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Vermont Supreme Court Finds Watercraft Exclusion Unambiguous

Homeowners insurance policies typically have watercraft exclusions. But those exclusions often have exceptions for specific types of smaller watercraft. In this case, the issue was whether an exception for watercraft powered by motors "with 25 total horsepower or less" is ambiguous.

The case arose from a 2021 boating accident in which a child was seriously injured while a passenger on the insureds' pontoon boat. The child's parent sued the insureds, who tendered the claim to their homeowners insurer. The insurer declined to defend asserting the watercraft exclusion.

That provision excluded coverage for liability arising from the use of a watercraft "principally designed to be propelled by engine power or electric motor." But the policy had an exception for liability arising from the use of watercraft "[t]hat are not sailing vessels and are powered by: … [o]ne or more outboard engines or motors with 25 total horsepower or less."

The insureds' pontoon boat was a 1988 model powered by an outboard motor marketed and sold as having 40 horsepower.

In an insurance coverage action, the insureds and the child's mother contended that this exception was ambiguous. They argued that capacity could mean either maximum capability at the time of loss or the manufacturer's rated capacity at the time of sale. The insureds and claimant urged the court to view the exception by the motor's actual operating capacity rather than the motor's capacity at the time of sale.

But the Supreme Court of Vermont thought otherwise. The insureds and the claimant cited no authority for their argument and one insured even told the insurer when reporting the loss that the pontoon boat had a 40-horsepower outboard motor.

In any event, the court found that the insureds' argument was unworkable because neither the insureds nor insurer would know whether coverage was available until post-accident testing had been performed. Such interpretation was not grounded in what the parties would reasonably expect when they entered into the insurance contract.

Adopting the reasoning of another court that addressed a similar issue, the court said that measuring the motor's capability should not entail evaluating the engine's age, whether it was properly tuned, the quality or type of fuel used, the boat's altitude, or other factors affecting actual output at the time of the accident. Instead, the original certification of the motor was intended as the determining factor.

The court held that the watercraft exclusion was unambiguous, and that the insurer had no duty to defend or indemnify.

The case is *Northern Security Ins. Co. v. Walker*, No. 24-AP-349 (Vt. June 6, 2025).

Sixth Circuit Holds That Equipment Designer's Knowledge of Ongoing Dispute Voided Coverage under Professional Services Policy

Five ST Corporation (FST) designs and supplies machines, equipment, and other technology for assembly lines. In 2018, FST entered into an agreement with PolyVision, agreeing to supply the whiteboard manufacturer with parts for one of its lines.

FST was consistently late in delivering equipment. In February 2020, PolyVision sought liquidated damages. FST negotiated a settlement where it agreed to pay a certain sum of money and to provide on-site services.

But PolyVision did not think FST was living up to its obligations. In August 2021, it told FST that its design flaws had cost PolyVision considerable costs. FST disputed that its design was flawed. FST sent a design specialist to PolyVision in October 2021 to review the operation and performance of FST's equipment. A few months earlier, however, that design specialist had already concluded that the equipment was not functioning properly because of a design issue.

While all of this was going on, FST applied for professional services liability insurance from Allied World Surplus Lines Insurance Company. The insurance application asked if any FST officer or employee had "knowledge of any act, error or omission, unresolved job dispute (including fee disputes), accident or any other circumstance that is or could be the basis for a claim under this proposed insurance policy." The application stated that if so, any such claim would be excluded. FST originally left this question blank, but when pressed by Allied World, it answered "no."

By January 2022, the relationship between FST and PolyVision soured even more. PolyVision claimed "abysmal" performance and sought $14 million in damages. It sued FST a few months later in Oklahoma.

After Allied World denied coverage, FST filed a declaratory judgment action against Allied World for defense and indemnity. Allied World prevailed on summary judgment and FST appealed.

The Sixth Circuit affirmed. Applying Michigan law, it held that FST had knowledge of the PolyVision dispute when it applied for coverage. The policy excluded coverage of any dispute that FST knew about before the policy began.

The specific policy language stated that no officer of the insured could have "knowledge of the actual or alleged Wrongful Act or circumstance that reasonably could give rise to a Claim under this Policy."

FST argued that when it applied for insurance, PolyVision's communications were just run-of-the-mill business and contractual disputes about the timing of delivery. The Sixth Circuit disagreed. The record showed that design failures were at the center of PolyVision's disputes. FST knew about design failures that amounted to a "circumstance" that was or could be the basis for a claim under the professional services policy.

FST also argued that the design defect related to a component part made by one of FST's subcontractors. But the court said that did not matter. FST, not its subcontractor, was contractually responsible for supplying the relevant equipment.

