2022: The Year In Review

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I. 2022: The Year That Was

2022 remained the year of COVID. If 2020 was the year in which the pandemic took hold and the coverage litigation began and 2021 the year in which a wall of federal district and appellate court rulings emerged barring coverage for COVID BI claims, 2022 was the year of state supreme court rulings. At year's end, the Ohio Supreme Court joined state supreme courts in Delaware, Iowa, Massachusetts, Oklahoma, South Carolina, Washington and Wisconsin in rejecting policyholder arguments that a loss of use of property due to virus concerns formed a basis for "direct physical loss or damage" to property. Other supreme courts are due to weigh in soon in states such as Louisiana and New Hampshire but, to date, only the Vermont Supreme Court has allowed the cases to proceed.

Despite their overwhelming success to date, insurers are watching recent developments in California and Pennsylvania with concern. In California, the state Supreme Court has continued to refuse to accept appeals that would clarify the scope and meaning of "direct physical loss and damage." In the absence of clarity from on high, some panels of the California Court of Appeal have been more forgiving to policyholders with respect to motions to dismiss and demurrers than their colleagues. Similarly, strangely inconsistent decisions from a panel of Superior Court justices in the Keystone State has persuaded some judges to let discovery proceed in COVID cases.

While the COVID coverage wars remain focused on commercial property insurance, there are also a growing number of decisions involving travel cancellation insurance. To date, however, the surge of CGL and D&O claims that had been anticipated at the outset of the pandemic has failed to materialize.

Even as COVID rulings continued to dominate court dockets in 2022, there were important rulings in other major areas of controversy. In the opioid coverage wars, insurers scored two vital victories in Delaware and Ohio that have given heft to insurer arguments that these suits do not seek damages for bodily injury and helped to counterbalance these disputes, which had heretofore been dominated by the Seventh Circuit's ruling in H.D. Smith. Next up: Kentucky.

2022 also saw important new developments in the on-going battle over coverage for cyber attacks and hacks; privacy claims Finally, despite a slow down in environmental liability claims in recent years, the growing curse of "forever chemicals" contaminating groundwater supplies has brought trigger of coverage and pollution exclusions disputes back to the fore.

At year's end, Florida legislators finally took steps to implement reforms to property insurance and claims handling rules in the Sunshine State. In a year that saw unprecedented numbers of insurer insolvencies in Florida, it may be too little too late.

II. TOP 20 CASES OF 2022

1. The Covid Rulings
--*Virus Particles Do Not Cover Direct Physical Loss*

In Verveine Corp. v. Strathmore Ins. Co., 489 Mass. 534, 184 N.E. 2d 1266 (2022), the Supreme Judicial Court of Massachusetts declared that "direct physical loss of or damage to property" requires some "distinct, demonstrable, physical alteration of the property." The court ruled that this conclusion was supported by both the language of the policy as well as other policy provisions such as the "period of restoration." Importantly, the court declared that this conclusion did not rest on whether a virus particle was present on the premises. The court distinguished between the presence of particles that penetrate surfaces and cause lasting damage as opposed to "evanescent presence of a harmful airborne substance that will quickly dissipate on its own or surface-level contamination that can be removed by simple cleaning and that does not physically alter or affect property." "While saturation, engraining or infiltration of a substance into the materials of a building or persistent pollution of premises requiring active remediation efforts is sufficient to constitute 'direct physical loss of or damage to property,' evanescent presence is not." Furthermore, the court declined to find that the presence of a virus exclusion in one policy and its absence in another implied a design that the other policy cover virus losses.

By contrast, the Vermont Supreme Court ruled in September that an insured had pleaded sufficient facts to satisfy Vermont's minimal standard for avoiding a motion for judgment on the pleadings. In Huntington Ingalls Industries, Inc. v. Ace American Ins. Co., 2022 WL 4396475 (Vt. Sept. 23, 2022), a divided court ruled 3-2 that allegations that "fomite" had adhered to building surfaces was enough to refute any suggestion that coverage was "beyond doubt." The majority agreed that "direct physical loss" requires that there be a "distinct, demonstrated physical alteration" to property but declared that this alteration did not have to be visible to the naked eye and could result from microscopic changes. Further, the court ruled that direct physical loss requires "destruction or deprivation of property" but that "deprivation" may occur when property is unusable due to a health hazard. Relying on the New York federal district court's decision in Kim-Chee, the court emphasized the difference between "persistent" events and contamination that is "ephemeral or transient." Applying this standard to the shipyard's pleaded claims, the court found that the defendant insurers had not met Vermont's "extremely liberal" standard that it was "beyond doubt that there exists no facts or circumstances that would entitle the claimant to relief." In particular, citing the recent California and Louisiana appellate rulings in Marina Pacific Hotel and Cajun Conti, the majority accepted the insured's contention that COVID virus particles were not only present at its shipyard but had adhered to property surfaces forming "fomite" that had "altered and impaired the functioning of the tangible, material surfaces" of the property. Justices Carroll and Bent

