

## Claims Notes: October 2024



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**Related Practice Areas**

- Insurance Coverage
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- Insurance

### PENNSYLVANIA

#### Reversing Two Lower Courts, Pennsylvania Supreme Court Rules Business Interruption Coverage Requires Physical Alteration to the Premises

A dental practice submitted a business interruption claim to its property insurers due to the COVID-19 shutdown orders. The insurers denied coverage, citing a lack of physical damage to the premises. Breaking with national authorities, the Pennsylvania trial court and intermediate appellate court ruled the phrase *direct physical loss of or damage* is ambiguous. They ruled that business interruption coverage is triggered whenever there is a lost use, including lost use due to the COVID-19 shutdown orders. The Pennsylvania Supreme Court found this to be erroneous. It ruled that the policy language unambiguously requires physical alteration to the property that necessitated repairs, rebuilding, or replacing the property. Because none of those actions occurred, the insurers did not owe business interruption coverage to the dental practice. This decision is a significant correction to Pennsylvania insurance law. [Decision](#).

### PENNSYLVANIA

#### Household Vehicle Exclusion Precluded UIM Recovery for Dirt Bike Accident

While off-roading, a Jeep Wrangler struck the claimant while riding a dirt bike. The claimant obtained the Jeep's liability limit. He submitted underinsured motorist (UIM) claims under two separate policies his parents purchased (issued by the same insurer). The insurer paid the UIM limit under the first policy. It denied coverage under the second based on a household vehicle exclusion, which bars payments for bodily injury sustained while occupying an uninsured vehicle.

Under Pennsylvania law, household vehicle exclusions are generally enforceable unless they act as waivers of stacking. The claimant challenged the denial, contending that household vehicle exclusion acted as a waiver of stacking in violation of Pennsylvania law. On appeal, the Third Circuit Court of Appeals ruled that the insurer properly denied coverage based on the household vehicle exclusion. The dirt bike is an uninsured vehicle because the parents never paid a premium for UIM coverage on the dirt bike. Since the policy did not cover the dirt bike, there was no impermissible stacking waiver and the insurer owed no further UIM coverage. [Decision](#).

### MISSISSIPPI

#### Insurer's Policy Renewal and Continued Acceptance of Premiums Did Not Waive Claim Denial

The insured purchased a commercial property it intended to renovate. The commercial property policy covers vacant buildings for only 60 days unless renovation work begins (vacancy provision). Several months later, a fire damaged the property. The insured admitted renovations had not started. The insurer immediately denied coverage based on the vacancy provision.

Despite this denial and the insurer's knowledge that the insured neglected to comply with the vacancy provision, the insurer renewed the policy and continued to accept premiums. The insurer then canceled the policy. The insured sued, contending that the insurer's renewal and continued acceptance of premiums waived the claim denial. The Fifth Circuit ruled that because the insurer had unequivocally denied coverage before renewing, and accepting further premiums, the insurer did not waive its right to refuse the claim. [Decision](#).

### COLORADO

## Under the Reasonable Expectations Test, Kratom is a *Drug*

Two insurers issued accidental death insurance policies to Merry Johnson. The policies' drug exclusion precluded coverage for death caused or contributed to by "taking of any drug, medication, narcotic or hallucinogen unless as prescribed by a physician." A physician prescribed hydrocodone to Ms. Johnson. She died from complications of combined hydrocodone and kratom. The estate submitted a benefits claim, which the insurers denied based on the drug exclusion. The estate sued. The Tenth Circuit Court of Appeals considered whether kratom is a drug under the reasonable expectations test, a legal standard that examines what a reasonable person would expect from the policy. The estate contended that kratom is an *herbal supplement*. The Tenth Circuit determined that the Drug Enforcement Administration defines kratom as a drug. As such, the drug exclusion applied. *Decision*.

## WASHINGTON

### Exclusion for Declaratory and Injunctive Relief Barred \$1.7M Attorneys' Fee Claim

Bremerton School District (the District) declined to renew its football coach's contract because the coach refused to stop his postgame tradition of praying on the field. The coach sued the District, claiming discrimination under Title VII and violations of his First Amendment rights to free speech and free exercise of religion. The coach sought various declaratory and injunctive relief, including reinstatement. He sought his attorney fees if he prevailed. The parties negotiated a settlement of \$1.775 Million, representing the coach's attorney fees and costs.

The District sought indemnification from its risk pool. The risk pool denied coverage for the settlement based on its exclusion for "[r]elief or redress in any form other than monetary damages, or for any fees, costs, or expenses which an Insured may become obligated to pay as a result of any adverse judgment for declaratory relief or injunctive relief." The District sued, contending that the exclusion is ambiguous. The Washington Court of Appeals disagreed, ruling that the attorney fee and costs award is a *fee* and *cost* and therefore excluded. *Decision*.

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