2024 WL 1223356 (S.C.App.) (Appellate Brief)
Court of Appeals of South Carolina.

Daniel A. SPEIGHTS, Appellant,

v.

CHUBB LIMITED D/B/A CHUBB NATIONAL INSURANCE COMPANY; Auto-Owners Insurance Company; and Bankers Standard Insurance Company, Respondents.

No. 2023-001845.
March 6, 2024.

Appeal From Hampton County Court of Common Pleas George M. McFaddin, Jr., Circuit Court Judge
Case No. 2022-CP-25-00269

Initial Brief of Appellant

A. Gibson Solomons, III (SC Bar #68291), Speights & Solomons, LLC, 100 Oak Street East, Post Office Box 685, Hampton, South Carolina 29924, T:(803)943-4444, F:(803)943-4599, E: gsolomons@speightsandsolomons.com, for the appellant.

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3. The Circuit Court erred in finding that there was no issue of material fact as to whether Dan Speights's loss could be covered under the policy.

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Statement of the Case

This matter comes before the Court by way of an appeal of a granting of summary judgment to the insurance company Auto-Owners in an action brought by the appellant. [1] On September 25,2023 the Circuit Court heard arguments via Webex on Auto-Owners Motion for Summary Judgment [Hearing Transcript 9/25/23]. On October 5, 2023, the Circuit Court entered an order granting Auto-Owners' Motion for Summary Judgment [Order 10/25/23]. On October 12, 2023, Speights filed a Motion to Reconsider the Order granting Auto-Owners' Motion for Summary Judgment [Motion to Reconsider 10/12/23]. On November 9, 2023, the Circuit Court denied Speights Motion to Reconsider [Order 11/9/23]. On November 27, 2023, Speights filed this appeal [Notice of Appeal 11/27/23].

Factual Background

On September 25, 2019, the bookkeeper for the firm Speights & Solomons, LLC received an email on her work email address which attached an invoice to the firm Speights & Solomons. ***2** [Exhibit A to Motion to Reconsider, DAS000001-000009]. On that day, both lawyers in the firm were engaged out of town. The invoice purported to be for services rendered to the firm and asked for payment by way of wire transport. The invoice was for $250,000.00. The bookkeeper thought she was corresponding with Speights, with whom she has worked for four decades in an exchange and a request that was not unusual. [Herndon Deposition at 18, lines 19-23]. [2] She did not know she was corresponding with a thief.

Unbeknownst to anyone at the firm at the time, this bad actor had used phishing malware to get into the firm's email server and was presenting the bookkeeper with forged emails and fraudulent invoices. The hacker then sent emails from the stolen email account of Speights, forging the electronic signature of Dan Speights and requesting the firm's bookkeeper to pay $250,000.00, ostensibly to address the invoice made out to the firm for investment distributions and professional services. The bookkeeper posed questions concerning the fraudulent invoice to whom she believed to be Speights. The thief would then forge responses to the questions and delete the email exchange from Speights' email account so that he would not see it and be alerted to what was occurring. Acting in reliance upon the forgery, the bookkeeper instructed the firm's bank to transfer the funds to pay the invoice. The bank wired the funds to the account provided on the invoice to Speights & Solomons.

Because of the undetected hack and capture of the firm's email system, the theft was only discovered when on September 27, two days later, Speights physically entered the office and a statement was made in passing by the bookkeeper to Speights concerning a second attempted transfer. Speights was first confused, then shocked by the statement. He alerted everyone in the ***3** office that a theft had occurred and ordered an immediate lockdown of accounts and the email server. [3] The realization of a theft prompted a flurry of action including immediate calls to the bank by Speights. Attempts were made by the bank to stop the transfer of the $250,000 or to pull back the funds but none of these attempts were successful.

Shortly after these unsuccessful attempts, Speights instructed his insurance agent to inform the applicable insurance companies of the loss. Auto-Owners issued a policy to Speights & Solomons for the applicable period. [Auto-Owners Policy, Exhibit A to Motion to Reconsider, DAS000013-000152]. The policy allows an insured to aggregate coverages and has an aggregate limit of $4,000,000.00. (*Id.*) The policy and its various riders cover 140 pages of material. (*Id*). Included in the policy are coverages for, *inter alia*, business personal property, business income, forgery and alterations, theft, money and securities inside premises, money and securities outside premises, electrical disturbance, and personal effects and property of others. There are additional riders purchased with the policy that include bailees coverage which covers the property of others and identity theft [Auto-Owners Policy, Exhibit A at DAS000056, DAS000102]. In the policy package, Auto-Owners places a heading that states Limited Liability Company, Businessowners Policy [Policy, Exhibit A at DAS000083]. Auto-Owners then defines in the Businessowners Policy who is an insured under the liability policy and that definition states “your members are also insureds, but only with respect to the conduct of your business”. There is no other definition elsewhere in the policy.