dissented, arguing that the alleged presence of "fomite," even if true, did not physical alter or change the property. The dissent emphasized that COVID affects humans, not property and that Ingalls had not alleged in its suit that it had to repair its property due to the presence of COVID particles, as required for "direct physical loss."

2. The Opioid Rulings
--Governmental Suits Do Not Seek Damages For "Bodily Injury"

https://cases.justia.com/delaware/supreme-court/2022-339-2020.pdf?ts=1641835888

In a significant win for liability insurers, the Delaware Supreme Court ruled that suits by two Ohio counties seeking to recover opioid-related economic damages did not seek damages "for" or "because of" bodily injury. In reversing a lower court's declaration that Ace American had a duty to defend, the Supreme Court ruled Ace American Insurance Company v. Rite Aid Corp., 270 A.3d 229 (Del. 2022), that the governmental entities were only seeking their own economic damages and had expressly disclaimed any suggestion that they were seeking to recover damages for personal injuries or any specific treatment damages. The court rejected the Seventh Circuits' analysis of the same issue under Illinois law in H.D. Smith and instead adopted the recently expressed view of a Federal District Court in Kentucky in Richie Enterprises. Instead of H.D. Smith, the Delaware Supreme Court looked to the Seventh Circuit's earlier decision in Medmarc, in which the Seventh Circuit has ruled that parents who sought economic injury for the cost of purchasing defective baby products had made a strategic decision to sue only for economic damages and did not claim any bodily injury and, therefore, were not entitled to coverage for their claims. The Court ruled that an objective reasonable third party would have understood at the time that this policy was issued, that it only covered damages suffered by a personal organization for care or death resulting from personal injury damages, providing care to an injured individual. Writing in dissent, Justice Vaughn declared that there were sufficient allegations in the underlying complaint, with respect to the willingness of the counties to provide treatment to trigger a duty to defend.

https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2022/2022-ohio-3092.pdf

In September, the Ohio Supreme Court similarly overturned an intermediate appellate court's declaration that a liability insurer must defend opioid suits against a pharmaceutical manufacturer. A year after hearing oral argument, the court ruled in Acuity Insurance v. Masters Pharmaceuticals, 2022-Ohio-3092 (Ohio Sept. 7, 2022) that law suits brought by governmental entities in Michigan, Nevada and West Virginia only seek damages for their own economic losses and not because of bodily injury. In favoring the Delaware Supreme Court's 2022 Rite-Aid analysis and rejecting the 7th Circuit's H.D. Smith approach that the Ohio Court of Appeals has heretofore followed, the court held that "the governments seek damages for their own aggregate economic injuries caused by the opioid epidemic and not for any particular opioid-related bodily injury sustained by a citizen as a direct result of Masters's alleged

failures." The court found that "[t]he repeated use of the phrase 'the bodily injury' suggests that the damages sought in the underlying suit need to be tied to a particular bodily injury sustained by a person or persons in order to invoke coverage under the policies." As a result, the court chose not to reach Acuity's alternative argument concerning "loss in progress," although the court found that the insured's arguments against "loss in progress" were inconsistent with its claim that the suits sought damages "because of…bodily injury."

3. EMOI Services v. Owners Ins. Co., 2022-Ohio-4649 (Ohio Dec. 27, 2022)
--Computer Software Is Not Tangible Property That Can Suffer Physical Loss

The Ohio Supreme Court has ruled that property insurance policies do not cover ransomware claims in which malware is attached to the insured's computer, encrypting access to stored files and data. The court ruled that the policy's electronic equipment endorsement did not apply to this loss because "software is an intangible item that cannot experience direct physical loss or direct physical damage" and that "[c]omputer software cannot experience "direct physical loss or physical damage" because it does not have a physical existence."

