Is There Insurance Coverage for Lawsuits Against the Firearm Industry?

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I. Introduction

Within the past several years, local governments, plaintiffs, and non-profit organizations have unleashed a major litigation assault upon the firearm industry seeking to impose liability upon the industry for the increasing number of shooting injuries. While it is still too early to tell whether the gun industry will fend off this assault, early victories for the assailants have slowly come undone at the appellate level.[1] What is known, however, is that the firearm industry has turned to its insurers to pick up the tab for its defense and to indemnify it for any amounts that it might become obligated to pay. As a result of the numerous underlying suits against the firearm industry, issues arise concerning the availability of insurance.

This article examines these issues in an attempt to determine whether insurance coverage is available to the firearm industry for the recent wave of lawsuits. We conclude that insurers have potentially significant defenses to demands for such coverage, several of which already have been applied by courts to bar coverage.

II. Lawsuits Against the Gun Industry

A. *Government Lawsuits*

As of August 1, 2001, at least thirty-two municipalities and one state attorney general filed lawsuits against the firearms industry, alleging public nuisance, negligent distribution of their products, and production of products with inadequate safety systems. These municipalities include: Atlanta, GA; Boston, MA; Bridgeport, CT; Camden City, NJ; Camden County, NJ; Chicago, IL; Cin-

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[1] Merrill v. Navegar, 89 Cal. Rptr. 2d 146 (Ct. App. 1999), *rev'd and superceded*, 28 P.3d 116 (Cal. 2001); Hamilton v. Beretta, 96 N.Y.2d 222 (2001).

cinnati, OH; Cleveland, OH; Detroit, MI; Gary, IN; Los Angeles City, CA; Los Angeles County, CA; Miami-Dade County, FL; Newark, NJ; New Orleans, LA; New York, NY; Philadelphia, PA; San Francisco, CA; St. Louis, MO; Wayne County, MI; and Wilmington, DE. New York is the only state to have filed such a suit. The lawsuits are in various phases of litigation, and some have even been consolidated. To date, eight of the lawsuits have been dismissed and/or are on appeal, including Bridgeport, Camden County, Chicago, Cincinnati, Gary, Miami-Dade County, New Orleans, and Philadelphia, while seven others have survived or partially survived the initial threshold motions to dismiss, including Atlanta, Boston, California, Cleveland, Detroit/Wayne County, and Wilmington.

1. General Allegations and Theories of Recovery

Historically, the gun industry has succeeded in defeating liability for shootings by criminals and other unauthorized users.[2] As a result, the latest gun lawsuits allege new theories of liability against gun manufacturers and distributors: promotion of an underground gun market for criminals, failure to prevent shootings by unauthorized gun users, and false and deceptive advertising about the safety benefits of guns.

a. Promotion of an Underground Gun Market for Criminals

Several recent lawsuits attempt to impose liability on the gun industry by focusing on the industry's marketing and distribution practices. These lawsuits allege that manufacturers and distributors market and distribute guns in a manner that generates an underground market for firearms in which criminals and other unauthorized users have easy access to guns.[3]

New York, for example, has brought a public nuisance suit against gun manufacturers, distributors, and dealers, alleging that the defendants facilitate the entry of guns into New York.[4] New York alleges that gun manufacturers knowingly oversupply the New York gun market, knowing that the oversupply will find its way into the hands of criminals.[5]

New York does not seek to recover damages. Rather, the state seeks injunctive relief in the form of, among other things, an order requiring the firearm industry to abate the public nuisance that it allegedly created.[6]

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[2] *See, e.g.*, McCarthy v. Olin Corp., 119 F.3d 148 (2d Cir. 1997); First Commercial Trust Co. v. Lorcin Eng'g, Inc., 900 S.W.2d 202 (Ark. 1995); Linton v. Smith & Wesson, 469 N.E.2d 339 (Ill. App. Ct. 1984); Buczkowski v. McKay, 490 N.W.2d 330 (Mich. 1992); Knott v. Liberty Jewelry & Loan, Inc., 748 P.2d 661 (Wash. Ct. App. 1988).

[3] Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 808 (E.D.N.Y. 1999), *related proceeding sub nom.*, Hamilton v. Beretta, 95 N.Y.2d 878 (2000), *certified questions answered*, 96 N.Y.2d 222 (2001).

[4] Complaint at 2, State v. Sturm, Ruger & Co., Inc. (N.Y. Sup. Ct. 2000) [hereinafter New York State Complaint]. The improper marketing theory has been asserted in lawsuits by several cities, including Boston, Chicago, Cincinnati, San Francisco, and Wayne County, Michigan.

[5] *Id.* at 3-4.

[6] *Id.* at 19.

This marketing liability theory achieved momentary success in *Hamilton v. Accu-Tek*,[7] a New York lawsuit brought by several shooting victims. In February 1999, the jury in *Hamilton* found that three gun manufacturers were liable for injuries suffered by a sixteen-year old shooting victim and awarded $4 million in damages. Accepting the plaintiffs' negligent marketing theory, the jury rejected the gun manufacturers' contention that the sole proximate cause of the shooting was the criminal conduct of the shooter.[8]

Judge Weinstein, the trial court judge, denied the gun manufacturers' motions for judgment as a matter of law notwithstanding the jury's verdict. In upholding the jury's verdict, Judge Weinstein held that gun manufacturers have a duty to use reasonable care to reduce the possibility that handguns will fall into the hands of criminals and juveniles.[9]

Judge Weinstein further held that sufficient evidence existed to show that gun manufacturers breached this duty. According to Judge Weinstein, the plaintiffs offered ample evidence that gun manufacturers knew about the alleged diversion of guns to the illicit underground market and that gun manufacturers failed to curb this diversion.[10] The plaintiffs alleged the following methods of diversion:

- "Straw purchasers" make multiple gun purchases for individuals who are not legally entitled to possess guns.
- Falsification of gun transaction records that are required by the United States Bureau of Alcohol, Tobacco and Firearms.
- Trafficking of guns from states with less restrictive gun control laws to states with more restrictive gun control laws.[11]

