

# Mapping Territorial Limitations on Insurance Coverage

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## I. INTRODUCTION

Globalization has come to financial markets and to innumerable industries. U.S. businesses routinely export and import goods and products; indeed, many have done so for decades. Domestic companies that sell materials online almost certainly do some international business. Many American corporations have foreign facilities or operations, while others operate in foreign countries intermittently. Individuals travel internationally with relative ease. For Americans living in states that adjoin Canada or Mexico, international travel can be accomplished simply by driving across the border.

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At the same time, insurance policies sold in the United States frequently contain territorial limitations on coverage that superficially seem out of place when compared to many aspects of modern business and to individual habits or practices. The concept of globalization is, in many instances, missing from the pages of insurance policies, or is, at the very least, significantly circumscribed. For example, a standard commercial general liability (CGL) insurance policy provides that it “applies to ‘bodily injury’ and ‘property damage’ only if . . . [t]he ‘bodily injury’ or ‘property damage’ is caused by an ‘occurrence’ that takes place in the ‘coverage territory.’”<sup>1</sup> A standard CGL policy defines “coverage territory” as:

- a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
- b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph a. above; or
- c. All other parts of the world if the injury or damage arises out of:
  1. Goods or products made or sold by you in the territory described in Paragraph a. above;
  2. The activities of a person whose home is in the territory described in Paragraph a. above, but is away for a short time on your business; or
  3. “Personal and advertising injury” offenses that take place through the Internet or similar electronic means of communication;

provided the insured’s responsibility to pay damages is determined in a “suit” on the merits, in the territory described in Paragraph a. above or in a settlement [the insurer] agree[s] to.<sup>2</sup>

To use another example, a standard personal auto policy provides that it “applies only to accidents and losses which occur . . . [w]ithin the policy territory.”<sup>3</sup> “The policy territory is: [t]he United States of America, its territories or possessions,” Puerto Rico, and Canada.<sup>4</sup> “The policy also

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1. INS. SERVS. OFFICE, INC., COMMERCIAL GENERAL LIABILITY COVERAGE FORM 1 (2012), <https://www.northstarmutual.com/UserFiles/Documents/forms/policyforms/Current/CG%2000%2001%2004%2013.pdf> [<https://perma.cc/DU2H-RF7W>].

2. *Id.* at 13 (emphasis omitted).

3. ISO PROPS., INC., PERSONAL AUTO POLICY 12 (2003), <https://www.lelandwest.com/images/pp00010105.pdf> [<https://perma.cc/WJ8N-CR2S>].

4. *Id.* Some insurance companies will extend the territory for some auto coverages to Mexico within a specified distance of the United States border. *See, e.g.,* *Quevillon v. State Farm Fire & Cas. Co.*, 501 N.W.2d 855, 857 (Wis. Ct. App. 1993) (upholding a territorial limitation which provided that “[t]he liability, medical payments

applies to loss to, or accidents involving, “[the named insured’s] covered auto” while being transported between their ports.”<sup>5</sup> Other policies may impose additional types of territorial limitations.<sup>6</sup> A policy that provides worldwide coverage for certain occurrences may nonetheless validly require that a suit against the insured be brought in the United States or its territories or possessions, Canada, or Puerto Rico for the insurer to have a duty to defend or indemnify the insured.<sup>7</sup>

Insurers territorially limit their coverages for rating purposes.<sup>8</sup> Courts generally enforce geographic restrictions in insurance policies.<sup>9</sup> But they

and physical damage coverages also apply in Mexico within 50 miles of the United States border”).

5. ISO PROPS., INC., *supra* note 3.

6. *See, e.g.*, Nat’l Cas. Co. v. Gonzalez, 637 F. App’x 812, 813 (5th Cir. 2016) (involving an insurance policy that covered one tractor-trailer and had a 100-mile radius of operation; the tractor-trailer was involved in an accident approximately 190 miles from the insured’s base of operation, and thus outside the coverage territory); Stratford Ins. Co. v. Cooley, 985 F. Supp. 665, 667–68 (S.D. Miss. 1996) (upholding a 50-mile radius limitation endorsement to a trucker’s liability insurance policy); Mendez v. Brites, 849 A.2d 329, 334–40 (R.I. 2004) (enforcing a provision in an auto policy issued to a Massachusetts resident, in Massachusetts, for a vehicle registered and garaged in Massachusetts, that stated in the compulsory insurance section that the insurer would “pay damages to people injured or killed by your auto in Massachusetts accidents” (emphasis omitted)).

7. *See, e.g.*, Diamond State Ins. Co. v. Marin Mountain Bikes, Inc., No. C11-5193CW, 2012 WL 3945531, at \*7–8 (N.D. Cal. Sept. 10, 2012) (applying California law and upholding such a provision); *see also, e.g.*, Nat’l Cas. Co. v. Sovereign Gen. Ins. Servs., Inc., 40 Cal. Rptr. 3d 591, 600 (Ct. App. 2006) (Hull, J., concurring) (“Indeed, it would be entirely understandable for an insurance company to want to limit the coverage of its policy to actions prosecuted only in particular jurisdictions and not want to obligate itself to the defense of claims in foreign jurisdictions having different laws and different legal systems. There is no reason why an unambiguous clause limiting coverage in that manner should not, as a matter of contract, be enforceable.”).

8. “Rating” refers to the process of determining the premium to be charged to insure a risk. *Rating*, IRMI, <https://www.irmi.com/term/insurance-definitions/rating> [<https://perma.cc/J34R-9VSU>].

9. Lane Finch, *Automobile Liability Insurance*, in 6 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 63.01, § 63.09 (Jeffrey E. Thomas & Christopher J. Robinette eds., 2018); *see, e.g.*, Jones v. State Farm Mut. Auto. Ins. Co., 601 S.E.2d 645, 647 (Va. 2004) (explaining the reasonableness of a territorial limitation on medical expense coverage in an auto policy); Werner’s Inc. v. Grinnell Mut. Reinsurance Co., 477 N.W.2d 868, 871 (Iowa Ct. App. 1991) (articulating the public policy reasons for enforcing a territorial restriction in an auto policy); *Quevillon*, 501 N.W.2d at 857–58 (rejecting the insured’s argument that the territorial limitation provision in an auto policy was ambiguous).

do not always do so,<sup>10</sup> and territorial limitations may, in any event, be a source of unpleasant surprises for insureds who, for one reason or another, thought they had coverage for an occurrence only to learn they were uninsured by virtue of an accident's location.<sup>11</sup> Territorial limitations may also pose analytical challenges for courts and lawyers in cases that involve allegedly tortious conduct that occurred both within and outside the specified coverage territory. Perhaps surprisingly, coverage territory clauses may frustrate insurers by potentially subjecting them to personal jurisdiction in remote or unfamiliar forums.

This Article examines the key issues raised by territorial limitations on insurance coverage. Part II begins the examination with discussions of three essential territorial limitation issues: (a) the so-called place-of-injury test for triggering coverage; (b) the short time exception to territorial limitations on coverage; and (c) the availability of coverage for accidents or losses that occur between the ports of countries within a policy's coverage territory. Part III explores territorial limitations on uninsured motorist coverage in automobile insurance policies. Although courts generally enforce territorial limitations in auto policies, they may not do so where the policy in question imposes a more restrictive territorial limitation on uninsured motorist coverage than it does on other coverages, or where the state's uninsured motorist statute does not contemplate a territorial limitation on this type of coverage. Finally, Part IV addresses the personal jurisdiction ramifications for insurers that arise out of coverage territory provisions. In a nutshell, a policy's coverage territory provision may create the minimum contacts required for specific personal jurisdiction over the insurer in a forum that is within the specified territory. If so, the insurer will have to establish that it would be unreasonable for a court in the forum state to exercise personal jurisdiction if it does not want to litigate the

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10. See, e.g., *Am. Empire Surplus Lines Ins. Co. v. Scanray Corp.*, No. CV-88-5065-KB, 1992 WL 104797, at \*3-5 (9th Cir. May 18, 1992) (concluding that the territorial limitation was ambiguous); *Sapp v. Canal Ins. Co.*, 706 S.E.2d 644, 649 (Ga. 2011) (“[A]ny provisions in the insurance policy . . . that would serve to reduce or negate Canal’s obligations . . . under the [Motor Carrier] Act are void and of no effect. . . . The radius-of-use limitation, which purports to exclude from coverage any incident occurring more than 50 miles from Tifton, Georgia, is such a provision and is, therefore, unenforceable.” (citations omitted)); see also *Werner’s*, 477 N.W.2d at 872 (“[C]ourts have not enforced territorial restrictions on specific areas of coverage, when those limitations were more restrictive than on other areas of coverage within the same policy.”).

11. See, e.g., *Gonzalez*, 637 F. App’x at 813-14, 817 (finding for the insurer where, a few months prior to an accident 190 miles from its base of operations, the insured asked its broker about increasing its covered radius of operations from 100 to 300 miles, and, based on the broker’s alleged representations and a premium increase, thought it had acquired expanded coverage).

related controversy there. The existence of personal jurisdiction is always a case- and fact-specific inquiry.

## II. ESSENTIAL CONTOURS OF TERRITORIAL LIMITATIONS ON COVERAGE

### A. *The Place-of-Injury Test*

As territorial limitations in insurance policies make clear, the existence of an occurrence in the coverage territory is a condition of coverage. This seemingly simple requirement can be controversial in cases that involve allegedly tortious conduct that took place both within and outside the coverage territory. In this recurring situation, courts typically focus on the location of the accident that gave rise to the injury or harm at issue.<sup>12</sup> Under the so-called place-of-injury test, “the final event in a chain of acts or omissions that culminates in the injury itself must be within the policy’s

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12. See, e.g., *ACE Am. Ins. Co. v. RC2 Corp.*, 600 F.3d 763, 770 (7th Cir. 2010) (“[U]nder Illinois law and unless a particular policy contemplates a different definition, an accident occurs when and where all the factors come together at once to produce the force that inflicts injury and not where some antecedent negligent act takes place.”); *CACI Int’l, Inc. v. St. Paul Fire & Marine Ins. Co.*, 566 F.3d 150, 157 (4th Cir. 2009) (calling the place of injury “controlling” when evaluating whether an occurrence was within the coverage territory); *Lincoln Gen. Ins. Co. v. De La Luz Garcia*, 501 F.3d 436, 442–43 (5th Cir. 2007) (involving an MCS-90B endorsement and an accident in Mexico); *Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 354–55 (5th Cir. 2005) (concluding that there was no coverage for a bus accident in Mexico, which was outside the coverage territory, even though the insured was alleged to have negligently hired, trained, and supervised the bus driver in Texas, which was within the policy’s coverage territory); *Auto-Owners Ins. Co. v. Globe Int’l Ministries, Inc.*, No. 3:14cv150/MCR/ CJK, 2015 WL 11110847, at \*5 (N.D. Fla. Sept. 26, 2015) (applying Florida law and focusing on “the immediate injury-producing act”); *Christian World Adoption, Inc. v. Phila. Indem. Ins. Co.*, No. 2:11-cv-831-RMG, 2012 WL 13005336, at \*4 (D.S.C. Sept. 19, 2012) (applying South Carolina law in a case in which the pleadings made clear that the injury occurred outside the policy’s “coverage territory”); *Chiquita Brands Int’l, Inc. v. Nat’l Union Fire Ins. Co.*, 988 N.E.2d 897, 903 (Ohio Ct. App. 2013) (reasoning that the underlying occurrences were outside the coverage territory based on the location of “the events that inflicted the harm alleged”); *Keystone Automated Equip. Co. v. Reliance Ins. Co.*, 535 A.2d 648, 652–53 (Pa. Super. Ct. 1988) (stating that when deciding whether an occurrence is within a policy’s coverage territory, “the occurrence giving rise to liability is the actual injury to the person or the property”); see also *Indus. Indem. Co. v. Apple Comput., Inc.*, 95 Cal. Rptr. 2d 528, 542–44 (Ct. App. 1999) (distinguishing between the planning and commission of an advertising injury offense for purposes of coverage territory analysis).

