Not Satisfy Self-Insured Retention In Subsidiary's Policies

HOLDING

Defense costs paid by a parent company do not satisfy the self-insured retention ("SIR") in policies issued to its subsidiary. *In re Aearo Technologies LLC Ins. Appeals*, 2025 Del. LEXIS 309 (Del. Aug. 12, 2025).

BACKGROUND

Aearo Technologies, the manufacturer and distributer of Combat Arms Earplugs, was acquired by 3M Company. A decade after the acquisition, 3M and Aearo were named as defendants in suits alleging personal injuries caused by defects in the earplugs. While the suits were pending, Aearo filed a voluntary petition for Chapter 11 bankruptcy, which was later dismissed based on a finding that the company was "financially healthy." Thereafter, 3M and Aearo reached a global settlement of $6.01 billion for the underlying claims. 3M stated that it paid over $370 million in defense costs, and Aearo stated that it paid approximately $411,000 in defense costs.

Aearo and 3M sued Aearo's insurers, seeking coverage for defense costs incurred by both companies, and a declaration that they satisfied the SIRs in the relevant policies. A Delaware trial court granted the insurers' summary judgment motion, ruling that the express language of the policies required payment by Aearo, and that payments by 3M did not count toward exhaustion of the SIRs.

DECISION

While the language in each of the three policies at issue differed somewhat, they all included SIR provisions that required the exhaustion of a specific dollar amount before coverage could be triggered. The SIR in each policy defined the terms "you" and "your" to mean "the Named Insured," which is Aearo on each policy.

The Delaware Supreme Court ruled that this language unambiguously requires payment of the SIRs by Aearo. Additionally, the court noted that other language in the SIR provisions of two policies expressly stated that the SIR is not reduced by payments made by other entities on Aearo's behalf.

Aearo and 3M alternatively argued that even if Aearo was required to satisfy the SIRs, its failure to do so did not eliminate coverage, but rather merely reduced each insurer's obligation by a setoff amount equal to the unpaid SIRs. Aearo and 3M relied on a Maintenance clause included in each policy, which generally provided that if Aearo becomes insolvent or bankrupt and unable to pay the SIR, the insurer will be liable only to the extent it would have been had the SIR remained in effect.

The court ruled that the Maintenance clause was inapplicable, noting that its purpose is not to protect the insured by creating a setoff if the insured fails to satisfy the SIR. Rather, the court explained, this provision is triggered when the insured is in financial distress and is intended to protect an insurer from having to "drop down" and expand its coverage obligations to amounts expressly allocated to the insured through the SIR.

COMMENTS

The decision highlights an important distinction between SIRs and deductibles. Whereas the insured's payment of a SIR serves as a precondition to coverage such that an insurer's obligations do not arise until the limits of the SIR have been exhausted, a deductible "obligates the insurer to respond to a claim from 'dollar one,' . . . subject to the insurer's right to later recoup the amount of the deductible from the insured."

Illinois Appellate Court Says Trial Court Properly Considered Insured's Sworn Statement In Concluding That Insurer Had No Duty To Defend

HOLDING

A trial court did not err in considering an insured's sworn statement in ruling that the insurer had no duty to defend, notwithstanding that the four corners of the complaint did not include any allegations that would have negated coverage. *Certain Underwriters at Lloyd's London v. Galey Consulting, LLC*, 2025 Ill. App. Unpub. LEXIS 1286 (Ill. App. Ct. July 28, 2025).

BACKGROUND

Galey Consulting and its principal Brian Galey were insured under a policy issued by the Underwriters. Brian Galey provided notice to an Underwriters claim manager of an incident that could give rise to a claim. Included with that notice was a sworn summary of the incident, which involved the hacking of Galey's email and a wire transfer of funds to the fraudster's account.

Thereafter, Galey was sued by another entity with whom it had contracted to manage certain construction payments, seeking reimbursement of the wired funds. The complaint in that action, which alleged claims of professional negligence, errors and omissions, breach of contract and breach of fiduciary duty, made no mention of any hacking, wire fraud or other cyber event. Nonetheless, in light of the details provided in Galey's summary of events, the Underwriters denied coverage based on an exclusion for claims "arising directly or indirectly out of any cyber event."

The Underwriters then sued Galey in Illinois state court, seeking a declaration of no coverage. The trial court granted the Underwriters' summary judgment motion, ruling that they had no duty to defend the underlying suit. The appellate court affirmed.

DECISION

The central issue in dispute was whether Galey's summary of events could be considered in the court's duty to defend analysis. The court held that it could, noting that while the general rule is that only the allegations within the four corners of the underlying complaint determine an insurer's defense obligations, exceptions exist in which courts may consider extrinsic evidence.