The plaintiffs alleged that the manufacturers failed to exercise control over the marketing and distribution of guns so as to eliminate the flow of guns into the illicit underground market. Plaintiffs contended that manufacturers could have taken the following steps to curb the flow of guns to criminals:

- Analyze gun crime trace reports and cut off the supply of guns to distributors who disproportionately serve as sources of guns used in crimes;
- Supply guns only to dealers who operate from legitimate retail outlets; and
- Prohibit the sale of guns at gun shows, where gun sales allegedly are unrecorded and unsupervised.[12]

Judge Weinstein also held that liability could be apportioned among the negligent gun manufacturers based on their respective market shares.[13]

On April 26, 2001, however, the New York State Court of Appeals effectively reversed the trial court when it answered in the negative two questions certified to it by the Second Circuit Court of Appeals.[14] The New York State

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[7] 62 F. Supp. 2d 802.
[8] *Id.* at 808-13.
[9] *Id.* at 825.
[10] *Id.* at 825-33.
[11] *Id.* at 826-31.
[12] *Id.* at 831.
[13] *Id.* at 843-47.
[14] Hamilton v. Beretta, 96 N.Y.2d 222 (2001).

Court of Appeals concluded that the defendant gun manufacturers did not owe the plaintiffs a duty to exercise reasonable care in the marketing or distribution of their guns.[15] As a result, the court concluded that the manufacturers could not be held liable for the way people ultimately acquire and use their guns.[16]

b. Failure to Prevent Shootings by Unauthorized Gun Users

New Orleans and several other cities have sued gun manufacturers based on a defective design theory.[17] They claim that gun manufacturers have failed to incorporate personalized locking devices into guns, even though such alleged technology is currently available. The cities claim that this technology will prevent guns from being fired by unauthorized users, such as criminals, children, and mentally-unstable persons.[18]

Cities also allege that gun manufacturers have failed to incorporate technology that would prevent the inadvertent firing of a gun. They allege that manufacturers have failed to install a "chamber loaded indicator" on the gun, which would warn a user when a bullet is in the gun's firing chamber.[19] They also allege that manufacturers have failed to install a "magazine disconnect safety" that would prevent a gun from being mistakenly fired when the ammunition magazine is removed from the gun.[20]

The cities claim that the failure to incorporate this alleged safety technology has resulted in numerous shootings. They seek recovery of expenditures for police, medical, and emergency services, as well as injunctive relief.

c. False Advertising About Guns and Self-Defense

Some recent gun lawsuits contend that gun manufacturers have engaged in false and deceptive advertising about the safety benefits of guns.

San Francisco, for example, alleges that gun manufacturers "have knowingly, purposefully and intentionally misled, deceived and confused members of the general public in California regarding the safety of firearms and the need for firearms within the home."[21] San Francisco alleges that gun manufacturers "have falsely and deceptively claimed . . . that the ownership and possession of firearms in the home increases one's security," even though, according to the City, research allegedly shows the opposite.[22] San Francisco claims that guns purchased for home protection have resulted in "a substantial number of deaths and injuries."[23]

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[15] *Id.* at 240.

[16] *Id.*

[17] The defective design theory has been asserted in lawsuits by several cities, including Atlanta, Boston, Cincinnati, Miami, New Orleans, and San Francisco. As with certain other of the municipal lawsuits, certain of the suits asserting the defective design theory have been dismissed, such as the City of New Orleans suit, which was dismissed on April 3, 2001.

[18] *See, e.g.*, Petition at 6-8, Morial v. Smith & Wesson Corp. (La. Civ. Dist. Ct. 1998) (No. 98-18578) [hereinafter City of New Orleans Petition].

[19] *See, e.g.*, Complaint at 23-25, People v. Arcadia Machine & Tool, Inc. (Cal. Super. Ct. 1999) (No. 303573) [hereinafter City of San Francisco Complaint].

[20] *Id.*

[21] *Id.* at 28.

[22] *Id* at 27.

[23] *Id.* at 28.

B. *The NAACP and NSCIA*

Two public interest groups, the National Association for the Advancement of Colored People ("NAACP") and the National Spinal Cord Injury Association ("NSCIA"), also have brought suit against the firearm industry. Like many of the Municipal Complaints described above, the NAACP/NSCIA Complaint alleges that the firearm industry created and continues to maintain an allegedly illegal secondary market for handguns. The NAACP/NSCIA Complaint requests injunctive relief in the form of an order directing that each firearm industry defendant establish, implement, and enforce various mandatory safety requirements, such as refraining from sales to non-store front and uninsured retailers or retailers who engage in making multiple sales of handguns to the same purchaser, and other similar requirements. The only monetary demand in the NAACP/NSCIA lawsuit is a request for an order requiring the industry to institute and contribute to a fund for the education, supervision, and regulation of approximately 16;000 gun dealers. Like many of the municipal Complaints, the NAACP and NSCIA do not seek compensatory relief. In fact, the NAACP/NSCIA Complaint explicitly states that it is not requesting legal damages.

C. *Victims of Gun Violence*

Actual victims of handgun violence and their survivors also have brought suit against the firearm industry. Unlike the suits described above, however, these lawsuits seek more traditional types of relief, including compensatory and punitive damages. These suits allege a variety of traditional tort-based liabilities, including product liability based on each defendants' market share and negligence. These lawsuits typically do not seek equitable relief.

III. Insurance Coverage Issues

As we mentioned, the recent wave of lawsuits against the gun industry has resulted in a similar wave of claims by the gun industry seeking insurance coverage. In this section, we explain why those claims have largely been unsuccessful. As the decisions discussed below demonstrate, insurers have substantial grounds on which they can successfully deny coverage for these lawsuits.[24]

A. *The "Occurrence" Requirement*

A key requirement of liability insurance is that the injury must result from accidents, not intentional or volitional acts.[25] Liability insurance policies, therefore, afford coverage only where the underlying injury is caused by an

[24] *See, e.g.*, Ellett Bros. Inc. v. USF&G, 275 F.3d 384 (4th Cir. 2001); Beretta U.S.A. Corp. v. Fed. Ins. Co., 2001 U.S. App. LEXIS 19798 (4th Cir. Sept. 6, 2001).