coverage territory” to trigger coverage.<sup>13</sup> Said another way, it is the location of the injury itself rather than “some precipitating cause” that determines whether an occurrence is within a policy’s coverage territory.<sup>14</sup> This is the correct approach. If courts instead applied a cause test, for example, plaintiffs could “sweep any number of worldwide events into the ambit of a domestic policy,” insurance companies would become liable for losses for which they did not contract or charge premiums, global insurance policies would be redundant, and territorial limitations on coverage would be meaningless.<sup>15</sup> As the Virginia Supreme Court similarly reasoned in enforcing a territorial limitation in an automobile insurance policy:

[A]n insurance company measures the actuarial risk for its policies by experience and data collected within the area for which coverage is contractually bound . . . and not by the wide variations found in foreign countries. The premium the insured contracts to pay for the policy coverage is based on that actuarial risk assumed by the insurer under the terms of the insurance contract. The premium payment and coverage terms of the contract between the insurer and insured are fundamentally based on these identifiable risks. It would be manifestly unreasonable to alter the terms of the insurance contract by judicial fiat and arbitrarily add to the policy additional and unmeasured insurance risks involved for driving in [a] foreign country or territory which is not a part of the insurance contract.<sup>16</sup>

*Lincoln General Insurance Co. v. Reyna* is a representative place-of-injury case.<sup>17</sup> *Reyna* arose out of a collision between a bus owned by Cesar Reyna and driven by his employee, Joel Lozano, and another vehicle.<sup>18</sup> The wreck occurred in Mexico.<sup>19</sup> Two people in the other vehicle were killed, and their relatives sued Reyna in a Texas state court.<sup>20</sup> Lincoln General insured Reyna under a business auto policy.<sup>21</sup> Lincoln General denied coverage for the accident and correspondingly declined to defend

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13. Walter J. Andrews & Matthew McLellan, *The Long Arm and Short Leash for Coverage Territory Clauses*, LAW360 (May 13, 2015, 11:56 AM), <http://www.law360.com/articles/653547/print?insurance>.

14. *CACI Int'l*, 566 F.3d at 157; see also *ACE American*, 600 F.3d at 769–70 (“[T]he ‘occurrence’ that triggers coverage takes place where the actual event that inflicts harm takes place. . . . [A]n accident occurs when and where all the factors come together at once to produce the force that inflicts injury and not where some antecedent negligent act takes place.”).

15. *CACI Int'l*, 566 F.3d at 157.

16. *Jones v. State Farm Mut. Auto. Ins. Co.*, 601 S.E.2d 645, 647 (Va. 2004); see also *Progressive Cas. Ins. Co. v. Ferguson*, 134 F. Supp. 2d 1159, 1166–67 (D. Haw. 2001) (explaining the economic importance of, and public policy reasons for, territorial restrictions in connection with uninsured motorist coverage).

17. See generally 401 F.3d 347 (5th Cir. 2005).

18. *Id.* at 349.

19. *Id.*

20. *Id.*

21. *Id.*

Reyna in the state court action.<sup>22</sup> After the plaintiffs obtained a default judgment against Reyna, Lincoln General filed a declaratory judgment action in a Texas federal court in which it sought a determination that it did not owe coverage for the action and, consequently, that it had no duty to defend Reyna.<sup>23</sup> Lincoln General won summary judgment in the district court, and the plaintiffs appealed to the Fifth Circuit.<sup>24</sup> On appeal, they had to find a way to skirt the territorial restrictions in the Lincoln General policy because Mexico was clearly outside the policy's coverage territory.<sup>25</sup> In an effort to do so, they argued that regardless of whether the bus crash occurred in Mexico, Lincoln General had a duty to defend Reyna because he negligently hired, trained, and supervised Lozano in Texas, which was within the policy's coverage territory.<sup>26</sup> They further contended that Reyna's actions in Texas qualified as an "accident" under Lincoln General's policy.<sup>27</sup> Lincoln General responded that because the bus crash occurred in Mexico, and thus outside the coverage territory, it could have had no duty to indemnify Reyna; therefore, it was not required to defend him.<sup>28</sup>

The *Reyna* court sided with Lincoln General. It was undisputed that the bus wreck occurred in Mexico.<sup>29</sup> The policy clearly provided that Mexico was not part of the coverage territory.<sup>30</sup> Reyna's alleged negligence would not have existed but for the bus wreck in Mexico.<sup>31</sup> It was irrelevant to the court that Reyna's allegedly negligent conduct took place in Texas "because the cause of action against him [arose] out of the bus crash in Mexico which [did] not fall within the [policy's] coverage provisions."<sup>32</sup> Applying Texas law, the court concluded that under the "eight corners rule"<sup>33</sup> Lincoln General had no duty to defend Reyna because the only facts alleged—as compared to claims asserted—were excluded from

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22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 354.

26. *Id.* at 351.

27. *Id.*

28. *Id.*

29. *Id.* at 354.

30. *Id.*

31. *Id.*

32. *Id.* at 354–55.

33. As the Texas Supreme Court has explained, "[t]he eight-corners rule provides that when an insured is sued by a third party, the liability insurer is to determine its duty to defend solely from terms of the policy and the pleadings of the third-party claimant." *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 307 (Tex. 2006).

coverage.<sup>34</sup> Accordingly, the *Reyna* court affirmed the district court’s grant of summary judgment to Lincoln General.<sup>35</sup>

The court in *Chiquita Brands International, Inc. v. National Union Fire Insurance Co.* reached a similar result.<sup>36</sup> In that case, Chiquita sought a declaration that National Union had a duty to defend it in numerous cases filed in the United States arising out of kidnappings, murders, torture, and other atrocities committed by terrorist groups in Colombia.<sup>37</sup> The plaintiffs in the underlying tort litigation alleged that Chiquita aided and abetted and conspired with the terrorist groups.<sup>38</sup> National Union declined to defend Chiquita in part because its policies stated that it would pay for damages caused by an occurrence in the “coverage territory” and defined the coverage territory “as [t]he United States of America (including its territories and possessions), Puerto Rico and Canada.”<sup>39</sup> As National Union pointed out, all of the harm for which Chiquita faced potential liability occurred in Colombia, which was plainly outside the policies’ coverage territory.<sup>40</sup> The trial court, however, held that the occurrences triggering coverage were within the coverage territory because “the decision to pay the terrorist groups was made at Chiquita’s corporate headquarters in Cincinnati, Ohio. The employees in Col[o]mbia simply implemented that policy with the goal of protecting Chiquita’s employees and property.”<sup>41</sup> National Union appealed to the Ohio Court of Appeals.

The *Chiquita* court rejected the trial court’s conclusion.<sup>42</sup> The court could locate no controlling Ohio authority but observed that “the ‘great weight of case law’ from other jurisdictions holds that ‘it is the location of the injury—not some precipitating cause—that determines the location of the event for purposes of insurance coverage.’”<sup>43</sup> The court embraced this line of authority.<sup>44</sup> As the court noted, the events that caused the harms alleged in the underlying cases occurred in Colombia; Chiquita’s decision to pay the terrorists in an effort to buy peace for its Colombian employees and operations “was merely a precipitating event.”<sup>45</sup> As a result, there were no “occurrences” in the United States, which was the relevant

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34. *Reyna*, 401 F.3d at 355 (citing *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 528 (5th Cir. 2004)).

35. *Id.*

36. *See generally* 988 N.E.2d 897 (Ohio Ct. App. 2013).

37. *Id.* at 898–99, 901.

38. *Id.* at 901.

39. *Id.* at 902 (quoting the National Union policies).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* (quoting *ACE Am. Ins. Co. v. RC2 Corp.*, 600 F.3d 763, 768 (7th Cir. 2010)).

44. *Id.* at 903.

45. *Id.*



coverage territory.<sup>46</sup> National Union, therefore, had no duty to defend Chiquita in the underlying litigation.<sup>47</sup> The court consequently reversed the trial court judgment for Chiquita and remanded the case “to the trial court to enter judgment in favor of National Union.”<sup>48</sup>

*ACE American Insurance Co. v. RC2 Corp.* is an interesting case because the insured, RC2, had both domestic and international CGL policies, but unfortunately found that its belt-and-suspenders approach to insuring against product liability risk still left it exposed.<sup>49</sup> RC2 manufactured wooden toys in China.<sup>50</sup> When it had to recall some of its toy trains because they were decorated with lead paint, numerous plaintiffs filed class actions alleging that RC2 negligently manufactured and tested the toys.<sup>51</sup> All of the suits involved toys that were sold and used exclusively in the United States.<sup>52</sup> RC2 had two lines of CGL coverage: one set of policies covered occurrences in the United States; the second set, which was issued by ACE, applied internationally but excluded from coverage occurrences within the United States.<sup>53</sup> RC2’s domestic insurer denied coverage for the class actions based on lead paint exclusions in its policies.<sup>54</sup> That left the ACE policies as RC2’s only potential source of protection.<sup>55</sup> But ACE denied coverage on the basis that the occurrences at issue took place in the United States.<sup>56</sup> ACE simultaneously filed a declaratory judgment action in an Illinois federal court in an attempt to establish that it had no duty to defend or indemnify RC2.<sup>57</sup>

The ACE policies provided that for coverage to apply, the “occurrence” at issue had to take place in the coverage territory, which included “anywhere in the world” except “the United States of America (including its territories and possessions).”<sup>58</sup> The parties filed cross motions for summary judgment, and the district court ruled that ACE had a duty to defend RC2

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46. *Id.*

47. *Id.*

48. *Id.* at 904.

49. *See generally* 600 F.3d 763 (7th Cir. 2010).

50. *Id.* at 765.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 763, 765.