In particular, the court held that in a declaratory judgment proceeding, an insurer may challenge its duty to defend with evidence that the insured's conduct falls exclusively within a policy exclusion, provided that such evidence is not relevant to an outcome-determinative issue in the underlying lawsuit. The court rejected the assertion that extrinsic evidence can only be used to establish a duty to defend and not to deny a defense. The court refused to "wear judicial blinders" where, as here, there is no real factual dispute that the loss at issue originated from an incident of email hacking and wire fraud.

COMMENTS

The decision also includes a noteworthy ruling on a commonly disputed issue in cyber coverage cases—the appropriate causation standard for determining whether losses "arise directly or indirectly out of" a cyber event. The court rejected the assertion that the cyber events exclusion did not bar coverage because the losses were concurrently caused by other events, such as the actions of the employees involved in effectuating the wire transfer and the company's failure to implement sufficient cyber safety measures. The court explained that, based on Galey's summary of events, the loss at issue unequivocally arose out of a cyber event, even if other potential causes could be identified.

Fifth Circuit Rules That Two-Year Delay In Notice To Reinsurer Was Unreasonable And Material As A Matter Of Law

HOLDING

A ceding insurer's delay in providing notice to a reinsurer was objectively unreasonable and material, and therefore the reinsurer had no duty to indemnify the underlying claims. *United States Fire Ins. Co. v. Unified Life Ins. Co.*, 2025 U.S. App. LEXIS 20768 (5th Cir. Aug. 14, 2025).

BACKGROUND

In April 2017, a claimant sued Unified Life, alleging that the insurer underestimated the "reasonable and customary" medical charges for which it would provide reimbursement. The complaint also asserted that Unified Life used a software program to systematically over-discount claims, an allegation that prompted the claimant to later move for class certification.

In September 2019, a Montana district court granted partial summary judgment for the claimant on his individual breach of contract claim and also granted the motion for class certification.

In December 2019, Unified Life notified U.S. Fire, its reinsurer, of the litigation. U.S. Fire responded by advising it of late notice and recommending that Unified Life move for reconsideration, among other things, which the district court denied in March 2021.

In July 2021, Unified Life told U.S. Fire that it had reached a settlement and in October 2021, Unified Life established an $8 million class fund, of which $2 million was allocated for class counsel's attorneys' fees.

In April 2022, U.S. Fire sued Unified Life, seeking a declaration that Unified Life's notice of the underlying litigation was untimely and prejudicial and that U.S. Fire was not obligated to provide indemnity. Unified Life countersued, seeking a declaratory judgment confirming its compliance with the treaty and right to indemnification. Ruling on cross-motions for summary judgment, a Texas district court granted Unified Life's motion and denied U.S. Fire's motion, reasoning that prompt notice under the treaty was triggered only when Unified Life subjectively realized that the underlying litigation might require indemnification from U.S. Fire. The district court further held that because there was no evidence of Unified Life's subjective intent, U.S. Fire could not prevail on the late notice issue. The Fifth Circuit reversed.

DECISION

The reinsurance treaty requires Unified Life to give prompt notice "of all Claims which, in the opinion of [Unified], may result in a claim hereunder." The central issue in dispute was whether this provision embodies an objectively reasonable standard or a subjective standard based on Unified Life's actual beliefs.

The court concluded that notwithstanding the "in the opinion of Unified" verbiage, the language requires a standard of objective reasonableness. The court noted that in the reinsurance context, an objective standard is "customary" and best aligns with the treaty as a whole. In particular, the court emphasized that notice in a quota share treaty enables the reinsurer to assess its financial exposure and participate in the defense, stating:

> U.S. Fire agreed to indemnify 25 percent of all Unified's loss on covered claims, beginning with the first dollar of loss. Because of first dollar loss exposure, U.S. Fire became liable not only for the ultimate outcome of disputed claims, but for meaningful litigation expenses at an early stage in their handling. As an experienced participant in the field of medical insurance, U.S. Fire was equipped, when afforded prompt notice, to assist in clam defense notwithstanding Unified's principal responsibility. Both Unified and U.S. Fire had skin in the game from the outset of litigation.

In predicting that the Texas Supreme Court would endorse an objective standard, the Fifth Circuit noted that other jurisdictions have "almost uniformly" applied an objective standard, even when the reinsurance treaty includes "in the opinion or judgment of" language. Additionally, the court emphasized the dangers of applying a purely subjective standard, which would allow a ceding insurer to "plead[ ] ignorance or error" and thereby "nullify the notice requirement."

