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# Intangible Economic Losses, Additional Insured Coverage Update

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## Intangible Economic Losses – Michigan

***HDI Glob. SE v. Magnesium Prod. of Am., Inc.***
No. 360385, 2023 WL 2938557 (Mich. Ct. App. Apr. 13, 2023)

In May 2018, Magnesium Products of America, Inc. (Magnesium) sustained a fire at its manufacturing facility. Magnesium had a contract to supply Mercedes-Benz U.S. International (MBUSI), an affiliate of Daimler AG (Daimler), with magnesium-casted cross car beams. MBUSI used the car beams from Magnesium to manufacture certain Daimler vehicles. The fire damaged the equipment that was used to manufacture the beams. As a result, Magnesium failed to produce and provide the beams to MBUSI, which could not then use the beams to manufacture vehicles for Daimler.

Consequently, Daimler suffered business interruptions and profit losses. Daimler was insured by HDI Global SE, AIG Europe Ltd., AXA Corporate Solutions, Chubb European Group, PLC, ERGO Insurance AG, Generali Insurance AG, Great Lakes Insurance SE, Swiss Versicherungs-AG, R+V General Insurance AG, SCOR SE, Sompo Japan Insurance, SV SparkassenVersicherung Gebaudeversicherung, Swiss Re International SE, XL Insurance Company SE, and Zurich Insurance SE (plaintiffs). Daimler filed a claim with the plaintiffs for the losses that it suffered as a result of the fire, and the plaintiffs paid the claim.

The plaintiffs then filed a negligence action against Magnesium, alleging that it owed Daimler "a duty to use caution and due care when manufacturing the goods and a duty to supply the goods on a timely and regular basis." Magnesium filed a motion for summary disposition, and the trial court dismissed the plaintiffs' complaint, reasoning that Magnesium did not owe a duty to Daimler. The plaintiffs then filed an amended complaint, including allegations "pertaining to the hazards arising from working with magnesium, as well as the dangers posed by a magnesium fire." The plaintiffs alleged that Magnesium "owed a duty to the general public to exercise due care when working with the magnesium so as to not cause damage to people or property." According to the plaintiffs, Daimler "was owed this duty as a member of the public." Magnesium again filed a motion for summary disposition, which the trial court again granted. The plaintiffs appealed.

On appeal, the plaintiffs argued that the trial court erred by granting Magnesium's motion for summary disposition because "the duty to use due care to avoid physical harm to foreseeable persons and


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property, which is owed to the general public, is separate and distinct from the contract." However, the appellate court held that the plaintiffs' argument failed because this duty does not extend to intangible economic losses. The appellate court reasoned that Magnesium owed Daimler, as a member of the general public, "a general common law duty to use due care during its undertakings, and this duty was separate and distinct from its contractual obligations to MBUSI." However, the appellate court made clear that this duty does not extend to intangible economic losses and is instead limited to preventing harm to "the person or property of others." In this case, the appellate court recognized that the plaintiffs only alleged economic harm in their complaint, describing the damages suffered by Daimler as "business interruption," the "loss of business income," and "lost profits." The appellate court held that these damages are "intangible economic losses" to which the common law duty to use due care does not extend. Therefore, the appellate court held that the trial court properly granted summary disposition in favor of Magnesium.

By: Danielle Chidiac

## Additional Insured – Texas

***ExxonMobil Corp. v. Nat'l Union Fire Ins. Co. of Pitt., PA***
--- S.W.3d ---, 2023 WL 2939596 (Tx. Apr. 14, 2023)

The Texas Supreme Court held that an insurance policy did not incorporate by reference the payout limits in an underlying service agreement. In so holding, the Supreme Court reversed the judgment of the Texas Court of Appeals and remanded the case to that court for further proceedings.

ExxonMobil Corporation (Exxon) hired Savage Refinery Services (Savage) to work as an independent contractor at Exxon's refinery in Texas. Their working relationship was memorialized in a service agreement under which Savage agreed to obtain at least a minimum stated amount of liability insurance for its employees and to name Exxon as an additional insured. Savage procured five different insurance policies. National Union Fire Insurance Company of Pittsburgh, PA (National Union) issued two of those policies – a primary policy and an umbrella policy. A third umbrella policy was issued by Starr Indemnity & Liability Insurance Company (Starr).

Two Savage employees were severely burned in a workplace accident at Exxon's refinery. The employees settled with Exxon for a collective amount exceeding $24 million. The first $5 million exhausted the National Union primary policy. Exxon paid the remainder out of pocket because National Union and Starr both denied Exxon coverage under their respective umbrella policies.

Exxon filed a lawsuit against National Union and Starr for breach of contract. The trial court ruled that National Union was solely obligated under its umbrella policy to reimburse Exxon for roughly $20 million it had paid in settlements. National Union appealed and argued that Exxon was not an insured under


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the umbrella policy. The appellate court agreed and reversed, concluding that the umbrella policy incorporated the primary policy's limits, and the primary policy, in turn, incorporated the limits of the underlying service agreement, which limited Exxon's status as an additional insured to primary coverage only. The appellate court also affirmed the trial court's ruling in favor of Starr on similar grounds.

The Supreme Court reversed the appellate court. The Supreme Court first acknowledged that the umbrella policy covered any organization included as an additional insured in the scheduled underlying insurance, that the schedule included National Union's primary policy, and that the primary policy, in turn, covered any organization that Savage was obligated by any contract or agreement to provide insurance. The Supreme Court held that the service agreement provided such an obligation, and it held that the umbrella policy insured Exxon.

National Union further argued that the umbrella policy incorporated the narrow payout limits of the service agreement. The Supreme Court disagreed, reasoning that the umbrella policy did not reference the service agreement's payout limits. In fact, the Supreme Court held that even if there was a reference in the umbrella policy, the service agreement did not have limits that could be adopted. It only provided for a minimum amount of insurance – not a maximum amount. Thus, the Supreme Court held that Exxon was an insured under both National Union's and Starr's umbrella policies.

By: Joshua LaBar


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