4. **Yahoo.com v. National Union Fire Ins. Co. of PA, 14 Cal. 5th 58 (2022)**
--Insured May Have A Reasonable Expectation of Coverage For Privacy Claims
https://cases.justia.com/california/supreme-court/2022-s253593.pdf?ts=1668708184

Although the issue of CGL coverage for junk fax claims has largely faded since the heyday of the TCPA coverage wars fifteen years ago, a new California Supreme Court ruling has opened the door to increased litigation notwithstanding the addition of new exclusions to control these losses. On a certified question from the Ninth Circuit, the state court ruled that a CGL policy can provide coverage for such claims if doing so would be consistent with the insured's objectively reasonable expectations of coverage. Even though the main body of AIG's CGL policy contained a TCPA exclusion, it was superseded by Endorsement No. 1, which reinstated coverage for "personal injury" due to five offenses, including publication of material that violates a person's right of privacy. The court emphasized that the policy provisions that are intended to limit coverage to "content-based" injuries were worded differently from these privacy wordings and that coverage therefore extended to injuries due to interference with the recipient's rights to seclusion and not just communications involving private information. As the court summed up, "we do not find Yahoo!'s broad reading of the coverage provision to be conclusive. Rather, we agree with Yahoo! that the coverage provision is ambiguous and that the standard rules of contract interpretation do not resolve the ambiguity. Because the provision is ambiguous, we conclude that it must be interpreted in a way that fulfills Yahoo!'s objectively reasonable expectations, which must be determined in further litigation. Finally, if the foregoing procedures do not resolve the ambiguity, then we resort to the rule that ambiguities are to be resolved against the drafter, and here the insurer is considered to be the drafter of the specific coverage language whose meaning is in dispute." The court did not express any

opinion on arguments raised in the Ninth Circuit that coverage might separately be subject to the policy's Violation of Statutes exclusion.

5. Dorfman v. Smith, 217 A.3d 53 (Conn. 2022)
--Internal Insurer Documents Protected From Bad Faith by Litigation Privilege
https://cases.justia.com/connecticut/supreme-court/2022-sc20556.pdf?ts=1648468861

The Connecticut Supreme Court has ruled that a motorist could not pursue CUIPA/CUTPA and common law bad faith claims against the Liberty Mutual Fire Insurance Company for willfully misrepresenting its knowledge of facts and witnesses concerning the insured's UIM claim as this conduct is subject to an absolute privilege for litigation-related communications. The court declared that pleadings and other communications made in response to the insured's discovery requests were communications made during and relevant to a judicial proceeding and are therefore afforded immunity because ''[w]itnesses and parties to judicial proceedings must be permitted to speak freely, without subjecting their statements and intentions to later scrutiny by an indignant jury, if the judicial process is to function.' The court rejected the plaintiff's argument that her claim was premised on the insurer's acts and not false communications—specifically, that the defendant intentionally withheld information from its attorneys and thus knew that the answer, special defense, and discovery responses were false and had no basis in fact. Declaring itself, unpersuaded, the court declared that "the crux of the plaintiff's claim remains false communications, regardless of how the defendant went about making those false communications." The court discounted fears that this broad grant of immunity would open the floodgates to misconduct, observing that the court had other internal remedies to sanction and otherwise safeguard against such conduct.

6. Radiator Specialty Co. v. Arrowood Ind. Co., 2022-NCSC-134 (N.C. Dec. 16, 2022)
--Supreme Court Clarifies Rules Re Triggering Coverage for Long-Tail Claims
https://cases.justia.com/north-carolina/supreme-court/2022-20pa21.pdf?ts=1671208779

The North Carolina Supreme Court has at long last clarified state law with respect to long-tail claims. In a 77 page opinion, the court ruled that benzene claims arising out of the insured's sale for forty years of its "Liquid Wrench" product and miscellaneous cleaners, degreasers and lubricants triggered coverage from the date of first exposure, rejecting "actual injury" arguments by Fireman's Fund and insured Radiator Specialty that earlier years are not triggered because coverage should not begin until claimants had suffered a "cognizable injury." Citing a Sixth Circuit opinion, the court expressed concern that limiting coverage to later "actual injury" years might render the policyholder's insurance rights illusory since by then coverage would be excluded under most policies. While adopting RSC's broader trigger, the Supreme Court rejected the insured's contention that it should be entitled to obtain coverage on an "all sums" basis. Instead, the court held that a "time on the risk" rule should apply. Even so, the court held that the insured could allege exhaustion on a 'vertical" basis and could therefore

pursue claims against Landmark "so long as "[n]o other valid and collectible insurance was available to [RSC] for damages covered by the policy."