Applying this objective standard, the court concluded that Unified Life breached the treaty by providing notice that was unreasonably late as a matter of law. The court noted that at several key points in the underlying litigation (including the class action certification and the Ninth Circuit's denial of appellate review), a reasonable reinsured would have realized its obligation to provide notice.

Finally, the court ruled that the late notice was a material breach that resulted in prejudice to U.S. Fire as a matter of law. The court reasoned that the delayed notice deprived U.S. Fire of its ability to assist in the underlying defense, particularly after the issuance of an adverse summary judgment ruling. The court further observed that late notice also weakened Unified Life's and U.S. Fire's position in the settlement negotiations.

COMMENTS

The decision highlights the relevance of the parties' sophistication in interpreting contract provisions. The court stated: "The sophisticated parties to this agreement had to assume that 'the opinion of' Unified, even if 'subjective,' would be grounded in its professional experience and familiarity with potential claims. Objective reality, in other words, was implicit in Unified's opinion."

The court noted U.S. Fire's expertise in short-term medical insurance (as well as Unified Life's lack of experience in this arena), stating that "Unified contracted with U.S. Fire because of 'its experience in reinsuring other health insurers and writing direct health insurance itself.' This context heightened the importance of U.S. Fire's right to associate pursuant to the Treaty."

Texas Court Rules That Policyholder's Alleged Payment To Terrorist Organization Is Not An Occurrence Under Liability Policy

HOLDING

Claims alleging that the policyholder made protection payments to a terrorist organization constitute only intentional acts rather than an "occurrence" under the policies. *Travelers Prop. Cas. Co. of Am. v. Ericsson Inc.*, 2025 U.S. Dist. LEXIS 159243 (E.D. Tex. Aug. 18, 2025).

BACKGROUND

Two underlying suits alleged that Ericsson violated the Federal Anti-Terrorism Act by aiding and abetting foreign terrorist organizations ("FTOs") in various attacks that resulted in the death of Americans. The suits alleged that Ericsson paid protection money to the FTOs to avoid being attacked and that such money was used to fund attacks against other American targets.

Travelers filed suit, alleging it had no duty to defend or indemnify for four reasons: (1) the injuries alleged in the underlying suits did not arise from occurrences; (2) the alleged injuries were expected and intended; (3) a war exclusion barred coverage; and (4) Ericsson was not a "Named Insured" under the policies.

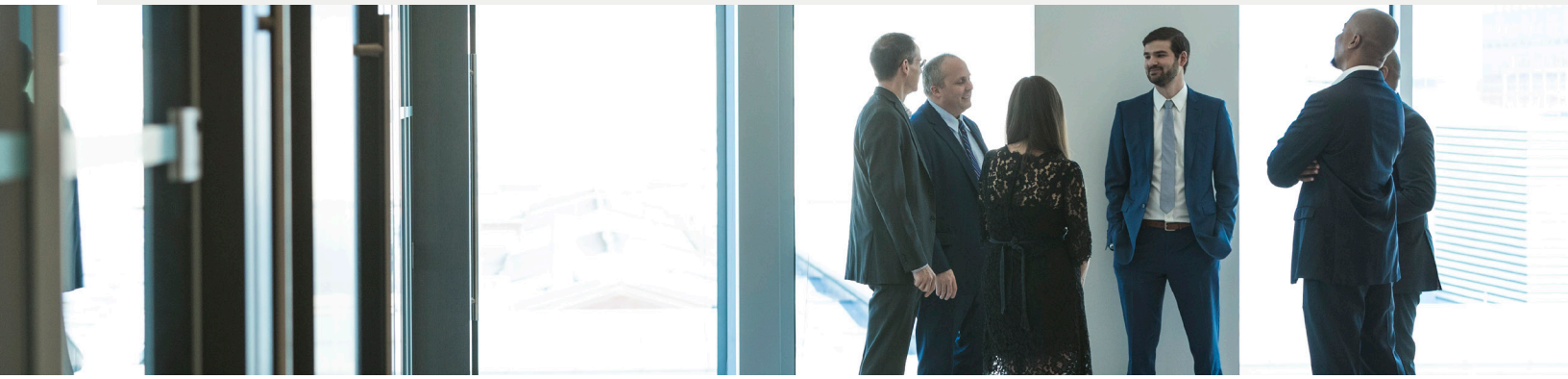
DECISION

The court agreed with Travelers that the suits did not allege an occurrence, defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The court reasoned that the payments to FTOs were knowing and intentional, not accidental. The court emphasized that under Texas law, the question of intent is based on the voluntariness of the policyholder's conduct, not the intended outcome.

