Second Circuit Changes Course on Reverse Preemption, Holds That State Anti-Arbitration Laws Don't Apply to Foreign Insurers

Several states have laws that bar insurers from arbitrating disputes with their policyholders. These laws clash with the Federal Arbitration Act, which give parties to a contract the freedom to resolve disputes through arbitration, rather than in the courthouse. But because under the McCarran Ferguson Act the regulation of insurance is generally left for the states, these state anti-arbitration laws have been found to reverse preempt the FAA. That means arbitration clauses in insurance policies issued by domestic insurers won't be enforced in states that have anti-arbitration laws.

Foreign insurers, such as Bermuda and London Market insurers, often participate in the U.S. surplus lines market. These insurers play a valuable role by covering otherwise uninsurable risks. Their arbitration clauses are often backed by an international treaty known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention for short). So, McCarran Ferguson may shield state arbitration laws from the supremacy of federal statutes, but McCarran Ferguson is subordinate to an international treaty, so long as that treaty is self-executing (meaning it does not rely on an implementing act of Congress to take effect).

There was a split among federal circuit courts of appeal over whether the New York Convention is self-executing. In 1995, the Second Circuit in *Stephens* held that the New York Convention was not self-executing, and thus subject to reverse preemption.

Relying on that decision, owners of Louisiana properties damaged by Hurricane Ida sought to have their insurance dispute with Lloyd's, London resolved in federal court in New York. Because Louisiana law voided arbitration clauses in insurance policies, they argued that the New York Convention was reverse preempted, and that London could not compel arbitration of the insurance dispute. Applying *Stephens*, the district agreed with the property owners.

On appeal, the Second Circuit took a fresh look at the issue and concluded that its reasoning in *Stephens* is outdated. The U.S. Supreme Court has since developed a new test for determining when a treaty is self-executing. In *Medellin*, the Supreme Court instructed that whether a treaty can operate without the aid of any legislative provision depends on whether it calls for political action or whether it is intended for immediate and direct judicial application.

Applying that test, the Second Circuit found that the New York Convention was self-executing because its language commanded courts to enforce certain arbitration agreements. *Stephens* focused only on the existence of implementing legislation for the New York Convention as a whole, rather than the factors identified in *Medellin* as controlling.

The Second Circuit thus abrogated *Stephens* to the extent it held that the New York Convention is not self-executing. The court then reversed the district court and held that Louisiana's anti-arbitration statute did not reverse preempt the New York Convention.

This decision is important because it removes an obstacle that foreign insurers sometimes face when seeking to compel arbitration and puts the Second Circuit in line with other federal circuit courts that have found the New York Convention to be self-executing.

The case is *Certain Underwriters at Lloyd's, London v. 3131 Veterans Blvd LLC,* Nos. 23-1268-cv and 23-7613-cv (2d Cir. May 8, 2025).

Ninth Circuit Affirms That Deposition Notice Did Not Trigger Coverage for SEC Investigation Costs

In an insurance claim arising out of a securities action against the insured, the Ninth Circuit agreed with the district court that an SEC investigation made after the policy expired did not relate back to an earlier "inquiry" when the policy was in effect.

JanOne had securities coverage under its claims-made insurance policy with Great American. A few days before the policy expired, its CFO, Tim Matula, received notice from the SEC that he would be subpoenaed for a deposition. The subpoena was issued about a week later.

The SEC subpoenaed Matula while investigating another company, Live Ventures, for securities law violations. Matula held a dual role. He was “Head of Investor Relations” for Live Ventures but was also a director of JanOne. The SEC began to probe a stock transaction between Live Ventures and JanOne. All correspondence Matula received from the SEC related to Live Ventures and never mentioned JanOne. After being notified of the subpoena, Great American said it would need to review the transcript of Matula’s deposition to see if it related to his JanOne employment.

The SEC decided not to depose Matula. But the SEC later notified two other JanOne employees of potential securities laws violations (“Wells Notices”).

JanOne’s insurance policy covered expenses an insured person incurs in preparing for an “inquiry.” The policy defined “inquiry” as: “a request or demand for an Insured Person either to appear at a meeting, deposition or interview or to produce documents relating to the business of the Company or such Insured Person's capacity with the Company.” An endorsement treated “inquiries” as “claims” in some cases. If a “claim” later results from the inquiry, it would relate back to the prior “inquiry” and lock in the policy in effect at the time of the inquiry.