[25] *See, e.g.*, N.H. Ball Bearings v. Aetna Cas. & Sur. Co., 43 F.3d 749, 754 (1st Cir. 1995) (no coverage for policyholder's intentional acts, even though policyholder claimed that it did not intend or expect injury from its acts); Berry v. McLemore, 795 F.2d 452, 458 (5th Cir. 1986) ("The policy excludes coverage for intentional acts. The focus is, therefore, not on the harm caused, but upon the act that caused the harm."); Red Ball Leasing, Inc. v. Hartford Accident & Indem. Co., 915 F.2d 306, 309-11 (7th Cir. 1990) (no coverage for volitional act because "a volitional act does not constitute an 'accident.'").

"occurrence." The following is an example of an insuring agreement in a liability policy:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.
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> This insurance applies to "bodily injury" and "property damage" only if . . . [t]he "bodily injury" or "property damage" IS CAUSED BY AN "OCCURRENCE."

Liability policies usually define the term "occurrence." An example of an "occurrence" definition is as follows:

> "Occurrence" means an accident, including continuous or repeated exposure to the same general harmful conditions.

Consistent with this definition, courts in many states have found the term "accident" to mean "[a]n UNEXPECTED happening, which occurs by chance, and usually suddenly . . . ."[26] The "occurrence" requirement, therefore, is a likely bar to coverage for gun liability, especially for lawsuits that allege that gun manufacturers intentionally and knowingly promoted the flow of guns to criminals through indiscriminate marketing and distribution practices. These lawsuits concern criminal shootings – hardly "accidental" events. Consequently, these gun lawsuits do not allege an "occurrence" as required by liability insurance policies.

The "occurrence" issue is relevant in determining whether an insurer is obligated to indemnify its insured. The issue pertains more to indemnity than defense, however, because it involves a certain degree of factual analysis concerning the policyholder's knowledge and expectations that otherwise would not be necessary in determining an insurer's defense obligation. As a result, some policyholders may not want to litigate the occurrence issue out of concern that doing so will impede their underlying defense. However, to the extent that policyholders make a demand for indemnification or bring suit against their insurers for a determination of the insurer's indemnity obligations, it becomes necessary to explore the factual basis of this issue.

In *Ellett v. USF&G*, for example, after suing its insurer for a determination of the insurer's defense and indemnity obligations and launching into extensive fact-based discovery, Ellett moved the court for leave to voluntarily dismiss its claim for indemnity. As Ellett argued in its Motion to Dismiss, further pursuit of its indemnity claim would prejudice its underlying defense.[27]

In sum, recent lawsuits allege that gun manufacturers consciously market and distribute guns in a manner that will supply guns to illicit users and thereby augment the manufacturers' profits. This alleged deliberate conduct on the part of gun manufacturers does not satisfy the "occurrence" requirement in a liability insurance policy.

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[26] *See, e.g.*, State Farm Fire & Cas. Co. v. Torio, 673 N.Y.S.2d 696, 697 (App. Div. 1998) (no coverage for injuries sustained by shooting victims because shooting was not an accident within meaning of liability policy); Green v. United Ins. Co. of Am., 174 S.E.2d 400, 402 (S.C. 1970) (emphasis added).

[27] *See* Ellett's Motion to Voluntarily Dismiss Indemnity Claims, Ellett Bros. Inc. v. USF&G, (D.S.C. 2000) (No. 3:00-1269-19).

1. Late Notice of Occurrence

Assuming, *arguendo*, that the municipal and public interest lawsuits do allege an occurrence, certain members of the gun industry may have failed to provide timely notice of that occurrence. General liability policies typically provide, as a condition precedent to coverage, that the policyholder notify the insurer of any occurrence "as soon as practicable." Courts often construe that condition as requiring that notice be given within a "reasonable" time.[28]

In determining whether a policyholder has provided timely notice of occurrence, it first is necessary to identify the occurrence. According to the allegations of the underlying complaints, gun companies sold and marketed their guns in a manner that facilitated the creation of various public nuisances and an illegitimate secondary handgun market, and it is these acts that allegedly caused the resulting public nuisances and illegal handgun market.[29] Alternatively, the occurrence may be deemed to be the act of gun violence that resulted from the public nuisance. Regardless of which event is deemed the occurrence, insurers have a solid basis on which to argue that notice of the occurrence was not timely.

According to the allegations in certain of the underlying complaints, individual gun companies are informed by the Bureau of Alcohol Tobacco and Firearms ("BATF") each time a gun is recovered in connection with a crime.[30] This BATF trace data dates back to the 1990s. Thus, gun industry members who received such notification from the BATF would have known as far back as the 1990s each time that one of their guns was recovered in connection with a crime.

Despite receiving this information from BATF, however, the industry failed to notify its insurers that its guns were routinely suspected of being involved in criminal activity. Rather, it was not until the industry became the target of the municipal and public interest lawsuits that insurers began to receive notice of these alleged occurrences. The industry, therefore, likely had actual knowledge that its guns were involved in criminal activity but failed to timely notify its insurers. Accordingly, the industry may have failed to satisfy a condition precedent to coverage under its general liability insurance coverage.

B. The "Expected or Intended" Exclusion

Separate from and in addition to the "occurrence" requirement, liability insurance policies generally exclude coverage for bodily injury or property damage that is "expected or intended from the standpoint of the insured." Courts have interpreted the "expected or intended" exclusion to bar coverage where the allegations against the insured allege that the injury was either expected or intended by the insured.[31] One caveat in some jurisdictions, how-

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[28] *See, e.g.*, Bruce v. United States Fid. & Guar. Co., 277 F. Supp. 439, 444 (D.S.C. 1967) (quoting Brown v. State Mut. Ins. Co., 104 S.E.2d 673, 682 (S.C. 1958)).

[29] New York State Complaint at 3-4.