The court rejected Ericsson's assertion that allegations of reckless conduct triggered Travelers' duty to defend. Focusing on the factual allegations in the underlying suit rather than the legal theories asserted, the court concluded that all allegations involved intentional conduct rather than involuntary actions or accidents.

COMMENTS

While a finding of no duty to defend typically means that there is no duty to indemnify, the court ruled that the issue of indemnification was not ripe under Texas law. The court noted that the underlying suits were still pending and that the facts established in those proceedings could affect whether Travelers ultimately owed indemnification under the policies.



Texas Court Denies Reinsurer's Motion To Dismiss Claims Brought By Original Insured

HOLDING

A reinsurer's motion to dismiss was denied because the complaint alleged a course of conduct and other facts that provided a potential basis for a direct right of action by the original insured against the reinsurer. *Indorama Ventures Holdings L.P. v. Factory Mutual Ins. Co.*, No. 1:24-cv-00404 (E.D. Tex. Aug. 7, 2025).

BACKGROUND

The coverage dispute arose out of an explosion at a facility originally owned by Huntsman. However, Indorama later acquired the facility and other property. The explosion occurred between the execution of the initial purchase agreement and the closing date.

According to the complaint, Factual Mutual "issued and/or reinsures" property and business interruption policy no. Prop 19-20, issued to Huntsman and various affiliates as insureds. The complaint further alleges that Factual Mutual is responsible for adjusting claims and paying loss under the policy.

After the explosion, Huntsman and Indorama entered into an Insurance Assignment Agreement in which Huntsman assigned all its rights, duties and obligations with respect to any claims under the policy to Indorama, including property damage and/or business interruption claims arising out of the explosion. Factory Mutual consented to this assignment and agreed that all loss payable under the policy would be paid directly to Indorama.

Factory Mutual made a payment of $50 million for losses arising from the explosion but denied coverage for an additional $50 million. Indorama argued that Factory Mutual strategically covered the loss under the policy's Contingent Time Element Extension ("CTTE"), which had the lowest applicable submit of $50 million.

Factory Mutual moved to dismiss, arguing that it was a reinsurer (rather than an insurer) and therefore that Indorama could not bring a direct action against it. The court denied the motion.

DECISION

As a preliminary matter, the court addressed attachments to the complaint. The court easily concluded that it would consider the original insurance policy (no. Prop. 19-20), as well as the Insurance Assignment Agreement and two "Adjustment Emails" sent from Factual Mutual to Indorama. However, the court declined to consider a reinsurance agreement between Factual Mutual and International Risk Insurance Company ("IRIC") or a subrogation agreement between Indorama and Factory Mutual. The court reasoned that the subrogation agreement was never referenced in the complaint and "arguably peripheral" to Indorama's claims, and that the reinsurance agreement, while significant to Factory Mutual's grounds for dismissal, was "clearly not central to Indorama's claims" for coverage.

Turning to the substantive issue of Indorama's right to sue Factory Mutual directly, the court rejected Factory Mutual's assertion that Texas statutory law precludes such a suit. Texas Insurance Code 493.055, entitled "Limitation on the Rights Against Reinsurer," states that "[a] person does not have a right against a reinsurer that is not specifically stated in: (1) the reinsurance contract, or (2) a specific agreement between the reinsurer and the person."

While the court declined to officially "consider" the reinsurance agreement, it noted that the reinsurance agreement clearly forecloses Indorama's right to directly sue Factual Mutual. The central issue was therefore whether a "specific agreement" existed between Indorama and Factory Mutual. The court ruled that a course of conduct could establish a "specific agreement" even without a written document, noting that such reasoning was supported by common law related to agreements formed by a course of dealing and by analogous caselaw in Texas and courts in other jurisdictions. While the Texas Supreme Court has not yet ruled on this precise issue, the court predicted that it would hold that insureds can directly sue reinsurers under § 493.055(2) based on a course of dealing, even absent an express written agreement.

Applying this framework, the court found that the complaint sufficiently alleged an implied agreement through a course of dealing. In particular, the court noted Factual Mutual's involvement in adjusting insurance claims and paying loss under the policy and its communication with Indorama in the two Adjustment Emails.

COMMENTS

The decision is murky in several respects. While the court refused to consider the reinsurance agreement between Factory Mutual and IRIC, it acknowledged a provision in the reinsurance agreement that precluded direct suits against Factory Mutual by any entity other than IRIC.

Additionally, while the court only considered the two Adjustment Emails in its decision, in a footnote, it "candidly" mentioned that "there might be some fact issues," including another email in which Factory Mutual refers to itself as a reinsurer and to IRIC as the reinsured. In that same footnote, the court notes that "the Policy does list IRIC as the owner of the Policy." However, the court then stated: "since the Court must read all attachments in the light most favorable to Indorama, these fine details do not justify dismissal given the preceding discussion."