Auto-Owners denied the claim stating that that the losses were excluded by false pretense language found in the policy package [Policy, Exhibit A at DAS000122]. Auto-Owners does not ***4** dispute the loss occurred. The false pretense basis has never been litigated and the Defendant's representative, when deposed could not remember a previous time of using this as basis to deny a claim [McManus Deposition at 20, lines 14-21].

After the claim was denied, Speights brought this lawsuit. During the lawsuit, Auto-Owners also has stated that an additional basis for denial of the claim was that the funds came out of an account owned by Speights, not the firm. The name of the policy purchased which contains a definition of the false pretense exclusion is “Businessowners Special Property Coverage Form”. (Policy, DAS000114). Speights is the business owner. [4]

The bookkeeper, when deposed, confirmed that the account the firm's bookkeeper used to pay the firm's invoice was a personal account of Speights. Questions remain concerning the normal practice of the use of certain "personal" accounts which are employed for what is a firm use and there is no factual clarification whether this was a firm action or a personal action.

Standard of Review

Because it is "a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). Accordingly, summary judgment should be granted only where the moving party has shown there is no genuine issue as to any material fact and it is therefore entitled to a judgment as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the ***5** nonmoving party." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009).

Argument

The context of this appeal underscores the impropriety of the circuit court's decision. In a state with a long history and a sound policy basis for narrow interpretation of policy limitations and exclusions as Court's interpret insurance policies, the appealed decision grants judgment as a matter of law before discovery was complete on grounds that, at a minimum, have material issues of fact unresolved.

1. The Circuit Court erred in granting summary judgment to the insurer on an insurance contract when conflicts exist in the policy language.

As stated above, the policy sold by Auto-Owners covers 140 pages. The policy is a maze of redundant language, replacement language, riders, and exclusions. The policy specifically states that loss from fraud is covered. The policy specifically states that loss from forgery is covered. The policy specifically states that loss from identity theft is covered. The policy specifically states that theft is covered. While the Defendant did not attach the entire policy to its Motion for Summary Judgment, leaving as an open question for the Court the content of omitted portions, the terms under additional optional coverages in the portion provided state:

"We will pay for loss of money or securities used in your business while at a bank or savings institution, within your living quarters or the living quarters of your partners or employees having use and custody of the property, at the described premises, or in transit between any of these places **resulting directly from: (1) Theft, *meaning any act of stealing."* [Policy, Exhibit A at DAS000013, emphasis added].**

However, after multiple affirmations of coverage, on page 110 of a 140 page package, in a document titled Business Owners Special Property Coverage Form, Section 2 purports to list areas that Auto Owners will not pay for loss and item (h) lists as an uncovered area: "Voluntary ***6** Parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense." [Policy, Exhibit A at DAS000122].

As a first matter, something is not voluntary if one is unaware of what one is doing. If an insured chose to give away, ("voluntarily part") with $250,000.00, that same insured should not be allowed to claim the gifting or voluntarily parting as a loss to be covered under a policy. That is not what happened. No one could call this a voluntary parting.

Webster's Dictionary delineates application of definitions of the word voluntary and includes a definition of the word under the law.

a: done by design or intention **: INTENTIONAL** was convicted of *voluntary* manslaughter

b: acting or done of one's own free will without valuable consideration or legal obligation

a *voluntary* conveyance

Auto-Owners representative Joseph McManus testified that the basis for the denial of this claim is that the "false pretenses" language would categorize the Plaintiff's actions as voluntary [McManus Deposition at 18, line 17 through 19, line 11]. There is no evidence, much less contradicting evidence, that the bookkeeper of the insured intentionally allowed a thief to make away with $250,000.00. Speights or the bookkeeper certainly had no intention to part ways with this money without valuable consideration. There is a conundrum. If the Court gives the words inside the contract written by Auto-Owners their plain and ordinary meaning, the attempted exclusion becomes nonsensical. Someone cannot be intentionally defrauded. "A contract should receive sensible and reasonable construction and not such construction as will lead to absurd consequences or unjust results." *Holden v. Alice Manufacturing, Inc.*, 317 S.C. 215, 221 (S.C. Ct. App. 1994). The granting of the Motion for Summary Judgment ignores that the wording of the ***7** insurance contract is patently conflicting with itself and the result is unjust.