[30] *Id.*

[31] *See, e.g*, Mfrs. & Merchs. Mut. Ins. Co. v. Harvey, 498 S.E.2d 222, 229 (S.C. Ct. App. 1998); *see also* Miller v. Fid.-Phoenix Ins. Co., 231 S.E.2d 701, 702 (S.C. 1977); USAA Prop. & Cas. Ins. Co. v. Rowland, 435 S.E.2d 879, 882 (S.C. Ct. App. 1993).

ever, is the requirement that the insured expect both (1) the act that causes the injury; and (2) the results of the act.[32] Many of the lawsuits against the firearm industry satisfy both prongs.

For the most part, the lawsuits brought by the municipalities and the public interest groups challenge the firearm industry's business practices. As a general matter, the lawsuits allege that the industry intentionally markets and sells firearms in a manner that promotes the widespread availability of firearms. For example, the complaint filed by San Francisco alleges that manufacturers, in an effort to make guns more attractive to criminals, have designed guns that are smaller, easier to conceal, more powerful, and rapid-firing.[33]

Similarly, the "expected or intended" exclusion applies to lawsuits involving assault weapons, such as the TEC-DC9 assault weapon at issue in *Merrill v. Navegar, Inc.* The *Merrill* lawsuit alleged that the TEC-DC9 is a "military-patterned weapon" that is "completely useless" for hunting, target shooting and self-defense.[34] The TEC-DC9 allegedly is marketed to criminal clientele by emphasizing that the weapon's threaded barrel accommodates silencers and that its surface has "excellent resistance to fingerprints."[35] The design and marketing of TEC-DC9 demonstrates that the manufacturer expected or intended for the assault weapon to be used for criminal purposes. Accordingly, since the alleged injuries that are at issue in these lawsuits allegedly resulted from the industry's regular and deliberate business practices, the first prong of the exclusion is satisfied.

The second prong of the exclusion also is satisfied. According to allegations against the industry, the industry knowingly, deliberately, or intentionally sold, marketed and distributed firearms in a manner that contributed to the proliferation of handguns. For example, New York alleges that the industry "seek[s] to profit from that portion of the . . . sale of lethal handguns that [it knows] become unlawfully possessed . . . in New York State."[36] Based on that type of allegation, there can be little question that the industry either expected or intended that its acts, the marketing and distribution of handguns, would result in the alleged consequence, the illegitimate secondary market that forms the basis of the municipal complaints.

Thus, because the firearm industry allegedly both intentionally marketed its guns in a manner designed to facilitate the acquisition and use of handguns and expected that doing so would result in an increase in handgun-related violence and injury through the creation of an illegitimate secondary market for handguns, it is likely that the "expected or intended" defense will bar coverage for lawsuits against the firearm industry.

C. *"Bodily Injury" and "Property Damage"*

Coverage for recent gun liability lawsuits also may not exist because these suits may not seek recovery for "bodily injury" or "property damage" as those terms are defined in a liability insurance policy.

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[32] *Mfrs. & Merchs.*, 498 S.E.2d at 229.
[33] City of San Francisco Complaint at 19.
[34] 89 Cal. Rptr. 2d 146 (Ct. App. 1999), *rev'd and superceded*, 28 P.3d 116 (Cal. 2001).
[35] *Id.* at 166.
[36] New York State Complaint at 3-4.

General liability insurers are not obligated to defend or indemnify unless "damages" are sought "because of 'bodily injury' or 'property damage.'" The terms "bodily injury" and "property damage" are defined in the policies. The following are examples of "bodily injury" and "property damage" definitions in a liability policy:

> "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
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> "Property damage" means:
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> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it.
>
> b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it.

Some liability policies also state that "[d]amages because of 'bodily injury' include damages claimed by any person or organization for care, loss of services or death resulting at any time from the 'bodily injury.'" But, even under policies containing this language clarifying who may seek the "damages," the "damages" still must be the result of "bodily injury." Thus, where the "damages" at issue are because of something other than "bodily injury" or "property damage," there can be no coverage.[37]

Many of the lawsuits against the gun industry do not seek amounts "because of 'bodily injury' or 'property damage.'" Rather, the lawsuits allege that the gun industry defendants engaged in allegedly illegal or improper business practices, which contributed to the creation of a public nuisance and amounted to a violation of certain business statutes.[38] Third parties may have acquired handguns through the industry's business practices and used these handguns to injure persons; however, the claims against individual gun industry defendants are not because of these injuries. Rather, they are because of the defendants' allegedly illegal or improper business practices. Thus, any amounts that gun industry defendants might become obligated to pay because of these activities are not because of "bodily injury" or "property damage" and, therefore, they are not covered under general liability insurance contracts.[39]

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[37] *See* Holmes v. McKay, 513 S.E.2d 851, 853 (S.C. Ct. App. 1999) (general liability insurance covers amounts because of "bodily injury" or "property damage," but not amounts that the insured must pay because of statutory violations) (citing Nationwide Mut. Ins. Co. v. Commercial Bank, 479 S.E.2d 524, 526 (S.C. Ct. App. 1996); *cf* Hendrix v. Employers Mut. Liab. Ins. Co., 98 F. Supp. 84, 87 (E.D.S.C. 1951) (South Carolina public policy prohibits insurance indemnification for liability resulting from an insured's unlawful acts).

[38] City of San Francisco Complaint at 1-2; City of Los Angeles Complaint at 4-5; County of Los Angeles Complaint at 2-3; NAACP Complaint at 1-3.

[39] *Holmes*, 513 S.E.2d at 853-54; *see also Nationwide*, 479 S.E.2d at 526 (noting policy terms define the insurer's obligations, and prohibiting enlargement by judicial construction); Atkinson v. Dollar Rent-A-Car, Inc., 525 So. 2d 976, 976-77 (Fla. Dist. Ct. App. 1988) (insured rental agency's negligent failure to warn did not constitute an "occurrence" where bodily injury resulted from conduct of third party and not from the agency's negligence); Sec. Ins. Group v. Wilkinson, 297 So. 2d 113, 114 (Fla. Dist. Ct. App. 1974) (no coverage where claim not predicated upon injury, but upon breach of contract that resulted in injury); Am. States Ins. Co. v. Pioneer Elec. Co., 85 F. Supp. 2d 1337 (S.D. Fla. 2000).