58. *Id.* at 765–66 (quoting the ACE policies).

because the toys had been negligently manufactured in China, which was, by definition, within the policies' coverage territory.<sup>59</sup> The district court awarded RC2 just over \$1.6 million in defense costs plus interest.<sup>60</sup> ACE and RC2 settled the latter's claim for indemnity, and the district court dismissed that part of the case.<sup>61</sup> ACE then appealed the district court's conclusion that it was obligated to defend RC2 to the Seventh Circuit.<sup>62</sup>

The Seventh Circuit observed that the resolution of the case turned "on whether, under the policies, an 'occurrence' takes place at the time and at the location where any antecedent negligent acts took place."<sup>63</sup> ACE argued that under controlling Illinois law, "the occurrence took place in the United States, where [consumers] were exposed to the lead paint."<sup>64</sup> RC2 countered that any "occurrence" took place in China, where the toys were negligently manufactured and tested.<sup>65</sup> According to RC2, this was because the acts that caused the plaintiffs' harm occurred in China.<sup>66</sup>

The *ACE American* court rejected RC2's theory that the occurrences that triggered ACE's duty to defend took place in China and thus were within the coverage territory because that is where the "antecedent negligent acts" were performed.<sup>67</sup> In the court's eyes, the ACE policies clearly established that an "'occurrence' that triggers coverage takes place where the actual event that inflicts the harm takes place."<sup>68</sup> As the court would later reiterate, absent contrary policy language, "an accident occurs when and where all the factors come together at once to produce the force that inflicts injury and not where some antecedent negligent act takes place."<sup>69</sup> There were sound reasons for this rule:

Because we hold that the insurance policies unambiguously exclude coverage . . . we need not rely on extrinsic factors to determine the intent of the parties in entering the agreements. But we note that the construction urged by RC2 would render the domestic and international policies in this case almost entirely redundant. And because these policies use standard language, this construction would make territorial limitations in insurance policies largely irrelevant in product liability situations. Most product liability claims will at least potentially be caused by negligent acts that allegedly occur both domestically and abroad; an insurance company's duty to defend would thus almost invariably be triggered in any products liability case, regardless of where the injury happened. The only reason

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59. *Id.* at 766.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 768–69.

68. *Id.* at 769.

69. *Id.* at 770.

that lead-paint exposure was not covered by the domestic policies was an express exclusion in those policies. Indeed, RC2's own conduct in first submitting its claims . . . to its domestic insurer was entirely consistent with our holding. Moreover, it would have made little sense for RC2 to take out both international and domestic policies if its primary risk for liability would be covered under both policies.<sup>70</sup>

Because the occurrences at issue took place outside the coverage territory and thus did not even potentially implicate ACE's duty to indemnify RC2, ACE had no duty to defend RC2 in the underlying litigation.<sup>71</sup> The Seventh Circuit reversed the district court's decision and remanded the case with instructions to enter judgment for ACE.<sup>72</sup>

*Barry v. Cincinnati Insurance Cos.*<sup>73</sup> merits discussion because of the particular territorial limitation at issue. In *Barry*, Mohamed Barry was killed in a car accident in Africa.<sup>74</sup> His widow, Kathleen Gibbons-Barry, sought uninsured motorist (UM) coverage under the couple's policy with the Cincinnati Insurance Companies.<sup>75</sup> The territorial limitation in the Cincinnati policy stated that coverage "applie[d] only to accidents and losses" that occurred in the coverage territory.<sup>76</sup> The coverage territory was the familiar combination of the United States, including its territories and possessions, Canada, and Puerto Rico.<sup>77</sup> Gibbons-Barry argued that coverage attached because, while the accident occurred in Africa and thus outside the Cincinnati policy's coverage territory, the "losses" from the accident occurred in the United States.<sup>78</sup> To put a finer point on her argument, she reasoned that "her 'losses' [were] covered by the policy because she suffered financial detriment caused by her husband's death while residing in the United States."<sup>79</sup> The *Barry* court disagreed.<sup>80</sup>

Interpretation of the territorial limitation did not pivot on the term "losses," as Gibbons-Barry contended, but instead on the conjunction "and."<sup>81</sup> Giving the phrase "accidents and losses" plain and ordinary

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70. *Id.* at 769–70.

71. *Id.* at 770.

72. *Id.*

73. *See generally* No. 01AP-1437, 2002 WL 31087264 (Ohio Ct. App. Sept. 19, 2002).

74. *Id.* at \*1.

75. *Id.*

76. *Id.* at \*2 (quoting the policy).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

meaning, the territorial limitation provided that the policy would not apply unless both the accident *and* the resulting losses occurred in the coverage territory.<sup>82</sup> Gibbons-Barry’s urged interpretation of the policy confused the conjunctive “and” with the disjunctive “or.”<sup>83</sup> In short, because her husband’s fatal accident occurred outside the Cincinnati policy’s coverage territory, the plaintiff could not recover.<sup>84</sup>

In conclusion, courts properly use the place-of-injury test to determine whether an occurrence took place in a policy’s coverage territory. The “cause” test, which courts generally use to determine the *number* of occurrences under a liability insurance policy,<sup>85</sup> is irrelevant to the *location* of an occurrence.<sup>86</sup> Indeed, use of a cause test in the coverage territory context would make it impossible as a practical matter for insurers to accurately underwrite and price their policies.<sup>87</sup>

### *B. The Short Time Exception to Territorial Limitations on Coverage*

As place-of-injury cases demonstrate, territorial limitations on coverage impose important conditions on insurers’ duties to their insureds. They also create potential practical difficulties for commercial insureds with occasional or intermittent foreign operations or engagements. Consider, for example, a company that sells a product to a purchaser in a country that is outside the coverage territory of the company’s CGL policy and must then dispatch an employee to install or service the product or train the purchaser’s employees in the product’s use. As brief or irregular as this trip may be, it nonetheless places the employee outside the company’s insurance coverage territory and exposes the company to uninsured vicarious liability if the employee commits a tort on the trip. To account for this possibility, some business insurance policies include a “short time exception” to territorial limitations on coverage. For example, a standard CGL policy that defines the coverage territory as the United States, its territories and possessions, Puerto Rico, and Canada states that it will apply to an “occurrence” in “[a]ll other parts of the world if the injury or damage arises out of . . . [t]he activities of a person whose home is in the [coverage] territory . . . but is away for a short time on [the named insured’s] business.”<sup>88</sup> So what is a *short time* in this context? There is no uniform answer.

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82. *Id.*

83. *Id.*

84. *Id.*

85. ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 454 (6th ed. 2018).

86. *See* ACE Am. Ins. Co. v. RC2 Corp., 600 F.3d 763, 769 (7th Cir. 2010))

87. *See supra* notes 15–16 and accompanying text.

88. INS. SERVS. OFFICE, INC., *supra* note 1, at 1, 13.

Giving the phrase a *short time* its customary and ordinary meaning, it “most naturally covers a brief, discrete event such as a several-day business trip abroad.”<sup>89</sup> In comparison, a trip or stay of several weeks or longer is not a short time for territorial limitation purposes.<sup>90</sup> If an insured plans to have a systematic or continuous presence in a country that is outside its policy’s coverage territory, it cannot exploit the short time exception by rotating employees in and out of that location, by requiring an employee to work there for short periods on a regular or recurring basis, or the like.<sup>91</sup> To allow such practices would result in the short time exception swallowing the policy’s territorial limitation whole.<sup>92</sup> Rather, a business with sustained foreign operations that does not have or want a global insurance policy may need to explore an endorsement to its CGL or other policy that expands the coverage territory to scheduled countries or makes coverage worldwide.<sup>93</sup>

### C. Losses or Accidents Between Ports

Standard automobile insurance policies do not include a short time exception, but they do extend coverage “to loss[es] to, or accidents involving,” insureds’ covered autos “while being transported between their ports.”<sup>94</sup> “Their” in this phrase refers to the “United States, its territories and possessions,” Puerto Rico, or Canada.<sup>95</sup> Absent specific definitional language in a policy, “port”

89. *CACI Int’l, Inc. v. St. Paul Fire & Marine Ins. Co.*, 566 F.3d 150, 158 (4th Cir. 2009); see also *Amor Ministries v. Century Sur. Co.*, No. 13-CV-1441 W (BGS), 2014 WL 12167640, at \*1, \*7 (S.D. Cal. Dec. 1, 2014) (implying that an injured church volunteer’s three-day religious mission was a short time for coverage territory purposes).

90. *CACI Int’l*, 566 F.3d at 158.

91. See *id.* at 159 (rejecting the insured’s argument that the short time exception applied to its extended operations in Iraq).

92. *Id.* (“The term ‘short time’ has a plain and ordinary meaning, and the complaints allege a systematic pattern of activities lasting months and even years. . . . [W]e are not permitted to take such a massive operation and cram it into a short time exception. If we did so, the exception would swallow the policies’ coverage provisions whole . . .”).

93. See Donald S. Malecki, *Strangers in a Strange Land: Avoid Coverage Shortcuts Where Short-Term Foreign Liability Is Concerned*, ROUGH NOTES CO., [http://www.roughnotes.com/magazine/2010/july2010/2010\\_07p082.htm](http://www.roughnotes.com/magazine/2010/july2010/2010_07p082.htm) [<https://perma.cc/EW3A-6U76>] (making this suggestion and identifying three standard endorsements that expand a CGL policy’s coverage territory). This observation does not constitute legal advice.

94. ISO PROPS., INC., *supra* note 3, at 12.

95. *Id.* Similarly, a standard CGL policy defines “coverage territory” to mean “[i]nternational waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in” the United States of America

refers to “a seaport or other place” in a covered country, such as an airport, from which it is possible to travel on or over international waters, or through international airspace.<sup>96</sup> If an insured airplane was being flown from Florida to Puerto Rico, for example, the departure and destination airports would be ports for coverage territory purposes.<sup>97</sup> In contrast, U.S. Customs and Border Protection ports of entry along the borders between the United States and Mexico and the United States and Canada are not ports within the meaning of auto insurance policies’ coverage territory provisions.<sup>98</sup> *Ruiz v. Government Employees Insurance Co.*<sup>99</sup> is an illustrative case.

In *Ruiz*, Hermilinda Quesada de Ruiz (Mrs. Ruiz) was driving her car in Ciudad Juarez, Mexico, which is across the border from El Paso, Texas, where she lived, when she was injured in an accident.<sup>100</sup> She and her husband reported the accident to their auto insurer, GEICO, which denied coverage because the accident occurred in Mexico.<sup>101</sup> The Ruizes’ policy with GEICO defined the coverage territory as the United States, including its territories and possessions, Puerto Rico, and Canada, and further stated: “This policy also applies to loss to, or accidents involving, your covered auto while being transported between their ports.”<sup>102</sup>

The Ruizes sued GEICO in a Texas state court.<sup>103</sup> The trial court awarded GEICO summary judgment and the Ruizes appealed.<sup>104</sup> On appeal, they argued that the policy was ambiguous and could be understood to provide coverage while it was being transported between United States ports of entry—five of which were in or near El Paso.<sup>105</sup> According to the Ruizes, the term “ports” in the coverage territory provision could easily be read to mean that a car would be covered if an insured was traveling from one United States port of entry to another via Mexico.<sup>106</sup> GEICO countered that “port” as used in its policy did “not mean port of entry.”<sup>107</sup>

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(including its territories and possessions), Puerto Rico, and Canada. INS. SERVS. OFFICE, INC., *supra* note 1, at 13.

96. Cal. State Auto. Ass’n, *Inter-Ins. Bureau v. Super. Ct.*, 223 Cal. Rptr. 246, 249 (Ct. App. 1986).

97. See *Peerless Ins. Co. v. Sun Line Helicopters, Inc.*, 180 So. 2d 364, 365–66 (Fla. Dist. Ct. App. 1965) (involving an airplane that was being flown from Florida to Puerto Rico, both of which were within the subject insurance policy’s coverage territory).