7. Monroe Guarantee Ins. Co. v. BITCO General Ins. Co. 21-0232 (Tex. Feb 11, 2022)
--When May Extrinsic Facts Be Relied On To Eliminate A Duty to Defend?
https://www.txcourts.gov/media/1453575/210232.pdf

On a certified question from the Fifth Circuit, the Texas Supreme Court has opened the door for the first time to the consideration of extrinsic evidence to eliminate an insurer's duty to defend, declaring that an insurer may properly rely on extrinsic evidence to decline a defense where the evidence (1) goes solely to the issue of coverage and does not overlap with the merits of liabilities; (2) does not contradict facts alleged in the pleading; and (3) conclusively establishes the coverage fact to be proved." Further, the court declined to follow the Fifth Circuit's ruling in Northfield Ins. Co. v. Loving Homecare, Inc. 363 F.3d 523 (5th Cir. 2004) that extrinsic evidence was only allowable as to "fundamental" coverage issues such as whether a policy had been issued or whether the claimant was an insured. As a result, the court found that "because we do not categorically limit the types of potentially coverage/determined in facts may be proven by extrinsic evidence, evidence of the date of an occurrence may be considered if it meets the other requirements described above." In this specific case, however, the court found that the stipulation offered in the coverage litigation could not be considered because it overlapped with the merits of the insured's underlying liability.

8. Merck & Company, Inc. v. Ace American Ins. Co., No. UNN-L-2682-18 (N.J. Super. Jan 13, 2022)
--War Exclusion Held Not To Apply to NotPetya Virus Losses
https://www.bloomberglaw.com/public/desktop/document/MerckCoIncvsAceAmericanInsuranCeDocketNoL00268218NJSuperCtLawDivA/1?doc_id=X1Q6O0S1OD82

A state trial court in New Jersey has held that a "war or hostile acts" exclusion did not defeat coverage for cyber losses resulting from the NotPetya virus in 2017. Citing a 1953 life insurance claims involving a combatant in the Korean War, Judge Walsh declared that "the word war when used in a private contractor document should not be construed on a public or political basis, in a legalistic or technical sense but should be given its ordinary, usual and realistic meaning, actual hostilities between the armed forces of two or more nations or states de facto or de jure." The court declared that this analysis was consistent with that of numerous other courts in cases involving terrorist or hijacking events, including the Ninth Circuit's landmark ruling in Universal Cable Products. The court took note of the fact that the insurance industry had chosen not to amend this exclusionary language notwithstanding its awareness of these rulings as well as the growing peril of cyberattacks. "Having failed to change the policy language, Merck had every right to anticipate that the exclusion applied only to traditional forms of warfare. Given the rules of construction, Merck's position that they did not anticipate that the exclusion would be applied to acts of cyber-based attacks reasonably shows that the expectation of the insured was that the exclusion applied only to traditional forms of warfare."

9. Nautilus Ins. Co. v. Motel Management Services, 2022 WL 15722613 (3d Cir. Oct. 28, 2022)

--Assault Exclusion Precludes Coverage for Sex Trafficking By Pennsylvania Motel

https://cases.justia.com/federal/appellate-courts/ca3/21-2871/21-2871-2022-10-28.pdf?ts=1669140018

In a case arising under Pennsylvania law, the Third Circuit has ruled that allegations by three women that a motel was complicit in allowing them to be commercially trafficked for sex were subject to a CGL exclusion for injuries "arising out of an assault or battery. The court observed that the Pennsylvania Supreme Court in Pennsylvania has adopted a "but for" rule for applying "arising out of" issues and that in this case, the women's claims clearly arose out the common law meaning of both "assault" and "battery." Thus, the court held: "Each victim alleged that their traffickers treated them in an aggressive or violent manner and made them feel a sense of fear and anxiety while being trafficked. Selling the women for sex under these circumstances qualified as assault because it placed them in imminent apprehension of a harmful or offensive bodily contact. Similarly, the allegations in each of the complaints suffice for battery: by using force and drugs to compel the women's participation in the sex trade, the traffickers subjected the women to harmful or offensive bodily contact without their consent."