Atkinson v. Dollar-Rent-A-Car, Inc., illustrates this point. In *Atkinson*, the renter of an automobile sued the policyholder, a car rental agency, and its insurer after the renter was injured in a collision with an uninsured motorist.[40] The renter alleged that the agency negligently misinformed the renter that the agency had provided the renter with uninsured motorist coverage. The trial court granted summary judgment for the insurer on the ground that the agency's negligence did not constitute an "occurrence."[41] The appellate court affirmed, holding that an "occurrence" must result in "bodily injury" and that the agency's negligence did not result in such an injury.[42] The court reasoned that the agency's negligence must be the direct cause of the bodily injury.[43] Accordingly, since the direct cause of the bodily injuries at issue in *Atkinson* was the negligent conduct of a third party, the uninsured motorist, and not Dollar's negligent misinformation, there would be no coverage, even though a bodily injury did lie at the center of the case.[44]

Similarly, in a case analogous to the municipal and public interest lawsuits against the firearm industry, an appellate court recently found that an insurer had no duty to defend or to indemnify its insured in connection with an underlying suit claiming violations of a statute designed to protect drinking water.[45] In *Crawford Laboratories, Inc. v. St. Paul Insurance Co. of Illinois*, the underlying suit alleged violations of a California statute designed to protect residents from contaminated drinking water. The underlying suit sought: (1) civil statutory penalties; (2) an injunction; (3) restitution; and (4) reasonable attorney's fees.[46] *Crawford* held that the amounts at issue, even if damages, were not "because of bodily injury."[47] Rather, they were "because of" the alleged statutory violations.[48] The court reached this conclusion even though the underlying complaint contained allegations of bodily injuries, reasoning that the allegations of bodily injuries were made "not for recovery for the injured" citizens, but rather, were "offered as evidence of the problems that resulted" from the statutory violation.[49] As a result, the amounts at issue in *Crawford* amounted to an economic loss that was wholly distinguishable from amounts that would have been paid as third-party damages because of "bodily injury" or "property damage."[50]

The amounts that the gun industry defendants might become obligated to pay are similar to the amounts at issue in *Crawford* because the amounts do not relate to actual bodily injuries or property damage. Rather, as in *Crawford*, the references to bodily injuries in the lawsuits against the gun industry serve only

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[40] *Atkinson*, 525 So. 2d 976.
[41] *Id.*
[42] *Id.* at 977.
[43] *Id.*
[44] *Id.*
[45] *See* Crawford Labs., Inc. v. St. Paul Ins. Co. of Ill., 715 N.E.2d 653, 657 (Ill. Ct. App. 1999), *appeal denied*, 720 N.E.2d 1090 (Ill. 1999).
[46] *Id.* at 656.
[47] *Id.* at 658.
[48] *Id.* at 658.
[49] *Id.* (quoting Diamond State Ins. Co. v. Chester-Jensen Co., 611 N.E.2d 1083 (Ill. Ct. App. 1993)).
[50] *See* Bausch & Lomb, Inc. v. Utica Mut. Ins. Co., 625 A.2d 1021, 1037 (Md. 1993).

to exemplify the harm associated with the prolific use of handguns. The lawsuits do not, however, seek to recover anything on behalf of the victims of gun violence. Rather, the amounts were sought to correct certain business practices that could, in the future, lead to bodily injury. These amounts are separate and distinct from any bodily injuries suffered by their citizens.[51] Consequently, the cities' alleged expenditures do not constitute "damages because of 'bodily injury'" as required by liability policies.

D. "As Damages" Limitation

Coverage for recent gun liability claims also is not available because these claims seek injunctive relief rather than compensatory relief. Liability insurance policies generally provided coverage only for "those sums that the insured becomes legally obligated to pay AS DAMAGES because of 'bodily injury' or 'property damage' to which this insurance applies." The "as damages" limitation restricts coverage to compensatory, monetary relief, and therefore, coverage does not extend to coercive, injunctive or other equitable relief.

Traditionally, courts have upheld the liability policy's distinction between compensatory damages – which are covered – and equitable or injunctive relief – which is not covered.[52] Although some courts have weakened the "as damages" limitation in the environmental liability context,[53] these courts nonetheless hold that coverage is unavailable for injunctive costs associated with preventative or prophylactic measures.[54]

In the firearm liability context, the United States District Court for the District of South Carolina entered a ruling favorable to insurers on the "damages" issue in *Ellett Brothers, Inc. v. USF&G*. That ruling subsequently was affirmed unanimously by the United States Court of Appeals for the Fourth Circuit.[55] The court ruled on cross motions for summary judgment in *Ellett* that the insurer, St. Paul, did not owe the policyholder, Ellett Brothers, Inc. ("Ellett"), a defense under ten years of primary and umbrella policies because the underlying lawsuits did not seek "damages."[56]

In *Ellett*,[57] California municipalities, including San Francisco, the City of Los Angeles, and the County of Los Angeles, brought three of the underlying

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[51] Shunn Constr. Co. v. Royal Ins. Co., 897 P.2d 89, 90 (Idaho 1995) (no "bodily injury" coverage for local government's suit that alleged health hazards because governmental entities "cannot sue for or recover damages for personal injuries").

[52] *See, e.g.*, Aetna Cas. & Sur. Co. v. Hanna, 224 F.2d 499, 503 (5th Cir. 1955); Garden Sanctuary, Inc. v. Ins. Co. of N. Am., 292 So. 2d 75, 77 (Fla. Dist. Ct. App. 1974); Desrochers v. N.Y. Cas. Co., 106 A.2d 196, 198 (N.H. 1954), *overruled by* Coakley v. Me. Bonding & Cas. Co., 618 A.2d 777 (N.H. 1992).