98. *Cal. State Auto.*, 223 Cal. Rptr. at 248.

99. 4 S.W.3d 838 (Tex. App. 1999).

100. *Id.* at 840.

101. *Id.* at 840–41.

102. *Id.* at 841 (emphasis omitted).

103. *Id.*

104. *Id.*

105. *Id.* at 842.

106. *Id.*

107. *Id.*

The court rejected the Ruizes' argument because it contradicted the clear policy language, and it was backed by no authority.<sup>108</sup> As the court summarized the situation:

The territorial limits of the policy are unambiguous. If an accident occurred within the United States' boundaries, it would be covered by the policy. If an accident occurred within the boundaries of Puerto Rico, Canada, or any other United States territory or possession, it would be covered by the policy. If the automobile were being transported from the United States to Puerto Rico, or from Miami to the Port of Houston, and the carrier was sunk during a hurricane, the loss would be covered by the policy. We find no authority supporting the Ruizes contention that the language in their policy could be interpreted to mean that their vehicle would be covered when traveling from one United States port of entry to another via Mexico.<sup>109</sup>

The Ruizes also undermined their position by conceding at oral argument that there would be no coverage for the accident if Mrs. Ruiz used the same port of entry to both enter Mexico and return to Texas.<sup>110</sup> Unfortunately for them, there was no evidence in the record to indicate which ports of entry Mrs. Ruiz utilized on the day of the accident.<sup>111</sup> As a matter of Texas civil procedure, if the Ruizes' interpretation of the policy required passage through different ports of entry to trigger coverage, it was their burden to demonstrate that Mrs. Ruiz used different ports of entry on the day of the accident to create a fact issue that would have precluded summary judgment for GEICO.<sup>112</sup> Without such evidence, and with the policy's coverage territory language being clear and unambiguous, the *Ruiz* court affirmed the trial court judgment for GEICO.<sup>113</sup>

The *Ruiz* court touched on the possible importance of different U.S. departure and entry ports when evaluating a territorial limitation on coverage, but it did not have to analyze the issue because of the case's procedural

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108. *Id.* at 843.

109. *Id.*; *see also* Cal. State Auto. Ass'n, Inter-Ins. Bureau v. Super. Ct., 223 Cal. Rptr. 246, 248–49 (Ct. App. 1986) (concerning a car that entered Mexico at an Arizona port of entry and was involved in an accident in Mexico before the driver could return to the U.S. via a California port of entry and explaining why ports of entry are not ports for coverage territory purposes); Dykeman v. Mission Ins. Co., 471 P.2d 317, 318 (Ariz. Ct. App. 1970) (reaching the same conclusion and further stating that the purpose of driving the car between two ports of entry via Mexico was to transport the occupants rather than the car).

110. *Ruiz*, 4 S.W.3d at 843.

111. *Id.*

112. *Id.*

113. *Id.*

posture and because of its rejection of the plaintiffs' claim that a port of entry for customs purposes is a *port* in the territorial limitations context.

In *Cassingham v. Nationwide General Insurance Co.*, which involved a seaport and therefore a port for territorial limitation purposes, the question was whether coverage for an injury outside the policy's coverage territory would lie when the departure and destination ports in the coverage territory were the same.<sup>114</sup> The answer was no.<sup>115</sup>

In *Cassingham*, Delaware resident Tamera Cassingham "was injured while ashore in Bermuda during a vacation cruise."<sup>116</sup> She was riding a rented moped when she was struck by an unidentified motorcyclist.<sup>117</sup> She sought UM and personal injury protection (PIP) benefits from her auto insurance carrier, Nationwide.<sup>118</sup> Nationwide denied coverage based on the territorial limitation in its policy, which restricted coverage to "Canada, the United States of America and its territories or possessions or between their ports."<sup>119</sup> Cassingham countered that the policy did, in fact, cover her accident because her cruise started and finished at the port of Philadelphia, such that it "took place between ports of the United States."<sup>120</sup> Alternatively, she argued, the "between their ports" language was ambiguous and accordingly had to be interpreted in line with her "reasonable expectations."<sup>121</sup> She contended that it was reasonable for her to assume that the Nationwide policy covered her for injuries incurred in a car wreck anywhere in the world because Nationwide never told her differently.<sup>122</sup>

Nationwide responded that the "between their ports" language referred to travel or transit between different U.S. and Canadian seaports.<sup>123</sup> According to Nationwide, Cassingham's reading of the territorial limitation provision was misguided because it would confer coverage on an insured who left a U.S. port to go anywhere in the world and later returned to a U.S. port, thus nullifying the territorial limitation.<sup>124</sup> Cassingham and Nationwide both moved for summary judgment.<sup>125</sup> The court found no merit in Cassingham's argument that the "between their ports" language in her policy extended coverage to her Bermuda moped accident.<sup>126</sup> Her interpretation of the

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114. No. 90-10-244, 1991 WL 236917, at \*1 (Del. Super. Ct. Nov. 8, 1991).

115. *Id.* at \*3-5.

116. *Id.* at \*1.

117. *Id.*

118. *Id.*

119. *Id.* (quoting the Nationwide insurance policy).

120. *Id.* at \*2.

121. *Id.* (citing *Jeanes v. Nationwide Ins. Co.*, 532 A.2d 595, 599 (Del. Ch. 1987)).

122. *Id.*

123. *Id.* (including seaports in United States territories and possessions).

124. *Id.*

125. *Id.* at \*1.

126. *Id.* at \*3.



territorial limitation would allow an insured to recover for an accident that occurred anywhere in the world provided that the insured returned to a Canadian or United States port or to a port in a U.S. territory or possession.<sup>127</sup> Such an interpretation would be “illogical” because it would render the territorial limitation “almost meaningless.”<sup>128</sup>

The court also rejected Cassingham’s ambiguity claim because the phrase “between their ports” was not susceptible “to more than one reasonable interpretation.”<sup>129</sup> More particularly, Cassingham’s urged interpretation of “between their ports” did not create an ambiguity because, although it was a *possible* competing construction of the Nationwide policy, it was an unlikely one rather than a reasonable alternative.<sup>130</sup>

After disposing of an additional issue, the court denied Cassingham’s motion for summary judgment and granted Nationwide’s motion.<sup>131</sup>

The *Cassingham* court reached the correct result. But, for the sake of argument and educational purposes, consider two alternative scenarios. Assume that instead of departing from and returning to Philadelphia, Cassingham’s ship left Philadelphia bound ultimately for Miami. Would she have had coverage for her Bermudian moped accident then? Yes—assuming that the accident was otherwise covered under the Nationwide policy—because the trip was between different U.S. ports.<sup>132</sup> What if the ship, instead of continuing to Miami, was forced by a storm or mechanical issues to return to Philadelphia, the same port from which it departed? Would Cassingham have had coverage in that instance? Again, the answer is yes because the planned course of the cruise was between different U.S. ports,<sup>133</sup> the fact that severe weather or equipment failure forced the ship

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127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at \*4.

131. *Id.* at \*5.

132. See *Ruiz v. Gov’t Emps. Ins. Co.*, 4 S.W.3d 838, 843 (Tex. App. 1999) (supporting this position by referring to a seafaring trip between the ports of Miami and Houston).

133. This affirmative answer again depends on the accident being covered under the Nationwide policy.

back to Philadelphia should not eliminate coverage.<sup>134</sup> To rule otherwise would, in that rare situation, defeat the parties' intent.<sup>135</sup>

In summary, the phrase *between their ports* in territorial limitations in standard insurance policies is clear. An insurer's failure to define the terms *port* or *ports* in its policy does not "render the policy ambiguous."<sup>136</sup> A *port* is a seaport or other place in a covered country, such as an airport, from which it is possible to travel on or over international waters, or through international airspace; U.S. Customs and Border Protection ports of entry along the U.S. borders with Canada and Mexico are not ports in this context. Absent exceptional circumstances—like the second hypothetical scenario sketched above—the phrase *between their ports* requires travel between different ports in the policy's coverage territory.

### III. TERRITORIAL LIMITATIONS ON UNINSURED MOTORIST COVERAGE

Although courts generally enforce territorial limitations on automobile insurance coverage, they may not do so where UM coverage is concerned and the policy at issue imposes a more restrictive territorial limitation on UM coverage than it does on other coverages or where the state's UM statute does not contemplate a territorial limitation.<sup>137</sup> In contrast, courts routinely uphold territorial limitations on UM coverage where the limitations track those that apply to the policy's liability coverages or are otherwise statutorily permissible.<sup>138</sup>

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134. *Cf. Peerless Ins. Co. v. Sun Line Helicopters, Inc.*, 180 So. 2d 364, 365–66 (Fla. Dist. Ct. App. 1965) (involving a plane being flown from Florida to Puerto Rico with a planned refueling stop in the Bahamas that developed engine trouble and crashed as it attempted an emergency landing in the Bahamas).

135. *See id.* at 366 (upholding the trial court's determination regarding the parties' intent).

136. *Grange Mut. Cas. Co. v. Estate of Stetz*, 92 N.E.3d 676, 683 (Ind. Ct. App. 2018) (applying Ohio law and stating "that the failure to define a term in an insurance policy does not automatically render the policy ambiguous" (citing *Fahlbush v. Crum-Jones*, 891 N.E.2d 1242, 1246 (Ohio Ct. App. 2008))); *Gil v. Clara Maas Med. Ctr.*, 162 A.3d 1093, 1102 (N.J. Super. Ct. App. Div. 2017) (noting that the lack of a definition does not "'automatically' create an ambiguity" (quoting *Priest v. Roncone*, 851 A.2d 751, 755 (N.J. Super. Ct. App. Div. 2004))).

137. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Marquez*, 28 P.3d 1132, 1135 (N.M. Ct. App. 2001) (holding that the territorial limitation was void because it sought to impose greater limitations on the UM coverage than it did on the liability coverage); 7A AM. JUR. 2D *Automobile Insurance* § 312 (2017) (stating that a UM endorsement cannot "establish a territorial restriction not contemplated by the applicable uninsured motorist statute" (citing *Mission Ins. Co. v. Brown*, 63 Cal.2d 508 (1965))).