Finally, the court rejected Factory Mutual's assertion that Indorama was subject to the forum selection clause requiring disputes to be brought in Rhode Island state court. The court stated: "Indorama is not seeking benefits under the Reinsurance Agreement, does not seek to enforce its terms, and is not asserting a claim that must be determined by reference to it: Indorama's claim operates on a different plane entirely. For this reason, the forum selection clause falls to the wayside."

New York Appellate Court Rules That Plaintiffs' Promise Not To Execute On Judgment In Exchange For Assignment Of Insurance Rights Does Not Extinguish Insurer's Duty To Indemnify

HOLDING

An underlying settlement agreement together with consent judgment and assignment of insurance rights did not eliminate the insured's liability for purposes of triggering the insurer's duty to indemnify. *Geiger v. Hudson Excess Ins. Co.*, 2025 N.Y. App. Div. LEXIS 4664 (App. Div. 1st Dep't Aug. 7, 2025).

BACKGROUND

Models and social medial influencers sued Vola, a night club operator, alleging use of their images in advertising without consent or payment. The parties eventually entered into a settlement agreement and consent judgment, pursuant to which Vola assigned to plaintiffs its right to prosecute its coverage claims against two insurers and to recover the amount of the judgment and defense costs. Plaintiffs then commenced a suit against the two insurers, Hudson and Lancer, seeking a declaration that they had a duty to defend and indemnify Vola in the underlying action.

A New York trial court ruled that Hudson's policy was void *ab initio* due to material misrepresentations in the policy and granted its motion for summary judgment. With respect to Lancer, the trial court ruled that the insurer had a duty to defend but no duty to indemnify.

DECISION

The appellate court affirmed the ruling in favor of Hudson. The court noted that Vola made numerous misrepresentations in its application relating to its hours of operation, alcohol sales, and entertainment aspects, among other things. Further, the court found these misrepresentations to be material since Hudson's underwriting guidelines would have prohibited the issuance of the policies to a venue with such activities.

The appellate court also agreed that Lancer had a duty to defend the underlying suit. The court explained that a "knowing violation" exclusion did not eliminate the possibility of coverage because some of the allegations in the complaint alleged negligent conduct.

However, the appellate court ruled that the trial court should have denied Lancer's summary judgment motion with respect to its duty to indemnify. The trial court had reasoned that because the settlement agreement language contained a "release," it relieved Vola of any liability (*i.e.*, it was not "legally obligated to pay" under the insurance policy), thereby extinguishing Lancer's indemnity obligations. The appellate court rejected this reasoning, finding that the agreement not to execute the judgment in exchange for the assignment of rights did not constitute an actual "release" and that Vola was still "legally obligated" to pay for the purposes of Lancer's potential indemnity obligations.

The appellate court noted that a release has the effect of discharging an obligation outright, whereas a covenant not to execute "recognizes the continuation of obligation or liability, and the party making the covenant agrees only to not assert any right or claim based upon the obligation." Reading the settlement agreement together with the assignment and consent judgment, the court concluded that there was no general "release" and that the question of Lancer's duty to indemnify should await resolution of liability.

COMMENTS

The court emphasized the absence of New York precedent on the question of whether an insurer has liability where, as here, a settlement involves a consent judgment that incorporates an assignment of the insured's rights coupled with a covenant not to execute the judgment. The court noted that the majority of courts in other jurisdictions have held that an insurer remains "legally obligated" to pay a claim under such circumstances. As a caveat, the court noted that this general principle applies only where the insured acted reasonably and in good faith, which was not disputed in this case.

Sixth Circuit Rules That Fatal Shooting Of Unintended Victim Is Not A Covered Occurrence

HOLDING

Fatal injury due to a shooting incident was not caused by an "occurrence." *State Farm Fire & Casualty Co. v. Giannone*, 2025 U.S. App. LEXIS 19854 (6th Cir. Aug. 5, 2025).

BACKGROUND

The incident arose when Matthew Mollicone, with his wife in the car, drove to the home of Daniele Giannone to confront him about an alleged affair with his wife. Both men had firearms, and a gunfight ensued in Giannone's driveway. At one point, Giannone, injured with two gunshot wounds, ran into his home to retrieve another firearm. When he returned to the driveway, Mrs. Mollicone was backing out with Mr. Mollicone in the passenger seat. Giannone fired at the car, claiming he saw a gun poke out of the passenger window and that he was aiming at Mr. Mollicone. Mrs. Mollicone was fatally wounded.

