

No. 22-_____

**In The
Supreme Court of the United States**

BEL AIR AUTO AUCTION, INC.,

Petitioner,

v.

GREAT NORTHERN INSURANCE COMPANY,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Fourth Circuit violate the principle of *Erie v. Thompsons* by denying Bel Air's motion to defer its ruling and by deciding the appeal against Bel Air when:

(a) the issue presented to it on appeal by Bel Air was pending before the Maryland Court of Appeals on a certification from the United States District Court for the District of Maryland and a decision by the Maryland Court of Appeals would be dispositive on the issue to be decided by the Fourth Circuit in Bel Air's appeal; and

(b) the First and Ninth Circuits deferred ruling on appeals before them raising the same issue as was before the Fourth Circuit when the issue on appeal was pending for decision by the highest courts of the states of Massachusetts and Washington, respectively.

PARTIES TO THE PROCEEDINGS IN THE FOURTH CIRCUIT

The caption of the case contains the names of the appellant and appellee. American Property Casualty Insurance Association and National Association of Mutual Insurance Companies, with leave of court and over the opposition of Bel Air, filed an *amicus curiae* brief on behalf of Great Northern.

CORPORATE DISCLOSURE STATEMENT

As required by Supreme Court Rule 29.6, Bel Air states that it is a privately held corporation with no parent company and no public company owns any stock or interest in it.

RELATED CASES

Bel Air Auto Auction Inc. v. Great N. Ins. Co., No. 21-1493 (4th Cir. January 7, 2021)
Bel Air Auto Auction, Inc. v. Great N. Ins. Co., No. 21-1493 (4th Cir. June 5, 2022)
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Bel Air Auto Auction, Inc. v. Great N. Ins. Co., No. 21-1493 (4th Cir. June 26, 2022)
Bel Air Auto Auction, Inc. v. Great N. Ins. Co., No. 21-1493 (4th Cir. July 26, 2022)

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OPINIONS BELOW

In a per curiam, unpublished decision, the Fourth Circuit on June 14, 2022, denied Bel Air’s appeal and its motion to defer a decision in the appeal until the Maryland Court of Appeals had decided *Tapestry, Inc. v. Factory Mutual Insurance Company. Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, No. 21-1493 (4th Cir. June 14, 2022). The Fourth Circuit on July 26, 2022, denied Bel Air’s petition for panel or *en banc* review. *Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, No. 21-1493 (4th Cir. July 26, 2022).

STATEMENT OF JURISDICTION

The decision and order as to which review is sought and the judgment on that decision were entered on June 14, 2022. A Petition for Panel or *En Banc* Rehearing was timely filed but was denied on July 26, 2022. This Petition for Certiorari has been filed within 90 days of the denial of the Petition for Panel or *En Banc* Rehearing and is timely under 28 U.S.C. § 1254(1) and Supreme Court Rule 13(3).

Supreme Court Rule 29.4(b) and (c) are inapplicable.

STATUTES INVOLVED

No statute is involved in this case.

STATEMENT OF THE CASE

I. Jurisdiction of the lower courts.

A. District Court.

The removal jurisdiction of the District Court under 28 U.S.C. §§ 1441 and 1332(a) existed based on diversity of citizenship of the parties and the amount in controversy. Plaintiff/Appellant, Bel Air, is a Maryland corporation with its principal place of business in Harford County, Maryland and is a citizen of the state of Maryland. Defendant/Appellee, Great Northern, is an Indiana corporation with its principal place of business in New Jersey and is a citizen of a state other than Maryland. The amount in controversy, exclusive of interest and costs, exceeds \$75,000.

B. Court of Appeals.

The Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291 over Bel Air's appeal from the final judgment of the District Court entered against it. The District Court entered a final judgment on April 14, 2021; Bel Air appealed on April 27, 2021.

II. Factual and procedural background.

This case emanates from the SARS-19 pandemic. Bel Air is one of the over 2,000 businesses that has sought insurance coverage for the losses it sustained in connection with the pandemic.