The Sixth Circuit affirmed that FST's knowledge of the ongoing or potential claims by PolyVision when it applied for insurance negated coverage.

The case is *Five ST Corp. v. Allied World Surplus Lines Ins. Co.*, No. 24-1921 (6th Cir. June 10, 2025). Note that this case is unpublished.

North Carolina Supreme Court Allows Negligence Claim Against Insurance Agent to Move Forward

Daniel Jones and his wife live on an eight-acre property that has a half-acre pond. An insurance agent, J. Kim Hatcher Insurance Agencies, Inc., solicited Jones to apply for a homeowners policy with Nationwide at a lower premium than his current policy.

During the quote process, Hatcher inspected and photographed Jones's property, including the pond. Hatcher asked Jones to sign a one-page document. Hatcher then applied for and obtained the Nationwide policy for Jones.

Jones remained with Nationwide for a year and then switched back to his previous insurer. Hatcher continued to solicit Jones's business and offered him the same coverage with GeoVera Specialty Insurance Company at a lower premium. Hatcher used the same application procedure as with the Nationwide policy. Hatcher did not ask Jones any questions about his home or property and asked him only to sign a single-page document.

Above the space for Jones's signature, preprinted text read: "I have read the above application and any attachments and declare that the information is true and complete." Hatcher told Jones he just had to sign the application page and make the first payment. Jones believed Hatcher had all the necessary information and trusted Hatcher would accurately prepare the application. Hatcher did not provide any documents aside from the third page of the blank application for Jones's review, and Jones complied with its instructions by signing the blank application.

GeoVera issued the policy. The declarations included a property detail page that did not mention the pond or the property's acreage.

Jones's property was severely damaged after Hurricane Florence. After Jones filed a claim, GeoVera informed Jones that it was cancelling the policy because his application did not mention the pond and understated his property's acreage. Geo Vera said had it known these facts, it would have never issued the policy. Hatcher would not have received a commission but for the misrepresentations in the application.

Jones sued Hatcher for negligence, gross negligence, and punitive damages. (He also sued GeoVera but his claims were dismissed). Hatcher sought to dismiss these claims because Jones was contributorily negligent; by signing the blank application, he represented that the information was true and accurate.

The case made it up to the North Carolina Supreme Court, who framed the issue as this:

> [Is a person] contributorily negligent for signing a blank insurance application and trusting his or her agent to complete it carefully, no matter the circumstances. In other words, when a complaint discloses that someone signed a blank insurance application, must the complaint be dismissed as a matter of law?

The North Carolina Supreme Court said "no." A reasonable person could conclude that Jones acted with ordinary prudence when he trusted Hatcher to carefully submit the insurance application as promised, given their course of dealings and Hatcher's assurances. Jones may have reasonably been put off guard.

The court reasoned that requiring customers to double-check their agent's work, no matter the circumstances, is inconsistent with social expectations. After all, if customers cannot trust their agents, what is the point of hiring the agent in the first place?

Thus, the court held that neither the ordinary negligence nor gross negligence causes of action should be dismissed (also because contributory negligence does not bar a claim for gross negligence). The court also found that Jones's punitive damages claim survived dismissal because it alleged conduct that was willful and wanton.

The case is *Jones v. J. Kim Hatcher Ins. Agencies, Inc.*, No. 264A23 (N.C. May 23, 2025).

New Jersey Appellate Court Applies Mold Exclusion to Wrongful Death Suit

WCCP Risk Purchasing Group., Inc. (WCCP) purchases insurance coverage on behalf of groups who engage in similar business. WCCP acquired insurance for a commercial real estate group, including Bleznak Organization, who managed the Village of Stoney Run apartment complex.

Darlene Pratt, who rented a Stoney Run apartment, died from pulmonary injuries. Her estate sued Stoney Run for wrongful death, alleging mold infiltration.

Bleznak sought coverage under its commercial general liability policy with Lexington. WCCP was the first named insured on the Lexington policy, but it included endorsements naming Bleznak and Stoney Run as the location name. Lexington denied coverage under a mold exclusion. WCCP, on Stoney Run's behalf, sued Lexington in New Jersey state court. The trial court granted summary judgment to WCCP. Lexington appealed.

The first question on appeal was whether WCCP even had the right to bring a claim. The appellate court agreed with the trial court that WCCP had standing to sue on behalf its members. WCCP, as the first named insured, qualified as an agent of all the named insureds and had a financial stake in the litigation because it was a Risk Purchasing Group that contracted to provide a defense to its members, including Stoney Run. The court also agreed with the trial court that the parties intended to cover Stoney Run even though it was not listed as a named insured or additional insured under the policy. Stoney Run's owner, Bleznak, was a named insured, and the policy covered losses for entities a named insured owns. The court also found that it would be unfair to allow Lexington to disclaim coverage after accepting premium payments for the property.