Even if this Court did not see a conflict in the words employed within the exclusion, the application of the exclusion creates conflict throughout the remainder of the document on multiple levels. It is a conflict creating an ambiguity for a policy to expressly cover losses from theft, fraud, and forgery and then attempt to exclude the exact same loss. "An insurance policy is a contract between the insured and the insurance company, and the policy's terms are to be construed according to the law of contracts." *Williams v. Gov't Emps. Ins. Co.*, 762 S.E.2d 705, 709 (S.C. 2014). A basic rule of good faith in contract is that a party may not procure payment for a thing and then employ fine print boilerplate to excuse themselves from providing the very essence of the bargain [5] . An insurer cannot expressly sell a policy that states it covers fraud and then exclude the same coverage later in the policy. [6] There is no South Carolina law directly on point. Other Court's looking at the same policy dispute in the same factual scenario have recognized the inherent conflict.

[T]he Forgery and Alteration Endorsement and the False Pretense Exclusion function to define the scope of coverage and, thus, serve the same purpose and function...Where the language of an insurance policy is ambiguous, as it is in the context of the Forgery and Alteration Endorsement and the False Pretense Exclusion being read in tandem, the contract should be interpreted in favor of the insured because the insurer is in control of the process of articulating the terms. *See Oglesby*, 695 A.2d at 1149-50; *Axis Reinsurance*, 993 A.2d at 1062. ***8** *Morris James LLP v. Continental Casualty Co.*, 928 F. Supp. 2d 816, 825 (D. Del. 2013) [7]

Protecting the insured has been a constant emphasis throughout the development of South Carolina's common law. South Carolina law states "conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Lyons v. Fid. Nat'l Title Ins. Co.*, 415 S.C. 115, 129 (S.C. Ct. App. 2015). "Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." *Auto-Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 144 (S.C. Ct. App. 2015) citing *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005)." The policy at issue has multiple types of coverage which all conflict with the "false pretense" or "voluntary parting" exclusion. To ignore this conflict to the detriment of the insured is contrary to South Carolina's well developed law of both contract and insurance.

2. The Circuit Court erred in granting summary judgment to the insurer when the insurer admitted that certain coverages under the policy could apply.

In this case, Auto-Owners has flatly denied the claim and taken the position that no coverage can be triggered. The Circuit Court agreed with Auto-Owners, finding that there is no issue of material fact that exists or could be discovered that could trigger any applicable coverage. Yet, Auto-Owners adjuster admitted in deposition that several forms of coverage could be applicable.

Auto-Owners conceded that the Plaintiff purchased additional coverage for money and securities. [McManus Deposition at 28 lines 19-22].

Auto-Owners also conceded that there was additional coverage purchased for forgery and alteration. [McManus Deposition at 29 lines 4-5]. The forgery endorsement providing coverage ***9** states explicitly that Auto-Owners will pay for any forgery of any promise in money. [Policy, Exhibit A at DAS000021]. Auto-Owners further conceded that Speights' electronic signature on an email "[e]ssentially, could be" forgery. [McManus Deposition at 29, lines 19-22]. Auto-Owners conceded that a policy was in place [McManus Deposition at 13, lines 15-18], that Speights suffered the loss [McManus Deposition at 17, lines 9-10] and conceded that coverage in addition to that noted above could apply as well. [McManus Deposition at 27, lines 1-3].

It would seem apodictic that there is a material issue of fact as to whether coverage exists for a loss when a representative of the insurance policy is conceding that coverage could exist for the loss.

3. The Circuit Court erred in finding that there was no issue of material fact as to whether Dan Speights's loss could be covered under the policy.

It is not disputed that the issue at bar concerns a theft that began with the receipt of a forged email and fraudulent invoice ("the invoice"). [Motion to Reconsider, Exhibit A at DAS000003]. The invoice was not addressed to Dan Speights individually. The invoice was addressed to the named policy holder Speights & Solomons, LLC. The theft was initiated through the firm's bookkeeper who was following firm protocol by contacting the business owner concerning the invoice and by using the funds of Speights to satisfy the invoice that was addressed to the insured. In sum, this controversy concerns a communication, initiated through the insured's email server, effectuated by the insured's employees in furtherance of the insured's business, addressing and paying an invoice that is made out to the insured, and resulted in a payment from an account of a member, owner and regular financier of the insured. The insurance policy at issue is named the "businessowners" policy. But the lower Court has ruled there is no material fact which could exist that could trigger coverage for the insured because the name on the account from which the money was wired is not the firm's name but the owner of the firm's name.