Her estate filed a lawsuit against Giannone alleging negligence, assault and battery. Giannone sought defense and indemnity from State Farm, his homeowner's insurers, who, in turn, filed a declaratory judgment action seeking a ruling of no coverage.

A Michigan district court granted State Farm's summary judgment motion, and the Sixth Circuit affirmed.

DECISION

The Sixth Circuit ruled that the bodily injury was not caused by an "occurrence" defined as "an accident." Under Michigan's subjective standard, a court looks to whether an insured should have reasonably expected the consequences of its act to determine whether it could be deemed accidental. Even viewing the facts in a light most favorable to Giannone, the court ruled that Mrs. Mollicone's death was a foreseeable result of aiming and shooting a gun at a vehicle she occupied, regardless of whether she was the intended target.

The court rejected Giannone's assertion that coverage existed pursuant to an exception to an intentional acts exclusion, which provided that the exclusion did not apply to bodily injury "resulting from the use of force to protect persons or property." The court declined to rule on the factual issue of whether Giannone's actions were in self-defense, instead ruling that even if he acted in self-defense, coverage would still be unavailable because there was no occurrence. The court cited numerous Michigan appellate court decisions holding that an intentional act taken in self-defense is not accidental and therefore not an occurrence.

COMMENTS

The Sixth Circuit distinguished cases in which Michigan courts held that an insured's subjective expectations rendered intentional actions accidental for purposes of insurance coverage. One case involved an accidental stabbing as the result of a knife brandishing incident and the other involved the shooting of a gun that the actor believed to be unloaded. The court deemed both cases "meaningfully different" from the present case, stating: In neither case "did the insured party use a weapon with a belief that he could cause bodily harm." In contrast, here, "[t]he act took place as intended, even if Giannone desired a different result."

Eleventh Circuit Affirms Dismissal Of Coverage Suit Based On Tolling Period, Late Notice And Failure To Establish Business Income Loss

HOLDING

An insurer had no duty to indemnify losses based on the policy's limitation period, late notice and the failure to establish coverage under a business income provision. *Transworld Food Service, LLC v. Nationwide Mutual Ins. Co.*, 2025 U.S. App. LEXIS 21762 (11th Cir. Aug. 26, 2025).

BACKGROUND

Transworld, a food supplier for Atlanta restaurants, incurred losses at its warehouse during three consecutive years. In 2016, a fire-water main failed, resulting in a flood that damaged the warehouse structure and equipment contained therein. Transworld notified Nationwide, and the insurer made partial payments for property damage and lost income over the following several months. Nationwide made its final payment in March 2018.

In 2017, roofers accidentally cut the freon supply line to the freezer compressor, which required repair of that component and the destruction of spoiled food. Before notifying Nationwide, Transworld made a claim with the roofer's insurer, which made some payments. After the final payment was issued by the roofer's insurer, Transworld reported the loss to Nationwide, which agreed to pay for replacement of the compressor but not for lost income.

In 2018, the unit next to the warehouse sprung a leak that ruined the food in Transworld's freezer. Transworld first notified the landlord's insurer, and when its claim was denied, it turned to Nationwide for lost business income and coverage for the spoiled food.

In 2019, Transworld sued Nationwide for breach of the policy and bad faith. A Georgia district court granted Nationwide's summary judgment motion, and the Eleventh Circuit affirmed.

DECISION

Transworld's 2016 Loss

Nationwide's policy required Transworld to bring a suit within one year of the date on which the damage or loss occurred. While Georgia law strictly enforces such contractual limitation periods, it also recognizes that an insurer may waive such clauses by working with the policyholder to resolve the claim after the period's expiration date. The court noted that the evidence indicated that Nationwide waived the one-year time bar by working with Transworld to resolve the 2016 loss (*i.e.*, sending an adjuster and making numerous payments) in the months after the loss.

The central issue was whether that waiver was "permanent" or conversely, whether it merely tolled the limitation period, such that the tolling period ends when negotiations cease and the insurer makes a final decision about the claim. The court endorsed the latter view, finding that Nationwide merely tolled the limitation period rather than waived it altogether. Therefore, the tolling period ended when Nationwide made its final payment on March 22, 2018, and denied further liability. Because Transworld waited more than one year after that date to bring suit, the suit was barred by the limitation clause.

Transworld's 2017 Loss

Nationwide's policy required Transworld to give "prompt notice" of loss or damage, which the court deemed to be a condition precedent to coverage. The court ruled that because Transworld waited nearly four months after it discovered the damage to notify Nationwide, it was not entitled to coverage. The court rejected Transworld's assertion that it was justified in waiting because it had initially submitted a claim to the roofer's insurer and was waiting a determination on that front.