138. *See, e.g., Boatner v. Atlanta Specialty Ins. Co.*, 115 F.3d 1248, 1254–58 (5th Cir. 1997) (interpreting Mississippi law); *Guillen v. State Farm Mut. Auto. Ins. Co.*, No. B-05-292, 2006 WL 1295060, at \*4–5 (S.D. Tex. May 10, 2006) (predicting Nebraska law); *Progressive Cas. Ins. Co. v. Ferguson*, 134 F. Supp. 2d 1159, 1164–67 (D. Haw. 2001) (applying Hawaii law); *Fazio v. Hamilton Mut. Ins. Co.*, 835 N.E.2d 20, 21, 25–26

By way of background, UM coverage is a form of first-party coverage.<sup>139</sup> With UM coverage, people injured by an uninsured motorist are compensated by their own auto insurer in an amount equal to what the uninsured tortfeasor's liability insurer would have paid if the tortfeasor had carried liability insurance.<sup>140</sup> UM coverage is personal to the insured, so insureds

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(Ohio 2005) (concluding that a territorial limitation that restricted UM coverage to the United States and Canada was valid and, therefore, the insured was not covered for a dune buggy accident in Mexico, even though liability coverage applied to areas of Mexico; the insurer offered UM coverage for Mexico in an amount equal to liability coverage); *Clark v. Am. Family Mut. Ins. Co.*, 577 N.W.2d 790, 794 (Wis. 1998) (validating the UM territorial limitation); *Degollado v. Gallegos*, 917 P.2d 823, 827 (Kan. 1996) (holding that a policy provision that limited UM coverage to United States and Canada was valid even though it was not a statutorily-permitted exclusion); *Hall v. Amica Mut. Ins. Co.*, 648 A.2d 755, 760–61 (Pa. 1994) (holding that the territorial limitation was enforceable); *Pollard v. Hartford Ins. Co.*, 583 A.2d 79, 81 (R.I. 1990) (upholding a territorial limitation that applied to all aspects of the policy); *Heinrich-Grundy v. Allstate Ins. Co.*, 525 N.E.2d 651, 654 (Mass. 1988) (“[T]he [Massachusetts] [l]egislature did not intend to proscribe territorial restrictions on [UM] coverage that are coextensive with territorial restrictions on liability coverage.”); *Lovato v. Liberty Mut. Fire Ins. Co.*, 742 P.2d 1242, 1243–44 (Wash. 1987) (recognizing a territorial limitation on UM coverage that was coextensive with the policy’s limitation on liability coverage); *Weaver v. Nat’l Gen. Ins. Co.*, No. L-412-13, 2014 WL 148541, at \*1, \*4–6 (N.J. Super. Ct. App. Div. Jan. 16, 2014) (enforcing a UM policy’s territorial limitation); *Gonzales v. Allstate Ins. Co.*, 51 P.3d 1103, 1106–07 (Colo. App. 2002) (rejecting the plaintiffs’ public policy argument against enforcing a territorial limitation on UM coverage); *Mijes v. Primerica Life Ins. Co.*, 740 N.E.2d 1160, 1165 (Ill. App. Ct. 2000) (noting that the territorial limitation was a general provision and finding that it did not violate Illinois public policy); *Dominguez v. Dairyland Ins. Co.*, 942 P.2d 191, 194 (N.M. Ct. App. 1997) (upholding a clear and unambiguous territorial limitation); *Higbee v. USAA Cas. Ins. Co.*, 617 So. 2d 51, 56 (La. Ct. App. 1993) (“[A territorial] limitation does not defeat the public policy underlying the [Louisiana] UM statute [and] [s]uch a restriction is reasonable when the burden on insurance providers is weighed against the benefits of disallowing the restriction.”); *Smith v. Ill. Farmers Ins. Co.*, 455 N.W.2d 499, 502 (Minn. Ct. App. 1990) (concluding that territorial limitations on UM coverage are enforceable); *Prudential Prop. & Cas. Ins. Co. v. Myers*, 557 A.2d 686, 687–88 (N.J. Super. Ct. App. Div. 1989) (determining that the territorial limitation on UM coverage was consistent with the relevant New Jersey statute and distinguishing PIP benefits); *Robles v. Cal. State Auto. Ass’n*, 145 Cal. Rptr. 115, 121 (Ct. App. 1978) (seeing “no statutory or public policy” basis for invalidating a territorial limitation on UM coverage); *Cassingham v. Nationwide Gen. Ins. Co.*, No. 90-10-244, 1991 WL 236917, at \*4 (Del. Super. Ct. Nov. 8, 1991) (upholding a territorial limitation).

139. *Wadzinski v. Auto-Owners Ins. Co.*, 818 N.W.2d 819, 826 (Wis. 2012); *Stamper v. Hyden*, 334 S.W.3d 120, 125 n.2 (Ky. Ct. App. 2011) (citing *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895, 898 (Ky. 1993)).

140. *See Floyd-Tunnell v. Shelter Mut. Ins. Co.*, 439 S.W.3d 215, 220 (Mo. 2014) (en banc) (“The purpose of UM coverage is to take the place of the liability coverage the insured would have received had he or she been involved in an accident with an insured

may recover UM benefits if they are hurt while occupying or operating vehicles other than those identified on their policies.<sup>141</sup> UM coverage is compulsory in many states, meaning each auto liability insurance policy issued in the state must provide UM coverage.<sup>142</sup> In other states, an insurer must offer UM coverage, but an insured may either reject it or purchase limits up to those required for liability coverage under the state's financial responsibility law.<sup>143</sup>

*Mijes v. Primerica Life Insurance Co.* is a characteristic case enforcing a territorial limitation on UM coverage.<sup>144</sup> There, Miguel and Maria Mijes had an auto policy with Allstate Insurance that provided coverage for an insured auto in Mexico for up to ten days so long as that auto was within seventy-five miles of the U.S. border.<sup>145</sup> Maria was killed when the rental car that Miguel was driving was hit by an uninsured vehicle near Mexico City.<sup>146</sup> Allstate denied coverage for the accident, and Miguel sued it for breach of contract.<sup>147</sup> He acknowledged that the accident occurred more than seventy-five miles from the U.S. border, but he contended that Allstate's

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motorist.” (citing *Kuda v. Am. Family Mut. Ins. Co.*, 790 S.W.2d 464, 467 (Mo. 1990) (en banc)); *Amica Mut. Ins. Co. v. Willis*, 235 So. 3d 1041, 1043 (Fla. Dist. Ct. App. 2018) (“UM coverage was intended to enable an insured to receive the same recovery that would have been available had the tortfeasor been covered by an automobile liability policy that complied with the Financial Responsibility Law (FRL). . . . Stated another way, UM coverage is intended to provide the reciprocal of liability coverage.” (citations omitted)).

141. See *Davis v. Allstate Prop. & Cas. Ins. Co.*, 129 So. 3d 811, 815 (La. Ct. App. 2013) (observing that UM coverage follows the insured rather than the vehicle (citing *Howell v. Balboa Ins. Co.*, 564 So. 2d 298, 301–02 (La. 1990))); *Ferguson*, 134 F. Supp. 2d at 1163 (explaining that UM coverage is “personal to the insured” and, consequently, “an insured under a UM policy is entitled to recover UM insurance benefits even though he or she was injured while operating a vehicle not covered by the policy . . . or while occupying a vehicle not declared in the policy” (citations omitted))(first citing *Dawes v. First Ins. Co. of Haw.*, 883 P.2d 38, 44 (Haw. 1994); and then citing *Palisbo v. Hawaiian Ins. & Guar. Co.*, 547 P.2d 1350, 1354 (Haw. 1976)).

142. See, e.g., KAN. STAT. ANN. § 40-284(a) (2018) (requiring UM coverage); MO. REV. STAT. § 379.203.1 (2018) (mandating UM coverage).

143. See, e.g., CAL. INS. CODE § 11580.2(a)(1) (2015) (“The insurer and any named insured . . . may, by agreement in writing . . . (1) delete the provision covering damage caused by an uninsured motor vehicle completely, or (2) delete the coverage when a motor vehicle is operated by a natural person or persons designated by name, or (3) agree to provide the coverage in an amount less than that required by subdivision (m) but not less than the financial responsibility requirements specified in . . . the Vehicle Code.”); HAW. REV. STAT. § 431:10C-301(d)(2) (2018) (“An insurer shall offer the insured the opportunity to purchase uninsured motorist coverage . . . by offering . . . [t]he option to select uninsured motorist coverage and underinsured motorist coverage, whichever is applicable, up to but not greater than the bodily injury liability coverage limits in the insured’s policy.”).

144. 740 N.E.2d 1160, 1165 (Ill. App. Ct. 2000).

145. *Id.* at 1164 (quoting the Allstate policy).

146. *Id.* at 1162.

147. *Id.* at 1163.

territorial limitation was void because it violated Illinois public policy.<sup>148</sup> His argument hinged on the Illinois Insurance Code’s requirement that all auto policies provide UM coverage at the limits established for liability coverage by the Illinois Safety and Family Financial Responsibility Law.<sup>149</sup>

Allstate won summary judgment in the trial court, and Miguel appealed.<sup>150</sup> His theory of liability presented an issue of first impression for the *Mijes* court.<sup>151</sup> The court began its analysis by noting that the “overwhelming weight of authority holds [that] territorial limitations are valid if they apply equally to statutorily mandated uninsured motorist and liability coverages.”<sup>152</sup> Unfortunately for Miguel, the Illinois financial responsibility law never mentioned Mexico; in fact, it defined a statutorily mandated motor vehicle liability policy as one which provided coverage in the United States and Canada.<sup>153</sup>

The territorial limitation in the Allstate policy was located in the policy’s general provisions and applied to all coverages.<sup>154</sup> The UM coverage was therefore “coextensive with [the] liability coverage” as required by Illinois statutes.<sup>155</sup> Because Illinois statutes did not mandate liability coverage in Mexico, it did not matter that the Allstate policy provided only limited UM coverage for accidents occurring there.<sup>156</sup> Miguel’s public policy argument failed as a result, and the *Mijes* court affirmed summary judgment for Allstate.<sup>157</sup>

*State Farm Mutual Automobile Insurance Co. v. Marquez*<sup>158</sup> supplies the opposing perspective. In that case, Librada Marquez was injured when the car in which she was a passenger was struck by an uninsured motorist on a road between Juarez and Palomas, Mexico.<sup>159</sup> Marquez’s policy with State Farm expressly limited UM coverage to the United States, including its territories and possessions, and Canada.<sup>160</sup> In comparison, the policy’s

148. *Id.* at 1164.

149. *Id.* at 1164–65 (citing 215 ILL. COMP. STAT. 5/143a (1998)).

150. *Id.* at 1161.

151. *Id.* at 1164.

152. *Id.* (citing numerous cases from various jurisdictions).

153. *Id.* at 1165 (quoting 625 ILL. COMP. STAT. 5/7-317 (1998)).

154. *Id.* (citing *Milwaukee Guardian Ins., Inc. v. Taraska*, 602 N.E.2d 70, 72 (Ill. App. Ct. 1992)).

155. *Id.*

156. *Id.*

157. *Id.* (noting “valid reasons to recognize territorial limitations” on UM coverage).

158. *See generally* 28 P.3d 1132 (N.M. Ct. App. 2001).

159. *Id.* at 1133.