[53] *See, e.g.*, Baush & Lomb Inc. v. Utica Mut. Ins. Co., 625 A.2d 1021, 1032-33 (Md. 1993) (environmental response costs may satisfy the "as damages" requirement). *But see* City of Edgerton v. Gen. Cas. & Sur. Co., 517 N.W.2d 463, 477-79 (Wis. 1994) (liability policies do not cover environmental response costs; otherwise, the "as damages" limitation "would be rendered mere surplusage" in the policies).

[54] *See, e.g.*, AIU Ins. Co. v. Super. Ct., 799 P.2d 1253, 1277-80 (Cal. 1990) (liability insurance policies do not cover environmental injunctive costs that are prophylactic in nature).

[55] Ellett Bros., Inc. v. USF&G, 275 F.3d 384 (4th Cir. 2001).

[56] The authors represented St. Paul in the *Ellett* litigation.

[57] Ellett Bros., Inc. v. USF&G, No. 3:00-1269-19, slip op. at 2 (D.S.C. Dec. 5, 2000).

lawsuits against Ellett. The NAACP and the NSCIA brought the fourth underlying suit. Each of the four lawsuits alleged that Ellett created and contributed to the maintenance of a public nuisance through the manner in which it sold, marketed, and distributed handguns. According to the Complaints, Ellett intentionally contributed to the creation of an allegedly illegitimate secondary handgun market through which children, criminals, and other illicit users could easily obtain possession of a handgun without being subject to normal market safeguards. The three municipal suits each sought to abate the illegitimate secondary market and the resulting public nuisance. The NAACP/NSCIA lawsuit sought to enjoin certain allegedly negligent and intentional conduct that has led to the proliferation of illegal handguns and also sought the establishment and funding of an educational program for the education, supervision, and regulation of retail gun dealers.

Each of the St. Paul policies issued to Ellett contained a standard form general liability insuring agreement, which afforded coverage to Ellett for amounts that Ellett became "legally obligated to pay as damages."[58] St. Paul contended in its motion for summary judgment that the "as damages" requirement was not satisfied and that the underlying lawsuits sought equitable relief. The court agreed, basing its decision on *Cincinnati Insurance Co. v. Milliken & Co.*[59]

In *Milliken*, the Fourth Circuit held that, under South Carolina law, neither injunctive nor equitable relief constitute "damages" covered by general liability insurance.[60] The Fourth Circuit reasoned that the term "damages" is not ambiguous and, therefore, must be afforded its plain and ordinary meaning.[61] The court concluded that that meaning does not include amounts that the insured becomes obligated to pay in equity.[62] Rather, the term only extends to amounts "which the insured becomes LEGALLY obligated to pay."[63] The *Milliken* court further concluded that an action seeking an equitable remedy such as an injunction or the abatement of a nuisance does not constitute an action seeking damages covered by general liability insurance.

Affirming *Ellett*, the Fourth Circuit confirmed that the term "damages" in the context of general liability insurance does not include amounts paid in equity to prevent future injury.[64] The Fourth Circuit reasoned that "damages" must compensate for past injuries.[65] Because none of the amounts that Ellett might become obligated to pay would serve this purpose, but rather, would serve to prevent future injuries that have not yet occurred, the amounts could not be classified as "damages" under Ellett's general liability insurance policies.[66]

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[58] Although the policies also require that the damages arise "because of bodily injury or property damage," the Court confined its decision to the "as damages" provision of the policies.

[59] 857 F.2d 979 (4th Cir. 1988).

[60] *Id.* at 980.

[61] *Id.* at 981.

[62] *Id.*

[63] *Id.* (emphasis added).

[64] Ellett Bros. Inc. v. USF&G, 275 F.3d 384, 388 (4th Cir. 2001).

[65] *Id.*

[66] *Id.*

In contrast to the decision in *Ellett*, a federal district court in *SIG Arms, Inc. v. Employers Insurance of Wausau*,[67] found that the primary insurers, Zurich Insurance Co. and Zurich-American Insurance Co., must defend SIG Arms, Inc. in fifteen underlying lawsuits, one of which is the same NAACP/NSCIA lawsuit at issue in *Ellett*, because certain of the fifteen lawsuits sought the recovery of amounts paid by the municipalities for additional police, medical, and emergency services.[68] The *SIG Arms* court reasoned that those amounts constitute covered damages because, under the terms of the Zurich policies, covered damages include amounts claimed by an organization "for care, loss of services or death resulting at any time from the 'bodily injury.'"[69]

Integral to the decision in *SIG Arms* was the court's decision to apply New Hampshire law. Zurich contended that, under New Hampshire's choice-of-law rules, Illinois law[70] applied because Illinois courts have interpreted the policy term "bodily injury" whereas New Hampshire courts have not, thus creating a conflict of law. The *SIG Arms* court rejected that contention, however, finding that the Illinois decisions were not relevant to the operative part of the Zurich policy concerning damages claimed by an organization "for care, loss of services or death resulting at any time from the 'bodily injury.'" Thus, the court found that there was no actual conflict of law.[71]

1. Prayers For "Such Other Relief" Do Not Constitute a Claim for "Damages"

Boilerplate catch-all prayers for "such other relief" likewise do not constitute "damages." Indeed, in *Ellett*, St. Paul successfully argued that the catch-all prayer for "such other relief" was merely a boilerplate provision that appears with little purpose in virtually every lawsuit. In support, St. Paul argued that the underlying complaint in the *Milliken* litigation also contained a prayer for "such other relief." As discussed above, however, the court in *Milliken* concluded, despite the presence of the prayer for "such other relief," that the underlying lawsuit did not seek damages. The *Ellett* court reached the same conclusion.

At least one court has reached the opposite conclusion, however, finding that the prayer creates at least a possibility of an award of legal "damages," thus triggering an insurer's duty to defend.[72] *Scottsdale Insurance Co. v. RSR Management Co.* arose out of the same underlying NAACP/NSCIA lawsuit at issue in *Ellett*. However, applying New York law, the federal court in New York awarded summary judgment in favor of the policyholder, RSR Management Co., and ordered its insurer, Scottsdale, to defend RSR in the suit brought

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[67] 122 F. Supp. 2d 255 (D.N.H. 2000).