***10** Auto-Owners acknowledged that the Speights was an owner of the firm in deposition. [McManus Deposition at 15, line 23 through 16, line 2]. It certainly can be inferred that the personal money lost was being used as the insured's. Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril*, 352 S.C. at 280, 573 S.E.2d at 835; *Hall*, 349 S.C. at 173-74, 561 S.E.2d at 656; *Glasscock, Inc. v. United States Fid. Guar. Co*., 348 S.C. 76, 557 S.E.2d 689 (Ct.App. 2001); *Stewart v. State Farm Mut. Auto. Ins. Co*., 341 S.C. 143, 533 S.E.2d 597 (Ct.App. 2000); see also *Laurens Emergency Med. Specialists v. M.S. Bailey Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003) (noting that summary judgment should not be granted even when there is no dispute as to evidentiary facts, if there is dispute as to conclusions to be drawn therefrom).

As discussed later, discovery was ongoing. Speights explained by affidavit that as an owner and founder of the firm, his personal funds were regularly used to address financial needs of the insured. [Speights Affidavit 10/12/23, Exhibit C to Motion to Reconsider]. Relying on a tight technicality concerning an alleged distinction between Speights and Speights & Solomons seems odd given the factual context that Speights himself was not a part of the underlying acts; rather it was only the employee of Speights & Solomons serving in her capacity.

Notwithstanding the above, (the factual amalgamation of funds and funding between Speights and the firm), the language in the policy which defines insured blurs the lines of distinction being used as the basis for denial of coverage. The policy at issue states that "[a] limited liability company, you are insured. Your members are also insureds, but only with respect to the conduct of your business." [Policy, Exhibit A at DAS 000083]. It is at least an issue of fact of whether the payment of an invoice addressed to the business is acting "with respect to the ***11** conduct of your business". The Circuit Court's order notes that the portion of the policy that contains this language is found in the "Businessowners Liability Coverage Form" as opposed to the "Businessowners Special Property Coverage Form". However, the policy is silent as to the definition in the "Businessowners

Special Property Form". To grant summary judgment on this basis, the Court must come to the conclusion that in one form for businessowners, there is a definition that explicitly covers Speights as an insured, but in the other portion of the same policy for the same businessowners, there is no definition so the Court must choose to ignore other explicit definitions in the policy and narrowly construe an elsewhere defined term to prohibit coverage. This type of blind inference by absence to expand an exclusion stands in sharp contrast to the rules of interpretation employed by South Carolina's common law.

Furthermore, the law provides that members of an LLC have certain legal standing as it relates to the affairs of the LLC. Each member of a LLC has presumptive authority and agency to pursue contractual and legal rights of the LLC, especially those which inure to the members' benefit. S.C. Code § 33-44-301(a)(1). South Carolina's statutory law states that members of an LLC may sign "any instrument" that affects the company's interest without limitation. Speights may be bringing this lawsuit on behalf of himself but also as the most appropriate member of the firm to protect the amalgamated funds. See S.C. Code § 33-44-301 "any member of a member-managed company or manager of a manager-managed company may sign and deliver any instrument transferring or affecting the company's interest in real property."

Lastly, South Carolina courts have found that an ownership interest provides standing to sue. *Charleston Joint Venture v. McPherson*, 308 S.C. 145, 154 (S.C. 1992) ("Further, unlike the property regime in *Queen's Grant*, CJF has an ownership interest in the Mall. We hold CJV had standing to sue on behalf of Belks, Thalhimers and Sears.").

***12** It is not plausible to oppose that the money was intended for and absconded during the course of and through the means of business operations. There are material facts unresolved about the what the funds were. The invoice, on its face, exhibits it was sent to the insured. The theft is not purely a theft of Speights and the theft does not solely have effects on the named insured. It would seem, at a minimum, these blurred lines create material issues of fact to determine whether the policy applies.

4. The Circuit Court erred in finding that there was no issue of material fact when it was admitted that discovery was ongoing and the issue presented a novel application of the terms of the policy.

Auto-Owners has testified that, as far it was aware, this claim was the first claim that was denied on the application of the voluntary parting exclusion.[8] The facts and application of the facts are novel to parties. Additionally, South Carolina courts have not examined the application of this exclusion for the parties or others. The case presents a novel application of the law. While the mere fact that a legal issue is novel, does not by itself render a case inappropriate for summary judgment, the fact that an issue is both legally and factually novel leaves a fact finder unable to render a decision in an established context. The novelty makes the application of the exclusion more appropriate for a full determination of all facts (once discovery is complete) by a jury. *Schmidt v. Courtney*, 357 S.C. 310, 318 (S.C. Ct. App. 2003) ("We find it extremely troubling this case was resolved on a summary judgment basis, especially considering the injury to Schmidt and the *novel* issue involved in this case.").