160. *Id.* (quoting the State Farm policy).

liability, medical payments, and physical damage coverages applied to accidents in Mexico within fifty miles of the U.S. border.<sup>161</sup> State Farm acknowledged that Marquez's accident occurred within fifty miles of the border, but it denied coverage based on the territorial limitation governing the policy's UM coverage.<sup>162</sup>

State Farm filed a declaratory judgment action and obtained summary judgment in the trial court.<sup>163</sup> The trial court rejected Marquez's argument in her cross-motion for summary judgment that New Mexico public policy demanded that liability and UM coverage be territorially coextensive.<sup>164</sup> Marquez appealed her loss to the New Mexico Court of Appeals.<sup>165</sup>

Marquez's appeal presented the court with the opportunity to answer a question left open in an earlier case, *Dominguez v. Dairyland Insurance Co.*, in which the court held that territorial limitations on UM coverage are valid when they apply to the policy as a whole.<sup>166</sup> In the *Marquez* case, however, the contested territorial limitation undoubtedly applied only to UM benefits.<sup>167</sup>

The *Marquez* court began its analysis with the language of the New Mexico UM statute, which provided:

No automobile liability policy insuring against loss resulting from liability imposed by law arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in New Mexico with respect to any motor vehicle registered or principally garaged in New Mexico unless coverage is provided therein or supplemental thereto in minimum limits . . . and such higher limits as may be desired by the insured, but up to the limits of liability specified in bodily injury and property damage liability provisions of the insured's policy, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles.<sup>168</sup>

The statute aims to restore injured policyholders to the position they would have occupied if the uninsured motorist instead had liability insurance.<sup>169</sup> Because the UM statute is remedial, courts interpret it liberally to promote its objectives.<sup>170</sup> "In light of these rules of statutory construction," the court concluded that the New Mexico legislature meant "for uninsured motorist coverage to apply in the same amounts and in the same territory

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161. *Id.* (quoting the territorial limitation in the State Farm policy).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *See generally* 942 P.2d 191 (N.M. Ct. App. 1997).

167. *Marquez*, 28 P.3d at 1132.

168. *Id.* at 1133 (emphasis omitted) (quoting N.M. STAT. ANN § 66-5-301 (1983)).

169. *Id.* at 1133-34 (citing *Chavez v. State Farm Mut. Auto. Ins. Co.*, 533 P.2d 100, 102 (N.M. 1975)).

170. *Id.* at 1134 (citing *Romero v. Dairyland Ins. Co.*, 803 P.2d 243, 245 (N.M. 1990)).

as a particular policy provides for liability coverage.”<sup>171</sup> Inasmuch as the UM statute was intended to protect an insured just as if the tortfeasor carried liability insurance, and that the amount of UM coverage depended on the amount of liability coverage, the court further concluded “that the legislature also intended that the geographical scope of uninsured motorist coverage depends on and must be equal to the scope of liability coverage.”<sup>172</sup>

In sum, the *Marquez* court found that New Mexico public policy required UM coverage to be “territorially coextensive with liability coverage.”<sup>173</sup> Because that was not the situation in this case, the UM territorial limitation was void.<sup>174</sup> As a result, the *Marquez* court reversed the district court order in favor of State Farm and remanded the case for further proceedings consistent with the opinion.<sup>175</sup> Quite simply, Marquez won.

#### IV. TERRITORIAL LIMITATIONS AND THE CREATION OF PERSONAL JURISDICTION OVER INSURERS

Finally, in addition to the coverage issues that territorial limitations create, these provisions may subject insurers to personal jurisdiction in courts that are seemingly outside the insurers’ spheres of operation. Indeed, insurers’ exposure to personal jurisdiction predicated on coverage territory provisions in their policies is a recurring source of controversy.

To explain, although states typically have long-arm statutes that govern when a nonresident defendant may be sued in the state, courts’ ability to exercise personal jurisdiction is nonetheless limited by the Fourteenth Amendment’s Due Process Clause.<sup>176</sup> In its canonical decision in *International*

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171. *Id.*

172. *Id.*

173. *Id.* at 1135.

174. *Id.*

175. *Id.* at 1136.

176. *See* *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1779 (2017) (observing that the Fourteenth Amendment limits state courts’ personal jurisdiction); *see also* *Trois v. Apple Tree Auction Ctr., Inc.*, 882 F.3d 485, 488 (5th Cir. 2018) (reciting that in a diversity case, the exercise of personal jurisdiction must satisfy both federal due process requirements and the state’s long-arm statute; where the long-arm statute “extends to the limits of federal constitutional due process, only one inquiry is required” (first citing *Paz v. Brush Engineered Materials, Inc.*, 445 F.3d 809, 812 (5th Cir. 2006); and then citing *Latshaw v. Johnston*, 167 F.3d 208, 211 (5th Cir. 1999)); *Brook v. McCormley*, 873 F.3d 549, 552 (7th Cir. 2017) (“As a procedural matter, federal courts look to state law in determining the bounds of their jurisdiction . . . . The Illinois long-arm statute permits the court to exercise jurisdiction to the full extent permitted by the Due Process Clause of the Fourteenth Amendment. . . . Thus, the state statutory and federal constitutional requirements

*Shoe Co. v. Washington*, the Supreme Court held that a court may exercise personal jurisdiction over a nonresident defendant where the defendant has “certain minimum contacts with [the state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>177</sup> A defendant has sufficient minimum contacts when its “conduct and connection with the forum [s]tate are such that [it] should reasonably anticipate being haled into court there.”<sup>178</sup> The existence of minimum contacts is a case- and fact-specific question.<sup>179</sup>

Once a defendant’s minimum contacts are established, the “court considers those contacts ‘in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice.’”<sup>180</sup> In evaluating whether the exercise of jurisdiction comports with notions of fair play and substantial justice—that is, whether it is reasonable<sup>181</sup>—courts consider

- (1) the burden on the defendant, (2) the forum state’s interest in resolving the dispute, (3) the plaintiff’s interest in receiving convenient and effective relief, (4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental social policies.<sup>182</sup>

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merge.” (citations omitted) (first citing FED. R. CIV. P. 4(k)(1)(A); then citing 735 ILL. COMP. STAT. 5/2-209(c) (2018); and then citing *Tamburo v. Dworkin*, 601 F.3d 693, 700 (7th Cir. 2010))).

177. 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

178. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

179. *TH Agric. & Nutrition, LLC v. Ace European Grp. Ltd.*, 488 F.3d 1282, 1287 (10th Cir. 2007) (quoting *Benton v. Cameco Corp.*, 375 F.3d 1070, 1076 (10th Cir. 2004)); *Baker v. LivaNova PLC*, 210 F. Supp. 3d 642, 647 (M.D. Pa. 2016) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485 (1985)).

180. *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 82 (2d Cir. 2018) (quoting *Licci v. Lebanese Canadian Bank*, 732 F.3d 161, 170 (2d Cir. 2013)); *see also Old Republic Ins. Co. v. Cont’l Motors, Inc.*, 877 F.3d 895, 908 (10th Cir. 2017) (“Even if a plaintiff has met its burden of establishing minimum contacts, ‘we must still inquire whether the exercise of personal jurisdiction would offend traditional notions of fair play and substantial justice.’” (quoting *Shrader v. Biddinger*, 633 F.3d 1235, 1240 (10th Cir. 2011))).

181. *See Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 331 (2d Cir. 2016) (explaining that the reasonableness inquiry asks “whether the assertion of personal jurisdiction over the defendant comports with ‘traditional notions of fair play and substantial justice’ [on the facts] of the particular case” (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014)); *TH Agriculture*, 488 F.3d at 1287 (stating that the fair play and substantial justice aspect of a personal jurisdiction inquiry pivots on “whether the exercise of personal jurisdiction is ‘reasonable’ under the circumstances” (quoting *OMI Holdings, Inc. v. Royal Ins. Co. of Can.*, 149 F.3d 1086, 1091 (10th Cir. 1998))).

182. *Old Republic*, 877 F.3d at 909 (quoting *Pro Axxess, Inc. v. Orlux Distrib., Inc.*, 428 F.3d 1270, 1279–80 (10th Cir. 2005)).



Chief among these factors is “the burden on the defendant.”<sup>183</sup>

Continuing, personal jurisdiction may be either general or specific.<sup>184</sup> For a corporation, “the paradigm forum for the exercise of general jurisdiction” is the place in which it “is fairly regarded as at home.”<sup>185</sup> Specific jurisdiction is different; for a court to exercise specific jurisdiction over a nonresident defendant, the litigation must arise out of, or relate to, the defendant’s contacts with the forum state.<sup>186</sup> A court’s specific jurisdiction is therefore restricted to the adjudication of issues that are connected to or derived from “the very controversy that establishes jurisdiction.”<sup>187</sup> Absent such linkage, specific jurisdiction is lacking regardless of the defendant’s unrelated activities in the state.<sup>188</sup>

Where an insurance policy includes a state within its coverage territory, courts frequently hold that the insurer purposely availed itself of the benefits and privileges of conducting business in the state and thus established the minimum contacts necessary for specific personal jurisdiction.<sup>189</sup> The

183. *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1780 (2017) (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

184. *Id.* at 1779–80; *In re DePuy Orthopaedics, Inc.*, 888 F.3d 753, 778 (5th Cir. 2018).

185. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011).

186. *Bristol-Myers*, 137 S. Ct. at 1780 (quoting *Daimler*, 571 U.S. at 127).

187. *Id.* (quoting *Goodyear*, 564 U.S. at 919).

188. *Id.* at 1781 (“For specific jurisdiction, a defendant’s general connections with the forum are not enough.”).

189. *See, e.g.*, *TH Agric. & Nutrition, LLC v. Ace European Grp. Ltd.*, 488 F.3d 1282, 1290 (10th Cir. 2007) (“[I]nsurers establish minimum contacts with a forum state by *affirmatively* choosing to include the forum state in the territory of coverage.”); *Ferrell v. W. Bend Mut. Ins. Co.*, 393 F.3d 786, 791 (8th Cir. 2005) (holding that the nationwide coverage territory clause in the West Bend policy established sufficient minimum contacts with Arkansas to satisfy due process); *McGow v. McCurry*, 412 F.3d 1207, 1215 (11th Cir. 2005) (agreeing with other courts that an insurer’s coverage territory clause constitutes purposeful availment for personal jurisdiction reasons); *Payne v. Motorists’ Mut. Ins. Cos.*, 4 F.3d 452, 456 (6th Cir. 1993) (“The fact that Motorists’ chose to provide coverage for all fifty states—indeed, such coverage is almost certainly the only kind of marketable auto insurance—constitutes purposeful availment of any individual state’s forum.”); *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 913 (9th Cir. 1990) (reasoning that the defendant insurance company “satisfied the purposeful availment requirement [because its] coverage extend[ed] into Montana and an insured event resulted in litigation there”); *Evanston Ins. Co. v. W. Cmty. Ins. Co.*, 13 F. Supp. 3d 1064, 1070 (D. Nev. 2014) (reasoning that by defining its coverage territory as the “United States of America (including its territories and possessions),” Western Community Insurance purposely availed itself of the benefits of conducting business in Nevada and ultimately was subject to personal jurisdiction there); *Forshaw Indus., Inc. v. Insurco, Ltd.*, 2 F. Supp. 3d 772, 782 (W.D.N.C. 2014) (“A foreign insurance company’s promise to defend its

question then becomes whether the court's exercise of personal jurisdiction over the insurer would "offend traditional notions of fair play and substantial justice"<sup>190</sup>—that is, whether it is reasonable.<sup>191</sup> As with the determination of minimum contacts, this is a case- and fact-specific inquiry.<sup>192</sup>