But the appellate court found that the trial court misinterpreted the mold exclusion. That provision excluded coverage for:

> Bodily injury or property damage or any other loss, cost or expense, including, but not limited to losses, costs or expenses related to, arising from or associated with clean-up, remediation, containment, removal or abatement, caused directly or indirectly, in whole or in part, by:

1. Any fungus(i), molds(s), mildew or yeast;

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regardless of any other cause, event, material, product and/or building component that contributed concurrently or in any sequence to that bodily injury or property damage, loss, cost or expense.

The court characterized this last phrase – "regardless of any other cause, event, material, product and/or building component that contributed concurrently or in any sequence to that bodily injury or property damage, loss, cost or expense" – as an anti-sequential and anti-concurrent clause. Thus, death caused directly or indirectly by mold regardless of any other contributing or concurrent clause was excluded from coverage. Unlike clauses in other cases that the trial court considered, the exclusion was not limited to injury due to "remediation efforts."

The appellate court reversed and remanded for entry of summary judgment in favor of Lexington.

The case is *WCPP Risk Purchasing Grp., Inc. v. Lexington Ins. Co.*, Docket No. A-0928-23 (N.J. App. Div. June 13, 2025).

New Mexico Court of Appeals Finds Cyber Coverage Available for Unpaid Vendor's Claim Due to Insured's Security Breach

New Mexico Health Connections, Inc. (NHMC), a health-care insurer, purchased a cyber breach response policy from the Syndicate 2623/623 Lloyd's of London d/b/a Beazley USA Services, Inc. (Beazley).

The cyber policy covered "damages" (defined as a monetary judgment, award or settlement) and "claims expenses" (defined as legal defense costs) that the insured "is legally obligated to pay because of a claim against [it] during the policy period for . . . a security breach."

In April 2020, a third-party posing as a senior accountant manager of one of NMHC's vendors, OptumRX, emailed a fraudulent invoice to NMHC on the form used by OptumRX for its invoices, requesting payment at a fraudulent bank account. In response, NMHC wired $4,415,833.11 to the fraudulent bank account from its Wells Fargo account.

OptumRX demanded payment of the outstanding invoice from NMHC. NMHC reported the claim to Beazley, who denied coverage. Beazley argued that OptumRX did not assert a claim against NMHC "for" a security breach because OptumRX did not allege that OptumRX information was stolen or compromised. Beazley argued that the preposition "for" means "equivalent to" and argued that coverage was provided only for a loss directly connected to the security breach. NMHC, in contrast, construed the phrase "a claim for a security breach" to include a third-party claim for damages where a security breach was only causally connected to the loss.

NHMC sued Beazley in New Mexico state court. The district court granted summary judgment to NHMC. Beazley appealed.

The Court of Appeals of New Mexico affirmed. Because the word "for" was undefined in the policy, the court turned to dictionary definitions of the word. But dictionary definitions supported both Beazley's preferred meaning of "equivalent to" and NMHC's preferred meaning of "because of" or "resulting from." Both are included in the common usage of the word "for." The court also observed a lack of interpretive consensus among courts on the meaning of the word "for." The court thus concluded that the word "for" was ambiguous and interpreted it in the insured's favor: the policy's coverage included claims of loss "because of," resulting from," or "on account of" a security breach.

The court also found an exclusion for any loss, transfer or theft of money "in the care, custody or control of the insured organization" did not apply. The policy stated that New York law controlled its interpretation. The court found that New York courts have repeatedly construed "care, custody or control" as a legal term of art in the insurance context denoting exclusive physical dominion over property. And under New York law, money deposited with a bank belongs to the bank and is not the property of the depositor (the amount on deposit represents an indebtedness by the bank to the depositor).

Because New York law places the "care, custody or control" of a depositor's funds with the bank holding the account, Wells Fargo (not NMHC) had the funds in its "care, custody and control" at the time of the transfer. This body of New York law, the court held, allowed a reasonable insured to conclude that the

exclusion did not apply to funds placed in the protection of a bank account, and only applied to property, securities and funds directly held in NHMC's "care, custody and control."

Accordingly, the Court of Appeals affirmed the order granting summary judgment to NHMC.

The case is *Kane v. Syndicate 2623-623 Lloyd's of London*, No. A-1-CA-41254 (N.M. Ct. App. June 26, 2025).