JanOne tendered the Wells Notices to Great American. But Great American denied coverage because the Wells Notices didn’t arise out of the Matula inquiry.

JanOne then sued to recover costs related to the SEC claim, which it contended began with correspondence to Matula about his deposition. Great American maintained that there never was an “inquiry” because there was no evidence that the SEC sought to depose Matula in his capacity as a JanOne employee.

The insured insisted that the investigation into JanOne arose out of the Matula deposition. Great American argued that because the Matula deposition never went forward, nothing could have arisen from it.

The district court agreed with Great American, and the Ninth Circuit affirmed.

The court held there was no evidence that the SEC's investigation and action arose out of the SEC's notice of intent to take Matula's deposition. Because the deposition never occurred, the court explained, the SEC learned nothing that could have caused it to continue its investigation or ultimately bring the complaint against JanOne and Matula.

The court said it did not matter that the deposition notice may have concerned the same underlying SEC investigation as JanOne's later expenses. That showed only that the Matula deposition notice flowed from the underlying investigation, not that JanOne's expenses flowed from the deposition notice. Thus, JanOne's litigation expenses were not covered.

The case is *JanOne v. Great Am. Ins. Co.,* No. 24-992 (9th Cir. May 9, 2025).

Court Affirms "Time-On-the-Risk" Ruling Under Massachusetts Law for Environmental Cleanup Claim

Beginning in 1957, BASF Catalysts operated a metal fabrication and finishing plant in Plainville, Massachusetts. Operations at the site varied over time, including both nuclear and non-nuclear operations, and jewelry and electronics manufacturing. These operations caused environmental contamination of groundwater, surface water, soils, and sediments near the facility. The primary contaminants of concern were chlorinated volatile organic compounds, including perchloroethylene, trichloroethylene, and trichloroethane.

Environmental regulators directed BASF to perform various on-site and off-site remediation measures. In 2005, BASF sued in New Jersey state court 15 insurers who had issued, at various times, comprehensive general liability policies to BASF. All the insurers except for United States Fire Insurance Company eventually settled or were dismissed.

A dispute arose over U.S. Fire's share of the total liability. The trial judge applied the "time-on-the-risk" allocation method and awarded BASF $2.6 million against U.S. Fire. BASF appealed to restore a prior determination applying a "fact-based" method for allocating the coverage.

The appellate court, applying Massachusetts law, affirmed the trial court's time-on-the-risk approach. The court acknowledged that, under *Boston Gas Co. v. Century Indem. Co.*, 454 Mass. 337, 910 N.E. 2d 290 (Mass. 2009), courts should strive for a "fact-based" allocation. This means that the court should determine precisely what injury or damage took place during each contract period or uninsured period and allocate the loss accordingly. But where it is not feasible to conduct such a fact-based allocation, various proxies for deriving "fair apportionment" are acceptable.

Here, the "fact-based" allocation method originally relied on by the trial court was based on specific operations conducted at each Area of Concern (AOC) on the site, the nature of the property damage from each AOC, and the relative contribution of each AOC to the site-wide groundwater problem. The appellate court said this approach failed to perform a policy-period-by-policy-period analysis of the estimated damages caused at each AOC. Discharge rates, for example, likely varied across policy periods. Given this imprecision, a "fact-based" allocation approach was not feasible here. A "time-on-the-risk" approach was thus appropriate.

For this reason, the court affirmed the trial court's ruling applying a "time-on-the-risk" allocation.

The case is *BASF Catalysts, LLC v. Allstate Ins. Co.*, Docket No. A-3029-22 (N.J. Sup. Ct. App. Div. May 2, 2025). Note this case is unpublished.

Michigan Court of Appeals Reverses "No Occurrence" Summary Judgment Ruling in Neighborhood Shooting Case

Le-Inhmathong was Le-Nguyen's girlfriend, and they lived together in her Michigan home for over two years. In June 2021, Le-Nguyen shot a third party, CAD, in the front yard of Le-Inhmathong's home by blindly firing through the living room window. The bullet struck CAD in the upper arm. Le-Nguyen claimed he was worried about crime in the neighborhood and kept a revolver, a shotgun, and ammunition in the home. He had prior "confrontations" with neighborhood children because they threw trash in the front yard of the home. Before shooting CAD, Le-Nguyen heard "banging sounds" outside. Fearing that the home would be shot at, Le-Nguyen blindly fired one shot through the living room window.