10. USA Gymnastics. v. Liberty Ins. Underwriters, No. 20-1245 (7th Cir. Feb. 28, 2022)

--EPL Claims Made Coverage Held to Apply to Nassr Sexual Assault Claims

https://cases.justia.com/federal/appellate-courts/ca7/20-1245/20-1245-2022-02-25.pdf?ts=1645826460

The Seventh Circuit has affirmed an Indiana Bankruptcy Court's declaration that USA Gymnastics is entitled to D&O coverage for claims arising out of a team doctor's sexual abuse of hundreds of women athletes. A divided panel ruled 2-1 that the insured's claims were presented to Liberty consistent with the policy's claims made and report requirements. Further, the court agreed with the court below that a "wrongful conduct" was limited by its terms to the ten cases in Nassar had pleaded guilty or there had otherwise been an express adjudication of is misconduct. The court also held that a bodily injury exclusion in the policy was subject to an exception to Employment Practices Wrongful Acts. Further, the court found coverage for investigations by Congress and the U.S. Olympic committee, holding that these were "formal proceedings" within the scope of the policy's coverage. However, the Seventh Circuit ruled that Indiana court erred in failing to consider extrinsic evidence before ruling that a $250,000 "Third Party EPL" sublimit was inapplicable. Whereas the lower court had ruled that the policy was ambiguous because it did not define the meaning of "EPL," the Seventh Circuit ruled that EPL was a term of art in the insurance industry and remanded the case for further findings as to the meaning of this clause. Writing in dissent, Judge Brennan argued that the majority had erred in failing to give full effect to the phrase "based upon, arising from, or in any way related to" in the wrongful conduct exclusion.

11. Preferred Contractors Ins. Co. v. Baker & Son Constr, Inc., 514 P.3d 1230 (Wash. 2022)
--Claims Made Limitation on Contractor Coverage Held Void As Against Public Policy
https://casetext.com/case/preferred-contractors-ins-co-v-baker-son-constr-inc

The Washington Supreme Court has ruled that "claims made and reported" provisions in a CGL policy issued to a building contractor would undermine the viability of the financial responsibility regime established for contractors and is therefore void as being against public policy. On a certified question from the U.S. District Court, the court ruled that "[t]hrough RCW 18.27.050 and RCW 18.27.140, the legislature has created a public policy wherein contractors must be financially responsible for the injuries they negligently inflict on the public. With such a public policy established, a contractor's CGL policy that requires the loss to occur and be reported to the insurer in the same policy year and fails to provide prospective or retroactive coverage is unenforceable.

12. Grange Ins. Co. v. Cycle-Tex, Inc., No. 21-147 (N.D. Ga. Dec. 5, 2022)
--Regulatory Surcharges for PFAS Held To Be An Excluded Pollution "Cost"

A federal court in Atlanta ruled that allegations that the insured caused or contributed to the discharge of harmful toxic per- and polyfluoroalkyl substances ("PFAS") chemicals into North Georgia waterways are subject to a total pollution exclusion. In granting summary judgment to Grange, the court held that PFAS chemicals are clearly "pollutants." While acknowledging the insured's argument that that they had to pay regulatory surcharges to pay for water filtration remedies that were not claims for "bodily injury" or "property damage" subject to Section 1 of the Total Pollution Exclusion, the court nonetheless held that these were a "loss, cost or expense" to treat or neutralize pollution within Section 2 of the exclusion.