Speights counsel began oral argument by telling the Circuit Court that Auto-Owner's summary judgment motion is made prior to the conclusion of discovery and that the Speights ***13** deposition has not been taken. The motion was filed only six days after Speights had taken his first deposition of the Auto-Owners representatives and written discovery is still outstanding. This matter was filed less than a year prior to the filing of the summary judgment motion and had not been placed on a trial roster. See Rule 40 SCRCP.

Summary judgment is a "drastic remedy" which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Cunningham v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (2003); *Lanham v. Blue Cross Blue Shield*, 349 S.C. 356, 563 S.E.2d 331 (2002); *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002); *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct.App. 2003); *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct.App. 2002); *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct.App. 2001); *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743 (Ct.App. 2001); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct.App. 1998). Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a "full and fair opportunity to complete discovery." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003); *Lanham*, 349

S.C. at 363, 563 S.E.2d at 334; *Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); *Baughman v. American Tel. Tel. Co*., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333; *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000); *Mosteller v. County of Lexington*, 336 S.C. 360, 520 S.E.2d 620 (1999); *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril*, 352 S.C. at 280, 573 S.E.2d at 835; ***14** *Trivelas*, 348 S.C. at 130, 558 S.E.2d at 273; *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct.App. 2002); *Hedgepath v. American Tel. Tel. Co*., 348 S.C. 340, 559 S.E.2d 327 (Ct.App. 2001); *Bayle v. South Carolina Dep't of Transp*., 344 S.C. 115, 542 S.E.2d 736 (Ct.App. 2001); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp*., 336 S.C. 53, 518 S.E.2d 301 (Ct.App. 1999); *Middleborough Horizontal Prop. Regime Council v. Montedison*, 320 S.C. 470, 465 S.E.2d 765 (Ct.App. 1995). "Summary judgment is inappropriate when further development of the facts is desirable to clarify the application of the law." *Lee v. Kelley*, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct.App. 1989).

Conclusion

For the foregoing reasons, the Order and Judgment below should be reversed.

By: *s/ A. Gibson Solomons, III*

A. Gibson Solomons, III (SC Bar #68291)

SPEIGHTS & SOLOMONS, LLC

100 Oak Street East

Post Office Box 685

Hampton, South Carolina 29924

T: (803)943-4444

F: (803)943-4599

E: *gsolomons@speightsandsolomons.com*

ATTORNEYS FOR THE APPELLANT

March 6, 2024

Hampton, South Carolina

Footnotes

1 Auto-Owners is the only remaining Respondent/Defendant. Dan Speights has resolved his claims with the other parties.

2 "You've been working for Mr. Speights for a long time. I guess nearly 40 years. Has he ever sent you e-mails like this in the past asking you to wire money? Yes, sir. It's not unusual."

3 Firm IT personnel spent days combing through data to find the point of entry for the thief. [Herndon Deposition at 38].

4 While Speights makes several arguments as to why this controversy does in fact concern the business of the insured, Speights does not concede that a distinction between himself and an LLC owned by him can be relevant as it relates to an insurance policy titled a business owners policy which includes owners in the definition of insured.

5 When deposed, Auto-Owners representative also testified that he was unaware of any type of coverage that could have been purchased at the time that would have avoided the harsh results of this improper exclusion. [McManus Deposition at 24, lines 4-7].

6 See in other insurance context *Nationwide Mut. Fire Ins. Co. v. Walls*, 433 S.C. 206, 211 (S.C. 2021) ("More specifically, the court of appeals noted that the *Williams* decision interpreted section 38-77-142(C) to prohibit provisions that reduced the contracted-for coverage to the mandatory minimum limit when "the policy's declaration page purport[ed] to provide a higher amount of coverage to a certain class of insureds."")

7 See Also *Cent. Mut. Ins. Co. v. Reliance Prop. Mgmt., Inc.*, No. 05-21-00071-CV, 2022 WL 1657031, at *6 (Tex. App. May 25, 2022) (ruling that voluntary parting exclusion "cannot be reconciled" with "endorsement's express coverage of loss for fraud-based crimes")

8 Auto-Owners representative stated that this claim "was the first of its type, that you're aware of...? A. I believe so. Yes." [McManus Deposition at 23, line 25 through 24, line 3].

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