Transworld's 2018 Loss

Nationwide's policy provided coverage for lost business income sustained "due to the necessary suspension" of Transworld's operations during the "period of restoration." The court ruled that Transworld was not entitled to coverage for lost income because the company continued its operations notwithstanding the damage. In so ruling, the court held that "suspension" requires a complete cessation of operations and that a partial shutdown is insufficient.

COMMENTS

The Eleventh Circuit rejected Transworld's contention that the notice issue was one of fact for the jury, ruling instead that an unjustified four-month delay is not prompt as a matter of law under Georgia precedent. Additionally, the court deemed it immaterial that the policy language presented in Georgia precedent did not require "prompt" notice, but rather, notice "as soon as reasonably possible" or "as soon as practicable." The court found that there was "no material difference" between those notice provisions and the one in Nationwide's policy.

Second Circuit Affirms That Policyholder Is Entitled To Coverage For Audit Expenses Under "Extra Expense" Policy Provision

HOLDING

A policyholder is entitled to "Extra Expense" coverage for audit expenses incurred after a power surge caused a breakdown to the company's computer system. *Arizona Beverages USA, LLC v. Hanover Ins. Co.*, 2025 U.S. App. LEXIS 22456 (2d Cir. Sept. 2, 2025).

BACKGROUND

A 2017 power surge at the corporate headquarters of Arizona Beverage resulted in damage to multiple disc drives and a failure of the company's accounting system. Arizona Beverage was unable to access its account balances, receivables, inventory and order information. It also lost its financial data from 2016 and 2017, jeopardizing a credit agreement it had with Chase which required the submission of annual audits to avoid default.

To address these issues, Arizona Beverage's independent auditor, Deloitte & Touche, had to change its standard auditing procedures, resulting in an additional $450,000 in expenses. Additionally, Arizona Beverage incurred other expenses, including overtime pay of its own employees to assist in the audit.

Hanover denied coverage for the audit expenses, instead reimbursing Arizona Beverage the $250,000 maximum for "Data Restoration" coverage. Arizona Beverage filed suit, seeking coverage under the Extra Expense clause. A New York district court ruled that the "restoration period" set forth in the Extra Expense clause began on the date of the power surge and ended when Deloitte completed its audit. The Second Circuit affirmed.

DECISION

The Extra Expense provision stated that Hanover will "cover only the extra expenses that are necessary during the 'restoration period' that [Arizona Beverage] would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from an 'accident' or 'electronic circuitry impairment' to 'covered property.'" In turn, "restoration period" was defined to end when property is "rebuilt, repaired, or replaced," among other things.

The court rejected Hanover's assertion that the "restoration period" ended on January 8, 2018, when Arizona Beverage's computer equipment was repaired and/or replaced, and when the company regained software functionality. The court reasoned that the language of the Extra Expense provision does not tie the end of the restoration period to the repair or replacement of "covered equipment," but rather defines "restoration period" to extend to the date upon which "property" is repaired or replaced. Therefore, while the term "covered equipment" would likely exclude financial data, the standalone term "property" does not. Importantly, Hanover did not dispute that the lost financial data constituted "property" under the policy, and the court found no basis to question the district court's conclusion that Deloitte's enhanced auditing procedures constituted a type of repair, replacement or rebuilding of the lost data.

Finally, the court ruled that the expenses incurred by Arizona Beverage were "necessary" because without the additional auditing procedures and overtime hours, the company would have defaulted on its credit agreement with Chase.

COMMENTS

In finding coverage under the Extra Expense clause, the court deemed it irrelevant that the policy also included a specific Data Restoration provision, noting that "nothing in the plain language of the policy provides that the Data Restoration provision is the exclusive vehicle for policyholders to seek recovery for damages associated with lost data."

Eleventh Circuit Addresses Abstention Standard For Mixed Action Seeking Declaratory Relief and Rescission

HOLDING

A Florida district court erred in dismissing an insurer's duty to defend claim for lack of ripeness and in refusing to exercise jurisdiction over a rescission claim based on an incorrect abstention standard. *Nautilus Ins. Co. v. Captain Pip's Holdings, Inc.*, 2025 U. S. App. LEXIS 18911 (11th Cir. July 29, 2025).

BACKGROUND

Captain Pip's was sued for negligence and vicarious liability after a parasailing incident resulted in the death of a minor. Nautilus, the company's liability insurer, defended the suit under a reservation of rights. Nautilus then filed suit against Captain Pip's and other entities, seeking a declaration of no coverage on several bases, as well as recission based on alleged misrepresentations in Captain Pip's renewal application.