13. Certain Underwriters at Lloyd's London v. Conagra Grocery Products Company, 77 Cal. App. 5th 729 (Cal. App. April 19, 2022), review denied (Cal. July 21, 2022).
--Marketing Lead Paint Excluded As Willful Conduct Under Section 155
https://caselaw.lexroll.com/2022/08/16/certain-underwriters-at-lloyds-london-v-conagra-grocery-products-co-llc-77-cal-app-5th-729-2022

Only weeks after a federal district court ruled in McKesson that opioid claims against a product manufacturer alleged only intentional acts for which coverage is barred by Section 533, the California Court of Appeal has now ruled that the same applies to a lead paint manufacturer. In Conagra, the First District rejected Conagra's argument that Section 533 applies to willful acts of "the insured" and should therefore not apply to it as the corporate successor of the original insured W.P. Fuller and Company Paint Manufacturer and not Conagra itself. The Court of Appeal distinguished between instances of vicarious liability, where California courts have declined to give effect to Section 533, and situations involving mergers or corporate acquisitions, where the corporation is unnoticed that it is purchasing the liabilities of the acquired entity. The court therefore declined to accept Conagra's argument that the underlying rationale of Section 533 to deter willful misconduct should not be implicated unless the insured was personally at fault. The court also rejected Conagra's argument that the

promotional efforts for which Fuller had been held liable were too attenuated to satisfy the court direct causal relationship" and "close temporal connection" between the willful act and the resulting injury required by Section 533. As had the court in McKesson, the Conagra court further ruled that the California Supreme Court's "occurrence" analysis in Ledesma did not require coverage here, inasmuch as the holding in Ledesma was based upon the employer's commission of an independent negligent conduct (negligent hiring) that did not exist here. The court also rejected Conagra's contention that Section 533 could only apply if it was established at Fuller's management had the required knowledge and expectation of damage. Rather, the court ruled that "the underlying litigation established that Fuller – the corporate entity – had actual knowledge of the harms associated with lead paint when it promoted lead paint for interior residential use. We have already concluded that this actual knowledge finding necessarily means Fuller acted with knowledge that lead paint was "substantially certain" or "highly likely" to resolve in the hazard found to exist in the underlying litigation and, therefore, established the willful act to trigger Section 533 prohibition against insurance coverage.

14. Millard Gutter Co. v. Shelter Mut. Ins. Co., 312 Neb. 606 (Neb. Oct. 14, 2022)
--Assignee of Post-Casualty Loss Cannot Sue Insurer for Bad Faith
https://cases.justia.com/nebraska/supreme-court/2022-s-20-907.pdf?ts=1665753696

The Nebraska Supreme Court has ruled that a gutter company could not pursue bad claims against the property insurers of homeowners for whom it had performed storm-repair work. The court ruled that an assignee of a post-casualty loss claim cannot state a claim for bad faith. The court also refused to find that Millard Gutter had an independent right of action against the insurers for breach of the implied covenant of good faith and fair dealing. The court left open the issue of how these claims might have been resolved under the Insured Homeowners Protection Act of 2018, which had been enacted by the Nebraska legislature subsequent to the events at issue in this case.

15. Progressive Direct Ins. Co. v. Groves, 431 S.C. 203 (S.C. Sept. 21, 2022)
--Auto Insurance Held Not To Cover Drive-By Shootings
https://cases.justia.com/south-carolina/supreme-court/2022-28115.pdf?ts=1663769947

The South Carolina Supreme Court has ruled that uninsured or underinsured benefits may not be recovered when an individual is shot and killed by another motorist as both cars are stopped at a traffic light. The court declared that the vehicle in this case was not an "active accessory" to insured's injuries, nor more broadly, were these gunshot injuries "foreseeably identifiable with the normal use of [an] automobile." In an opinion that traces the development of South Carolina jurisprudence concerning the meaning of the "use" of an auto, the court declared that contracting parties never intended to be gunshot injuries and, as consequentially, "driving a vehicle and discharging a firearm at persons in another vehicle are acts of independent significance."

16. Yoshida Foods Int' v. Federal Ins. Co., No. 21-1455 (D. Or. Dec. 6, 2022)
--Bitcoin Payments To Restore Computer Hack Was A "Direct Loss"
https://storage.courtlistener.com/recap/gov.uscourts.ord.163165/gov.uscourts.ord.163165.31.0.pdf

A federal district court has ruled that Chubb owed coverage for an incident in which an anonymous hacker gained unauthorized entry into Yoshida Foods' computer system and used malware to encrypt the data in the computer system's storage devices. In holding that the policy's Computer Fraud section covered $100,000 that the insured's president paid to obtain four keys to decrypt the company's data, Judge Baylson rejected Federal's contention that Yoshida Foods did not suffer a "direct loss" from computer fraud and that the only loss that the company suffered was when it repaid Mr. Yoshida for the ransom payment he made with his own cryptocurrency. To the contrary, the court ruled that "Both the ransom payment made by Mr. Yoshida and the reimbursement of that amount by Plaintiff were proximately caused by the hacker's computer violation directed against Plaintiff's computer system. There was no intervening occurrence between the ransomware attack, the ransom payment, and the reimbursement to Mr. Yoshida, which were all part of an unbroken sequence of events."