American Select Insurance Company had issued a homeowner's insurance policy to Inhmathong that covered her home. Inhmathong was the sole named insured. The policy defined "Occurrence" as an "accident, including continuous or repeated exposure to substantially the same general conditions, which results, during the policy period."

CAD sued Inhmathong and Le-Nguyen alleging negligence and nuisance. American Select then filed a declaratory judgment action against Inhmathong, Le-Nguyen, and CAD for a ruling that its policy did not cover defense or indemnity related to the underlying claims. The trial court granted summary judgment to American Select, reasoning that the underlying suit did not allege an Occurrence. CAD appealed.

The Court of Appeals reversed. The Court based its decision on the fact that Inhmathong – not Le-Nguyen – was the insured and, from that perspective, CAD's injury was an accident and, by extension, an Occurrence. Under Michigan law, an accident is an "undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be expected." The court found that although Inhmathong was aware that Le-Nguyen had at least one firearm in her home and that he had prior issues with neighbors, there was no evidence Inhmathong intended for Le-Nguyen to blindly fire a gun from inside her home or for the bullet to strike CAD. For similar reasons, the court found the expected or intended injury exclusion inapplicable. The court thus reversed the trial court's decision awarding summary judgment to American Select.

Judge Michael J. Kelly dissented. Judge Kelly stated that, where an insurance policy does not define Occurrence "from the standpoint of the insured," the court must consider only the incident itself (here, the shooting) regardless of whether it was perpetrated by the insured in determining whether it was an accident. In Judge Kelly's view, whether the incident was an accident from the standpoint of the insured, Inhamathong, was an incorrect framing of the issue. Rather, the occurrence was the gunshot intentionally fired by Le-Nguyen that resulted in the injury. Judge Kelly would thus have held that the shooting here was not an accident.

The case is *Am. Select Ins. Co. v. Inhmathong*, No. 370037 (Mich. Ct. App. May 9, 2025).

Ohio Court of Appeals Applies Intentional Act and Criminal Act Exclusions to Reckless Homicide Case

On August 5, 2020, Jeremy Miller discharged a firearm, killing Taylor Feick. Miller pled guilty to reckless homicide and to using a weapon while intoxicated.

On July 29, 2022, Ralph Feick filed a wrongful death suit in Ohio state court on behalf of his son's estate against Jeremy Miller and his wife, Tamea Miller. The Millers' homeowner insurer, American Modern Property and Casualty Insurance Company, intervened. The trial court granted judgment on the pleadings for American Modern, finding that it had no duty to defend or indemnify the Millers from the underlying suit. The trial court found that the policy's intentional acts and criminal acts exclusion barred coverage. Ralph Feick appealed.

The Court of Appeals of Ohio affirmed. The court rejected Feick's argument that intent to cause injury or damage may be inferred only when that harm is intrinsically tied to the act of the insured. The court found that this "inferred intent" standard in Ohio did not apply to the American Modern intentional acts exclusion. That provision applied "whether or not the resulting bodily injury or property damage was expected or intended." It also provided that the exclusion applied "even if the insured person is insane, intoxicated or otherwise impaired if a person without that impairment who committed such an act would otherwise be deemed to have acted with intent to cause bodily injury or property damage."

Because of this broad exclusionary language, the court said it was not necessary to examine whether Jeremy Miller intended to cause harm. The only relevant question for purposes of the intentional acts exclusion was whether his intentional actions caused the harm. Because there was no dispute that it did, the intentional acts exclusion barred coverage.

And because Miller had pled guilty to both reckless homicide and using weapons while intoxicated, coverage was also barred by the criminal acts exclusion. The court declined to find that the criminal acts exclusion contravened public policy. While a criminal acts exclusion of otherwise insurable negligent acts might go against public policy, there was no such public policy concern here because Miller pled guilty to "reckless" homicide and his acts went beyond mere negligence.

The case is *Feick v. Miller*, Case No. 23CA14 (Ohio Ct. App. Apr. 22, 2025).

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