Captain Pip's moved to dismiss based on lack of subject matter jurisdiction, or alternatively to stay claims for declaratory relief as to the duty to indemnify and rescission. A Florida district court granted the motion, ruling that the coverage claim was not ripe and declining to hear the rescission claim based on abstention principles. The Eleventh Circuit reversed.

DECISION

Applying an abuse of discretion standard to review the district court's dismissal of the declaratory judgment claims, the Eleventh Circuit upheld the district court's ruling that the question of Nautilus's indemnity was not ripe since the underlying action was ongoing. However, the Eleventh Circuit held that the district court erred in dismissing the duty to defend claims and remanded the matter for a determination of Nautilus's defense obligations.

With respect to the rescission claim, the Eleventh Circuit noted the absence of a consensus among federal circuit courts as to the proper abstention test to apply in mixed actions, such as that presented here, which involve both declaratory and coercive claims. The district court had based its abstention ruling on the standard applicable to declaratory relief actions, which offers wide leeway for judicial discretion, with consideration of "practicality and wise judicial administration." Finding this holding erroneous, the Eleventh Circuit ruled that the district court should have applied the *Colorado River* abstention doctrine, which holds that abstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800 (1976). The Eleventh Circuit therefore ruled that the district court had a duty to exercise jurisdiction subject only to *Colorado River* abstention.

COMMENTS

The Eleventh Circuit noted that other federal circuit courts have applied various tests to determine whether abstention is warranted in mixed actions, including an analysis of whether the declaratory claims can exist independently of the coercive claims, or whether "the heart of the action" is declaratory or coercive. The Eleventh Circuit declined to endorse any specific test and instead held that the district court should have applied *Colorado River* abstention regardless of the approach.

As reported in our June 2025 Alert, the Sixth Circuit similarly addressed the standard for abstention over a mixed action, ruling that when an action seeks both damages and declaratory relief, and there is no basis for abstention as to the damages claims, it would "most likely" be an abuse of discretion for the court to abstain on the declaratory claims. *Fire-Dex, LLC v. Admiral Ins. Co.*, 2025 U.S. App. LEXIS 13372 (6th Cir. June 2, 2025).

See us at Upcoming Conferences

American Property Casualty Insurance Association℠
INSURING AMERICA

APCIA
National General Counsel Conference

November 3 – 4, 2025
Chicago, IL

PLUS

PLUS
Conference

November 10 – 12, 2025
Orlando, FL

ARIAS U.S.

ARIAS
U.S. 2025 Fall Conference

November 13 – 14, 2025
New York, NY

If you are also attending one of these upcoming conferences, please click here to let us know.

Simpson Thacher

Simpson Thacher has been an international leader in the practice of insurance and reinsurance law for more than a quarter of a century. Our insurance litigation team practices worldwide.

Summer Craig
+1-212-455-3881
scraig@stblaw.com

Bryce L. Friedman
+1-212-455-2235
bfriedman@stblaw.com

Michael J. Garvey
+1-212-455-7358
mgarvey@stblaw.com

Chet A. Kronenberg
+1-310-407-7557
ckronenberg@stblaw.com

Laura Lin
+1-650-251-5160
laura.lin@stblaw.com

Lynn K. Neuner
+1-212-455-2696
lneuner@stblaw.com

Joshua Polster
+1-212-455-2266
joshua.polster@stblaw.com

Tyler B. Robinson
+44-(0)20-7275-6118
trobinson@stblaw.com

Alan C. Turner
+1-212-455-2472
aturner@stblaw.com

George S. Wang
+1-212-455-2228
gwang@stblaw.com

Matthew C. Penny
+1-212-455-2152
matthew.penny@stblaw.com

Sarah E. Phillips
+1-212-455-2891
sarah.phillips@stblaw.com

Abigail W. Williams
+1-202-636-5569
abigail.williams@stblaw.com

This edition of the
Insurance Law Alert
was prepared by
Bryce L. Friedman / +1-212-455-2235
bfriedman@stblaw.com
Chet A. Kronenberg / +1-310-407-7557
ckronenberg@stblaw.com
and Karen Cestari
kcestari@stblaw.com.

** In April 2025, Simpson Thacher announced plans to expand its Bay Area presence with an office in San Francisco.*

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Boston
855 Boylston Street, 9th Floor
Boston, MA 02116
+1-617-778-9200

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

Brussels
Square de Meeus 1, Floor 7
B-1000 Brussels
Belgium
+32-2-504-73-00

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

Luxembourg
Espace Monterey
40 Avenue Monterey
L-2163 Luxembourg
Grand Duchy of Luxembourg
+352-27-94-23-00

ASIA

Beijing
6208 China World Tower B
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000