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policyholders from any claim arising from a loss or accident within the forum state is a sufficient contact to support jurisdiction."); *Melvin v. Farm Bureau Prop. & Cas. Ins. Co.*, No. CIV-14-927-R, 2014 WL 12730319, at \*2–3 (W.D. Okla. Nov. 5, 2014) (reasoning that the insurer availed itself of the privilege of conducting business in Oklahoma by including the state in its coverage territory); *Robinson Corp. v. Auto-Owners Ins. Co.*, 304 F. Supp. 2d 1232, 1237–39 (D. Haw. 2003) (finding that the insurer purposefully availed itself of Hawaii and that the litigation would not have arisen but for the insurer's contacts with Hawaii); *Samelko v. Kingstone Ins. Co.*, 184 A.3d 741, 754 (Conn. 2018) (finding personal jurisdiction in Connecticut where the policy provided nationwide coverage and obligated the insurer to defend and indemnify the insured); *Auto Owners Ins. Co. v. Consumers Ins. USA, Inc.*, 323 S.W.3d 781, 784–86 (Ky. Ct. App. 2010) (concluding that the defendant subjected itself to personal jurisdiction in Kentucky through its coverage territory provision); *State Farm Mut. Auto. Ins. Co. v. Tenn. Farmers Mut. Ins. Co.*, 645 N.W.2d 169, 174 (Minn. Ct. App. 2002) (reasoning that Tennessee Farmers' coverage territory provision provided minimum contacts). *But see* *Maxitrate Tratamento Termico E Controles v. Super Sys., Inc.*, No. 12-3807, 2015 WL 3407370, at \*3 (6th Cir. May 28, 2015) (concluding that a Brazilian insurer's decision to insure property in Brazil was not purposeful activity in Ohio even though the insured did considerable business in Ohio); *Lexington Ins. Co. v. Zurich Ins. (Taiwan) Ltd.*, 286 F. Supp. 3d 982, 990 (W.D. Wis. 2017) (declining to exercise personal jurisdiction; although the insurer might have expected to have to defend its insured in Wisconsin as a result of its worldwide territorial coverage, it would not have expected to litigate coverage in the state); *Odeh v. Auto Club Ins. Ass'n*, No. 1:09 CV 1114, 2010 WL 319742, at \*7 (N.D. Ohio Jan. 20, 2010) (finding no personal jurisdiction in Ohio where the accident occurred in Michigan, notwithstanding a nationwide territory of coverage clause); *Meyer v. Auto Club Ins. Ass'n*, 492 So. 2d 1314, 1315–16 (Fla. 1986) (concluding that the insurer's identification of its coverage territory to include Florida did not support personal jurisdiction there); *Waste Mgmt., Inc. v. Admiral Ins. Co.*, 649 A.2d 379, 389 (N.J. Super. Ct. App. Div. 1994) ("[I]n the absence of a forum-related event, a 'territory of coverage' clause alone does not create a sufficient basis on which to rest jurisdiction in this state.>").

190. *Int'l Shoe v. Wash.*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

191. *See, e.g., Evanston Ins.*, 13 F. Supp. 3d at 1071–72 (concluding that the defending insurer failed to carry its burden of rebutting the reasonableness of personal jurisdiction in Nevada); *Melvin*, 2014 WL 12730319, at \*3–5 (determining that the insurer had not shown that the court's exercise of personal jurisdiction was unreasonable under a five-factor test); *Robinson Corp.*, 304 F. Supp. 2d 1239–42 (applying a seven-factor test in deciding that specific personal jurisdiction was reasonable); *State Farm*, 645 N.W.2d at 174 (citing a five-factor test in concluding that the exercise of personal jurisdiction was reasonable). *But see, e.g., Satterfield v. Gov't Emps. Ins. Co.*, 287 F. Supp. 3d 1285, 1294–96 (W.D. Okla. 2018) (declining to exercise personal jurisdiction on this basis); *Delta Stone Prods. v. Xpertfreight*, No. 2:16-cv-369-CW-EJF, 2017 WL 3491845, at \*6–9 (D. Utah Aug. 14, 2017) (exercising personal jurisdiction over the insurer would be unreasonable under the circumstances).

192. *TH Agriculture*, 488 F.3d at 1292.

*TH Agriculture & Nutrition, LLC v. Ace European Group Ltd.*, which was decided by the Tenth Circuit in 2007, is currently the leading case on personal jurisdiction arising out of an insurer's coverage territory provision.<sup>193</sup> Plaintiff T.H. Agriculture & Nutrition, LLC (THAN) was a Delaware liability company with its principal place of business in Kansas.<sup>194</sup> THAN was a second-tier subsidiary of a Dutch corporation, Koninklijke Philips Electronics N.V. (Philips).<sup>195</sup> The defendants were thirteen European insurance companies, which issued primary and excess liability insurance policies to Philips as part of its "World-Wide Liability Insurance Programme" (Programme).<sup>196</sup> A Dutch insurance broker placed the Programme policies with the participating insurers, and the insurers "issued the policies to Philips in the Netherlands."<sup>197</sup> The Programme afforded "worldwide . . . coverage to Philips . . . and its unnamed direct and indirect subsidiaries."<sup>198</sup> The Programme insured THAN as one of Philips's indirect subsidiaries.<sup>199</sup>

The insurers reserved the right to control any litigation against the insureds that their policies covered, prevented the insureds from settling covered claims without the insurers' consent, and granted the insurers the right to use the insureds' names in pursuing litigation for the insurers' benefit.<sup>200</sup> The policies also included a provision which provided that any dispute between the parties would be litigated in the Netherlands, and Dutch law would control the outcome.<sup>201</sup>

For years, THAN's predecessor company, Thompson Hayward, which also was a Philips subsidiary, distributed asbestos.<sup>202</sup> Asbestos is a well-known carcinogen.<sup>203</sup> THAN's primary function was to satisfy Thompson

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193. *See generally id.*

194. *Id.* at 1285.

195. *Id.* (explaining that THAN was a subsidiary of Philips Electronics North America Corp., which was, in turn, a subsidiary of Philips).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 1285–86.

201. *Id.* at 1286.

202. *Id.*

203. *See Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1207 (5th Cir. 1991) ("Asbestos is a toxic material, and occupational exposure to asbestos dust can result in mesothelioma, asbestosis, and lung cancer."); *Decker Plastics, Inc. v. W. Bend Mut. Ins. Co.*, No. 1:14-cv-15-CFB, 2017 WL 2196898, at \*4 (S.D. Iowa Jan. 12, 2017) ("Asbestos is a carcinogen that is subject to significant state and federal regulation." (citing *U.S. Fid. & Guar. Co. v. Wilkin Insulation Co.*, 578 N.E.2d 926, 929 (Ill. 1991))).

Hayward's existing liabilities and remediate its environmental liabilities.<sup>204</sup> As a result of Thompson Hayward's toxic business practices, THAN had been named as a defendant in more than 14,000 bodily injury and wrongful death claims in state and federal courts across the country.<sup>205</sup> One such claim was filed in Kansas, that is, THAN's principal place of business.<sup>206</sup>

The Programme insurers contended that Philips had not disclosed its asbestos liabilities during their negotiations, and all but one of them joined in a declaratory judgment (DJ) action in the Netherlands in an effort to rescind their policies.<sup>207</sup> When the insurance companies further declined to defend or indemnify THAN in connection with the Kansas asbestos claim, THAN sued them for breach of contract in the District of Kansas.<sup>208</sup> The district court held that the exercise of personal jurisdiction over the insurers would be unreasonable.<sup>209</sup> THAN appealed that decision.

The *TH Agriculture* court explained that its jurisdictional inquiry required it to ask whether the insurers had minimum contacts with Kansas, and, if so, whether the district court's assertion of personal jurisdiction over them would "offend 'traditional notions of fair play and substantial justice.'"<sup>210</sup> The fair play and substantial justice component of the inquiry pivots on whether the exercise of personal jurisdiction is reasonable in a particular case.<sup>211</sup> In any event, the two components are interrelated, so, depending on the strength of a defendant's minimum contacts with the forum state, the reasonableness component "may have a greater or lesser effect on the outcome of the due process inquiry."<sup>212</sup> In other words, the due process reasonableness "inquiry evokes a sliding scale: the weaker the plaintiff's showing on minimum contacts, the less the defendant need show in terms of unreasonableness to defeat jurisdiction."<sup>213</sup>

In considering whether the insurers had minimum contacts with Kansas by virtue of their purposeful direction of their activities at Kansas, such that they should reasonably expect to be haled into a Kansas court, the court noted that the insurance policies on which THAN predicated its

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204. *TH Agriculture*, 488 F.3d at 1286.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *TH Agric. & Nutrition, LLC v. Ace European Grp. Ltd.*, 416 F. Supp. 2d 1054, 1068–73 (D. Kan. 2006), *aff'd*, 488 F.3d 1282 (10th Cir. 2007).

210. *TH Agriculture*, 488 F.3d at 1287 (quoting *OMI Holdings, Inc. v. Royal Ins. Co. of Can.*, 149 F.3d 1086, 1091 (10th Cir. 1998)).

211. *Id.* (quoting *OMI Holdings*, 149 F.3d at 1091).

212. *Id.* (quoting *OMI Holdings*, 149 F.3d at 1091–92).

213. *Id.* (quoting *OMI Holdings*, 149 F.3d at 1092).

minimum contacts argument had to have “a substantial connection with Kansas”;<sup>214</sup> the mere fact that THAN had contracts with the insurers was not enough.<sup>215</sup> Given that all the dealings between the insurers and Philips—and thus THAN—took place in Europe, the only possible connection between the insurers and THAN came from the worldwide coverage territory provisions in the insurance policies.<sup>216</sup> As the court would go on to explain, however, “the issuance of an insurance policy that” provided worldwide coverage and granted the insurer “an option to defend the insured [sufficed] to establish minimum contacts with” Kansas.<sup>217</sup>

The court reasoned that the policy provisions giving the insurers control of defense and settlement and empowering them to litigate in the insureds’ names plainly contemplated the insurers’ participation in foreign litigation.<sup>218</sup> Although the foreseeability of litigation in a given forum, standing alone, is normally insufficient to confer personal jurisdiction over a nonresident defendant, it may be a factor to consider in some cases.<sup>219</sup> In fact, “[f]orseeability that an event may occur over which a defendant has no control is distinct from [the] foreseeability of litigation based on the defendant’s own actions.”<sup>220</sup> More particularly:

When an insurer includes a broad territory-of-coverage clause in an insurance policy, the foreseeability of litigation in foreign states is based on the insurer’s own actions. . . . Although litigation involving the insurer’s participation may be merely foreseeable, the fact that the insurer purposefully bargains and contracts for that participation creates contacts with the forum states within the scope of the policy’s territory of coverage. In other words, the insurer’s “willingness to be called into court in the foreign forum” is “an express feature of its policy.”

. . . .

We acknowledge that we have expressed concern that, when courts focus on an insurance policy’s scope of coverage, they base jurisdiction on what a defendant-insurer does *not* do, that is, its failure to exclude the forum state from coverage. . . . We are not, however, suggesting that insurers establish minimum contacts with a forum state by failing to exclude it from the covered territory.