[68] *Id.* at 260-61.

[69] *Id.* at 259.

[70] Zurich argued in favor of Illinois law because two decisions, *Crawford Labs, Inc. v. St. Paul Insurance Co.*, 715 N.E.2d 653 (Ill. Ct. App. 1999) and *Diamond State Insurance Co. v. Chester-Jensen Co.*, 611 N.E.2d 1083 (Ill. Ct. App. 1993), hold that the term "bodily injury" does not cover underlying claims for economic damages that result from lost worker productivity as a result of sickness or bodily injury.

[71] *SIG Arms*, 122 F. Supp. 2d at 258-59.

[72] Scottsdale Ins. Co. v. RSR Mgmt. Co., 2000 U.S. Dist. LEXIS 14160 (E.D.N.Y. Sept. 26, 2000).

by the NAACP/NSCIA.[73] The court found that, pursuant to New York law, a court in equity is permitted to award money damages in addition to or as an incident of some other special equitable relief, or where the granting of equitable relief may be impossible.[74] The court noted that, in addition to the specific relief sought, the NAACP/NSCIA complaint requested "such further relief as the court deems just." Accordingly, the *Scottsdale* court concluded that Scottsdale had a duty to defend.

Unlike *Ellett*, *Scottsdale* ignores the actual claims against the policyholder to fabricate a duty to defend out of a speculative, not actual, prayer for relief. Virtually every complaint contains some form of catch-all prayer for "such further relief," whether or not the claims support the further relief. To rely upon boilerplate language to create a duty to defend, therefore, unreasonably extends coverage under the general liability contract.

2. *Requests for Civil Penalties Do Not Constitute a Claim for "Damages"*

Requests for civil penalties in certain of the lawsuits against the gun industry likewise do not constitute "damages." For example, with respect to lawsuits filed by municipalities in California seeking penalties under California's Business and Professions Code, California law compels that the municipal complaints do not and cannot seek damages. Indeed, the only civil statutes at issue in those lawsuits expressly state that the underlying plaintiffs CANNOT seek money damage remedies. Rather, under California law, government entities may ONLY seek abatement of a public nuisance, not recovery of compensatory damages.[75]

Similarly, punitive damages and civil penalties are not the same and, thus, the insurability of punitive damages does not mean that civil penalties also should be insured. Civil penalties and punitive damages are not one and the same since before there can be an award of punitive damages there first must be an award of compensatory damages.[76] Civil penalties are different. Unlike punitive damages, there is no prerequisite that compensatory damages be imposed upon a party prior to the imposition of civil penalties. Rather, civil penalties may be, and often are, imposed in the absence of any compensatory damages. In addition, like compensatory damages, punitive damages are paid to an injured party. In contrast, civil penalties are not paid to an injured party and, thus, as one state's high court has explained, they are distinguishable from punitive damages:

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[73] *Id.* at *5.

[74] *Id.* at *4.

[75] *See* People v. Mitchell Bros. Santa Ana Theater, 171 Cal. Rptr. 85, 89 (Ct. App. 1981) ("[a]batement . . . is the sole relief that [Code of Civil Procedure] section 731 authorizes the city attorney to seek") *rev'd on other grounds*, 454 U.S. 90 (1981); Van de Kamp v. Am. Art Enters., Inc., 656 P.2d 1170, 1173 n.11 (Cal. 1983) ("[A]lthough California's general nuisance statute expressly permits the recovery of damages in a public nuisance action brought by a specially injured party, it does not grant a damage remedy in actions brought on behalf of the People to abate a public nuisance."); County of San Luis Obispo v. Abalone Alliance, 223 Cal. Rptr. 846, 851-52 (Ct. App. 1986) ("[C]ounties cannot obtain damages for abating a public nuisance because the statutory scheme does not authorize them to do so.").

[76] McGee v. Bruce Hosp. Sys., 545 S.E.2d 286, 288 (S.C. 2001).

> Exemplary or punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been willfully invaded . . . .[77]

Another distinction between civil penalties and punitive damages is that, like compensatory damages, punitive damages are paid to an injured third party. For that reason, general liability insurance is also known as "third party" insurance.[78] It derives that name from the simple fact that the insurance payments flow to a third party.[79] In contrast to that purpose, insurance coverage for civil penalties would simply permit a policyholder to use its own liability insurance as a means of defraying the cost of fines and penalties that it might incur as a result of its own failure to adhere to a required course of conduct.[80] No third party would be involved.

3. Requests for Pre-Judgment and Post-Judgment Interest and Costs and Attorneys Fees Do Not Constitute Claims for "Damages"

Likewise, requests in the lawsuits against the gun industry for pre-judgment and post-judgment interest, costs, and attorney's fees constituted requests for "damages." Indeed, courts have held that general liability insurance contracts plainly distinguish those amounts from amounts that a policyholder might become legally obligated to pay "as damages" by expressly providing for the payment of such amounts, but *only* if those amounts are incurred in connection with an underlying suit that the insurer defends.[81] Accordingly, amounts in the form of pre-judgment and post-judgment interest and costs and attorney's fees could not be considered in a determination of whether there is a duty to defend because an underlying claim seeks "damages."

General liability contracts provide that the insurer will pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance provides." The contracts further provide:

> No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A AND B.

The Supplementary Payments provision of the contracts plainly states that interest (pre-judgment and post-judgment) and all costs taxed against the insured will be paid by the insurer ONLY for those suits that the insurer is obligated to defend. Thus, by separately providing for interest and costs of suit under the Supplementary Payments provision of the contracts, those amounts, if

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[77] Clark v. Cantrell, 529 S.E.2d 528, 533 (S.C. 2000).

[78] *See* A&E Supply Co., Inc. v. Nationwide Mut. Fire Ins. Co., 798 F.2d 669, 676 n.8 (4th Cir. 1986) (explaining distinction between first-party insurance and third-party insurance).