17. Sterigenics, U.S. LLC v. National Union Fire Ins. of Pittsburgh, PA, No. 21-5481 (N.D. Ill. Aug. 3, 2022)
--Pollution Exclusion Held Not To Apply To Regulated Emissions By Insured
https://d31hzlhk6di2h5.cloudfront.net/20220811/09/97/f1/3a/3d549e874743b6450e99b093/Sterigenics.pdf

A federal court has ruled that a pollution exclusion does not eliminate a CGL insurer's duty to defend allegations that the insured's laboratory emitted carcinogenic emissions of ethylene oxide from its sterilization facility. Judge Rowland ruled that under Illinois law, pollution exclusions only apply to "hazards traditionally associated with environmental pollution." Despite National Union's argument that ethylene oxide is registered as a "priority pollutant," the court held that the exclusion was ambiguous as to whether it applies to "permitted emissions." Further the court ruled that the "sudden and accidental" exception to the exclusion applied in light of allegations in the underlying suit that the discharges were "unintended" without regard to whether they occurred continuously.

18. President and Fellows of Harvard College v. Zurich American Ins. Co., No. 21-11530 (D. Mass. Nov. 2, 2022)
--Late Notice of Affirmative Action Litigation Eliminates Coverage
https://casetext.com/case/president-fellows-of-harvard-coll-v-zurich-am-ins-co

A high stakes dispute between Harvard and Zurich with respect to the availability of liability insurance for litigation concerning the university's affirmative action efforts that are now pending in the United States Supreme Court came to a crashing halt last week after Judge Burroughs ruled that Harvard's claims were untimely since they had been presented to Zurich

later than the 90-day extended reporting period in the 2014-2015 "claims made and reported" policy at issue. The district court observed that claims made and reported provisions are strictly enforced in Massachusetts. Further, the District Court refused to find that an insurer's actual or constructive knowledge of a claim triggered coverage in the absence of the required notice. As a result, Judge Burroughs ruled that "it is thus clear that Zurich's lack of prejudice, or constructive, or even actual knowledge would not change Harvard's obligation to provide notice in full compliance with the terms of the Policy."

19. Ebert v. Illinois Cas. Co., 188 N.E.3d 858 (Ill. 2022)
--Liquor Liability Exclusion Precludes Bar's Coverage For Subsequent Auto Accident

The Indiana Supreme Court has ruled that a liquor liability exclusion unambiguously precluded any duty to defend a suit in which an injured motorist alleged that a bar had negligently allowed a customer to become inebriated. In holding that the "efficient and predominant cause" of the bar's liability was "causing or contributing to the intoxication of any person or furnishing alcoholic beverages to a person under the influence of alcohol," the court ruled that allegations that the bar failed to call the police and negligently failed to intervene to prevent the inebriated customer from driving away were "inextricably intertwined" with his having been allowed to get drunk and were therefore excluded.

20. Crosby Valve LLC v. OneBeacon Ins. Co., 1284CV02705 (Mass. Super. July 19, 2022)
--Massachusetts Judge Reverses Himself on Pro Rata Allocation for Defense Costs

Having previously ruled that defense costs in an asbestos case were not subject to "pro rata" allocation but that insurers did have an equitable right to seek restitution after the fact for fees allocable to uninsured periods of time, Judge Salinger has now done an about face and has ruled that the considerations that had led the Supreme Judicial Court of Massachusetts to apply a "time on the risk" analysis to indemnity claims in Boston Gas did not apply to the duty to defend because the duty to defend is broader than the duty to defend and that if an insurer owes coverage for any part of a law suit, it must defend the entire case. Since an insurer may not require its policyholder to pay for the defense of non-covered claims, the Superior Court ruled that it followed that the insured did not owe for defense of claims allocable to non-covered periods, especially as there is no correlation between the cost of defending a case and the period of time in which injuries occurred.