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214. *Id.* at 1288 (quoting *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

215. *See id.* at 1287 (“An individual’s contract with an out-of-state party cannot, standing alone, establish sufficient minimum contacts with the forum state.” (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985))).

216. *See id.* at 1288.

217. *Id.*

218. *Id.* at 1289.

219. *Id.* at 1289–90 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295–98 (1980)).

220. *Id.* at 1290 (citing *World-Wide Volkswagen*, 444 U.S. at 297).

Rather, insurers establish minimum contacts with a forum state by *affirmatively* choosing to include the forum state in the territory of coverage. That is, insurers quite clearly avail themselves of the privilege of conducting business in a forum state when that state is included in an insurance policy's territory of coverage.<sup>221</sup>

Here, the insurers' minimum contacts with Kansas were obviously based on their affirmative conduct: they included the state in their policies' coverage territory.<sup>222</sup> This was no accident; the insurers consciously chose their policies' scope of coverage.<sup>223</sup> In sum, by reserving the right to defend and indemnify Philips and its subsidiaries within their policies' coverage territory, the insurers had "purposefully availed themselves of the privileges and benefits of conducting business in any forum state within" that territory.<sup>224</sup> Consequently, the insurers had established minimum contacts with Kansas.<sup>225</sup> At the same time, those contacts were "relatively weak."<sup>226</sup>

The court easily found that THAN's claims arose out of the insurers' contacts with Kansas, as was additionally required for specific jurisdiction.<sup>227</sup> After all, THAN was seeking coverage under insurance policies that included Kansas in the coverage territory and that gave the insurers the right to control litigation involving covered claims, and at least one of the underlying asbestos claims for which THAN sought coverage was filed in Kansas.<sup>228</sup>

The *TH Agriculture* court next examined whether it would be reasonable for the district court to assume personal jurisdiction over the insurers.<sup>229</sup> Because, as noted earlier, the insurers' minimum contacts with Kansas were weak, they did not have to "make a strong showing of unreasonableness."<sup>230</sup> Five factors would be in play: (1) the burden imposed on the insurers by litigating in Kansas; (2) Kansas's interest in adjudicating the dispute; (3) THAN's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in efficiently resolving the dispute; and

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221. *Id.* (citations omitted) (first quoting *Rossman v. State Farm Mut. Auto. Ins. Co.*, 832 F.3d 282, 286 (4th Cir. 1987); and then citing *OMI Holdings, Inc. v. Royal Ins. Co. of Can.*, 149 F.3d 1086, 1094 (10th Cir. 1998)).

222. *Id.* at 1291.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* ("Sole reliance on the territory of coverage clause creates contacts which are qualitatively low on the due process scale." (citing *OMI Holdings*, 149 F.3d at 1095)).

227. *See id.* at 1291–92 (citing *OMI Holdings*, 149 F.3d at 1095).

228. *Id.*

229. *Id.* at 1292.

230. *Id.*

(5) the states' shared interest in furthering fundamental substantive social policies.<sup>231</sup>

First, with respect to the burden on the insurers, it was certainly true that because they were located in Europe, litigating a case in Kansas would burden them to some degree.<sup>232</sup> As THAN pointed out, however, modern means of communication and transportation have lessened the burden of litigating in a remote forum.<sup>233</sup> Plus, as the district court had noted, the insurers were global companies that were routinely involved in litigation across the United States.<sup>234</sup> But, although modern communication and transportation advances would lessen the insurers' burden in litigating in Kansas, they were not so weighty as "to tip the scales in *favor* of exercising jurisdiction."<sup>235</sup> This factor was a draw.<sup>236</sup>

The second factor—the forum state's interest in adjudicating the dispute—was also neutral.<sup>237</sup> Although Kansas had an interest in seeing that its citizens received insurance proceeds for which they bargained, this interest was offset by the fact that Dutch law would control the resolution of the parties' dispute.<sup>238</sup>

With respect to the third factor, that being THAN's interest in convenient and effective relief, THAN could obtain such relief in the Dutch DJ action.<sup>239</sup> Indeed, THAN's breach of contract action and the Dutch DJ action involved the same issues.<sup>240</sup> For that matter, "THAN [wa]s less likely to receive convenient and effective relief if it litigate[d] the same" issues in different forums because of the potential for inconsistent results.<sup>241</sup> Additionally, there was no sign that THAN's burden of litigating its breach of contract case in the Netherlands would be "so overwhelming as to practically foreclose pursuit of the lawsuit."<sup>242</sup> Although THAN argued that the vast majority of the documents and witnesses necessary to try its

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231. *Id.* (quoting *Intercon, Inc. v. Bell Atl. Internet Sols., Inc.*, 205 F.3d 1244, 1249 (10th Cir. 2000)).

232. *Id.*

233. *Id.* at 1293 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)).

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 1293–94.

238. *Id.* (citing *Benton v. Cameco Corp.*, 375 F.3d 1070, 1079 (10th Cir. 2004)).

239. *Id.* at 1294.

240. *Id.*

241. *Id.* at 1295.

242. *Id.*

breach of contract case were in Kansas, in fact, many key documents and witnesses were in the Netherlands.<sup>243</sup> Long story short, this factor cut against the recognition of personal jurisdiction in Kansas.<sup>244</sup>

The court next evaluated the fourth factor, which was the interstate judicial system's interest in efficiently resolving the dispute.<sup>245</sup> The outcome of this inquiry rests on the location of witnesses, where the underlying wrong occurred, what forum's substantive law controls the dispute, and whether the exercise of personal jurisdiction is required to avoid piecemeal litigation.<sup>246</sup>

THAN repeated the same claims it made in arguing that Kansas provided the best forum for it to obtain convenient and effective relief, and the court similarly shot them down.<sup>247</sup> Furthermore, at least two other considerations compelled the conclusion that Kansas was not the proper forum for this case. First, Dutch law would govern the dispute.<sup>248</sup> Second, in light of the pending DJ action in the Netherlands, litigating THAN's breach of contract case in Kansas would actually create or further piecemeal litigation rather than avoiding it.<sup>249</sup> On balance, then, the fourth factor weighed against vesting jurisdiction in Kansas.<sup>250</sup>

Finally, the court focused on the fifth factor, which required it to determine whether the exercise of personal jurisdiction by Kansas would affect other states' or countries' substantive social policy interests.<sup>251</sup> The court concluded that exercising personal jurisdiction in Kansas would intrude on Dutch sovereignty.<sup>252</sup> In doing so, the court analogized to an earlier case involving Canadian insurers:

Exercising personal jurisdiction in Kansas would affect the policy interests of Canada. Defendants are Canadian corporations. They entered into insurance contracts in Canada, with Plaintiff's Canadian parent company. The contracts are governed by Canadian law. Moreover, when jurisdiction is exercised over a foreign citizen regarding a contract entered into in the foreign country, the country's sovereign interest in interpreting its laws and resolving disputes involving its citizens is implicated.<sup>253</sup>

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243. *Id.* at 1295–96.

244. *Id.* at 1296.

245. *Id.*

246. *Id.* (quoting *OMI Holdings, Inc. v. Royal Ins. Co. of Can.*, 149 F.3d 1086, 1097 (10th Cir. 1998)).

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 1297.

251. *Id.* (quoting *OMI Holdings*, 149 F.3d at 1097).

252. *Id.*

253. *Id.* (quoting *OMI Holdings*, 149 F.3d at 1098).



Although the insurance companies in *TH Agriculture* opted to deal with THAN by insuring Philips's subsidiaries as part of the Programme, five of the carriers were domiciled in the Netherlands, none of the remaining insurers were based in Kansas, and Dutch law would govern the case.<sup>254</sup> Overall, the fifth factor counseled against exercising jurisdiction in Kansas.<sup>255</sup>

In conclusion, three of the five reasonableness factors weighed against asserting personal jurisdiction over the insurers in Kansas, and the remaining two factors were neutral.<sup>256</sup> The Tenth Circuit accordingly decided that exercising jurisdiction over the insurers would offend “traditional notions of fair play and substantial justice.”<sup>257</sup> It affirmed the district court’s ruling and dismissed THAN’s appeal.<sup>258</sup>

There should be little doubt that the *TH Agriculture* court reached the right result, but it is worth asking whether it sufficiently analyzed the first reasonableness factor, meaning the burden imposed on the insurers by requiring them to litigate in Kansas. In concluding that, on balance, this factor favored neither side, the court did not noticeably consider the fact that key documents and witnesses were located in Europe,<sup>259</sup> it merely observed that litigating in Kansas would subject the insurers to “some burden.”<sup>260</sup> Nor did the court consider the importance of Dutch law and Dutch jurisdiction in connection with this factor—although it did weigh them in the insurers’ favor later.<sup>261</sup> In fact, while THAN felt the effect of the insurers’ coverage denial in Kansas, its breach of contract case for practical purposes rested in the Netherlands or elsewhere in Europe; that is, where the great majority of the critical documents and witnesses necessarily had to be. The modern communication and travel options that THAN argued lightened the burden of producing those documents or making those witnesses available for deposition or trial still come at a cost, much of which would have been borne by the insurers.<sup>262</sup> The importance of Dutch

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254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 1297–98.

258. *Id.* at 1298.

259. *See id.* at 1292–93, 1295–96 (analyzing the burden on the insurers and discussing the locations of relevant documents and witnesses).

260. *Id.* at 1292.

261. *See id.* at 1292–97.

262. *But see* *Barranco v. 3D Sys. Corp.*, 6 F. Supp. 3d 1068, 1083 (D. Haw. 2014) (requiring inconvenience to a defendant “so great as to constitute a deprivation of due process” to defeat personal jurisdiction and noting the improvements in communication

law and jurisdiction cannot be overstated inasmuch as THAN was a subsidiary of a Dutch parent, Philips, and obtained its insurance through Philips at no expense to itself and through no Kansas connection.<sup>263</sup>

Why is getting the burden analysis right so essential? Because now, perhaps more than ever, the primary concern in personal jurisdiction analysis is the burden on the defendant.<sup>264</sup> And, while assessing the burden on a defendant “obviously requires a court to consider the practical problems resulting from litigating in the forum, . . . it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question.”<sup>265</sup>

## V. CONCLUSION

In the current global environment, territorial limitations on coverage remain an important condition in insurance policies. At the same time, these provisions often escape insureds’ attention until it is too late. They may also ambush insurers, which periodically become locked in jurisdictional struggles in states that seemingly have little connection to their normal business operations or which bear little relation to the risks they thought they were assuming. For courts, the dearth of coverage territory case law in many jurisdictions may make analyzing related issues a challenge. In short, this interesting but frequently overlooked or underappreciated aspect of insurance law potentially tests everyone concerned.

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and transportation that lighten any potential burden on defendants attributable to litigation in a remote jurisdiction (first quoting *Panavision Int’l, LP v. Toeppen*, 141 F.3d 1316, 1323 (9th Cir. 1998); and then quoting *Kukui Gardens Corp. v. Holco Capital Grp., Inc.*, 664 F. Supp. 2d 1103, 1116 (D. Haw. 2008))).

263. *TH Agriculture*, 488 F.3d at 1288.

264. *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1780 (2017) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

265. *Id.*