[79] ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 1.01 (1994) ("Liability insurance is sometimes called 'third party' insurance because it does not recompense the insured for his own loss . . . . Instead, liability insurance protects the insured against damages which he may be liable to pay to other persons . . . .").

[80] *See A&E Supply Co., Inc.*, 798 F.2d at 676 n.7; *see also* OSTRAGER & NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 10.03[d], at 610 (10th ed. 2000); Hendrix v. Employers Mut. Liab. Ins. Co. of Wisc., 98 F. Supp. 84, 87 (E.D.S.C. 1951).

[81] *See* Ellett Bros., Inc. v. USF&G, No. 3:00-1269-19 (D.S.C. Dec. 5, 2000); Cutler-Orosi Unified Sch. Dist. v. Tulare Co. Sch. Auth., 37 Cal. Rptr. 2d 106 (Ct. App. 1994).

any, cannot be deemed to constitute "damages" under the Insuring Agreement of the contracts.

In *Cutler-Orosi Unified School District v. Tulare County School Authority*,[82] for example a California appellate court found that such a prayer *does not* trigger a duty to defend.[83] The *Cutler-Orosi* court relied on decisions from numerous other jurisdictions to conclude that coverage for costs of suit such as costs and attorney's fees plainly came within the scope of the general liability insurance contract's Supplementary Payment provision.[84] The court reasoned that the language of the Supplementary Payment provision plainly demonstrates that the policy does not include within the meaning of the term "damages" supplemental costs such as court costs and attorney's fees.[85] The court explained:

> [T]he supplementary payment provisions of the policies, which [make] the insurer responsible for all costs taxed against the insured in a suit for damages, demonstrated "very persuasively" [that] the policy meant to refer to "damages" only in the conventional sense of the term, for if the word had been used originally in a sense that already included costs, the quoted portion of the Supplementary Payments provision would have been totally unnecessary . . . .[86]

Like the court in *Cutler-Orosi*, the district court in *Ellett* concluded that the Supplementary Payments provision clarified that requests for interest, costs, and attorney's fees do not constitute requests for "damages":

> Although plaintiff argues that prayers for interest, costs and attorneys fees create the possibility of an award of "damages," the Court finds the argument foreclosed by the "Supplementary Payments" provisions of St. Paul's contracts.[87]

Accordingly, such requests do not constitute requests for "damages" and do not trigger an insurer's duty to defend.

E. "Products Hazard" Exclusion

Some liability policies contain "products hazard" exclusions that bar coverage for gun liability lawsuits because those lawsuits arise out of the policyholder's product. Where these exclusions exist, they have been held to be a bar to all coverage.

The products hazard exclusion typically bars coverage for:

> all bodily injury and property damage occurring away from premises you own or rent and arising out of "your product."

Policies typically define "your product" as:

> any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by "you."

The United States Court of Appeals for the Fourth Circuit recently affirmed a decision by a federal district court in Maryland, holding that an insurer in a gun liability coverage suit was under no obligation to defend or indemnify the insured based on the products hazard exclusion. In *Beretta*

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[82] *Cutler-Orosi*, 37 Cal. Rptr. 2d at 115.
[83] *Id.* at 114.
[84] *Id.*
[85] *Id.*
[86] *Id.* (quoting Sullivan County, Tenn. v. Home Indem. Co., 925 F.2d 152 (6th Cir. 1991)).
[87] Ellet Bros., Inc. v. USF&G, No. 3:100-1269-19, slip op. at 2-3 n.6 (D.S.C. Dec. 5, 2000).

U.S.A., Corp. v. Federal Insurance Co.,[88] the district court granted the insurers' motion for summary judgment and denied Beretta's motion for partial summary judgment on the ground that the Products-Completed Operations Hazard exclusion removed any possibility of coverage for claims asserted against Beretta by twelve municipalities and one class action. At issue were ten years of primary CGL (Comprehensive General Liability) coverage and seven years of umbrella coverage. None of the policies at issue included coverage for the Products-Completed Operations Hazard.

The Fourth Circuit affirmed the district court's decision, rejecting the policyholder's contention that the products-hazard exclusion was limited to claims relating to allegations that Beretta's products were defective and Beretta's alleged failure to warn.[89] Rather, the court followed the decision in *Brazas Sporting Arms, Inc. v. American Empire Surplus Lines Insurance Co.*,[90] in which the First Circuit likewise concluded that the exclusion barred coverage to a gun distributor where the allegations concerned the insured's conduct regarding its product, in addition to the product itself.

Finally, the Fourth Circuit rejected Beretta's contention that extrinsic evidence should be considered to explain the exclusion's scope and effect. As the Fourth Circuit explained, extrinsic evidence could not be considered for several reasons: (1) the products-hazard exclusion is not ambiguous; (2) the exclusion's title has no bearing on the exclusion's effect; (3) mere conflict with other jurisdictions cannot create an ambiguity; and (4) constructions of the exclusion by cases of other states have no bearing on the construction in this case.

IV. CONCLUSION

The cases discussed herein demonstrate on a whole that the firearm industry is not entitled to coverage for lawsuits that attack the manner in which it does business. Those cases reaching disparate conclusions were either decided under idiosyncratic factual circumstances or were based on specific legal issues such as choice of law. Nevertheless, the analysis demonstrates that there are potentially significant barriers to coverage for these types of claims against the gun industry. The recent lawsuits implicate coverage defenses such as the lack of an "occurrence" or untimely "occurrence," the "expected or intended" defense, the absence of "bodily injury" and "property damage," the absence of a claim for covered "damages," and the applicability of the products hazard exclusion. Despite these defenses, policyholders continue to assert claims for coverage. Thus, because there appears to be a continued flow of claims by gun industry insureds and because there are significant defenses to coverage, the gun industry's demands for coverage of gun liability claims are likely to continue to be hotly disputed.

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[88] 117 F. Supp. 2d 489 (D. Md. 2000).
[89] Beretta USA Corp. v. Fed. Ins. Co., No. 00-2387, slip op. at 6 (4th Cir. 2001).
[90] 220 F.3d 1 (1st Cir. 2000).