A. Factual background.**1. Bel Air operates a vehicle auction facility and related businesses.**

Bel Air operates a vehicle auction facility and related businesses in Belcamp, Maryland, and several other locations in Maryland. The presence of SARS-CoV-2 in, on, around, and in the air of Bel Air's facility physically contaminated it. In response to the pervasive physical contamination caused by SARS-CoV-2, the State of Maryland and Harford County issued orders compelling businesses to cease or substantially reduce operations.

As a direct result of the physical contamination by SARS-CoV-2 and the governmental orders responding to this pervasive contamination, Bel Air was compelled to curtail and reduce drastically its operations. As an essential business, the governmental orders permitted Bel Air to operate but only on a limited, restricted basis. The governmental orders also prohibited access to the Bel Air facility, with only limited persons (such as managers and essential employees, but not customers) permitted to enter the facility.

Before the physical contamination of its facility by SARS-CoV-2 and the issuance of the governmental orders, large crowds of sellers and prospective buyers attended and were present at Bel Air's auctions. The purchasers attending the auctions inspected and bid on the vehicles as they moved through eleven auction lanes.

Besides the vehicle auctions, Bel Air provided other customer services, such as operating a Vehicle Enhancement Center where vehicles were restored and enhanced for prospective sale and a full-service restaurant catering to the auction attendees and other persons doing business with Bel Air.

The ubiquitous presence of SARS-CoV-2 in, on, around, and at the premises physically contaminated Bel Air's auction facility and, together with the governmental orders, prevented Bel Air both from using the auction facility, as had been done before the physical contamination occurred and the governmental orders issued, and from conducting the related businesses, such as the full-service restaurant. The large crowds that had attended the auctions and patronized the related businesses could no longer do so. While the SARS-CoV-2 was contaminating its facility, several Bel Air employees contracted SARS-19, although they do not know if they contracted the disease at the Bel Air facility of elsewhere.

2. Bel Air purchased business interruption insurance from Great Northern.

Bel Air purchased from Great Northern an all-risk policy of property insurance (the "Policy") that insured against all perils other than those expressly excluded in the policy. The Policy specifically states that Great Northern will "pay for direct physical loss or damage to" the insured premises caused by a covered peril (*i.e.*, all perils other than those expressly excluded) that

occurs at or within 1,000 feet of the premises shown in the Declarations. The Policy, although a contract of adhesion prepared by Great Northern, does not define what “direct physical loss or damage” is, encompasses, or requires.

The Policy includes business interruption coverage that requires Great Northern to pay for loss of business income due to the actual impairment of operations caused by or resulting from the “direct physical loss or damage to” the insured premises resulting from any peril not expressly excluded in the Policy.

B. Procedural background.

1. Bel Air sued for a declaratory judgment in state court after Great Northern denied its coverage claim.

Bel Air filed a claim for business interruption insurance coverage that Great Northern denied. Bel Air then sued Great Northern in the Circuit Court for Harford County, Maryland to obtain a declaratory judgment construing the policy under Maryland law and addressing the reasons Great Northern gave for denying coverage. Bel Air sought a declaration that the Policy afforded coverage under its business interruption portion for Bel Air’s loss of business income resulting from Bel Air’s being deprived of the full use of its insured premises caused by the presence and physical contamination of the premises by SARS-CoV-2 and by the governmental shutdown orders entered as a result of the SARS-CoV-2 contamination, despite the absence

of any harmful or detrimental structural change or alteration to the insured premises.

2. Great Northern removed the case.

Great Northern removed the case to the District Court and filed an answer to the complaint.

3. Bel Air moved for summary declaratory judgment and certification to the Maryland Court of Appeals.

After the removal to the District Court, Bel Air immediately moved for a summary declaratory judgment. At the same time, Bel Air moved for certification to the Maryland Court of Appeals of the following question of Maryland law that had never been addressed by the Maryland Court of Appeals and would have been dispositive of Bel Air's case and the other pending Maryland state and federal cases involving the same issues:

- (a) Is the "direct physical loss or damage" requirement in the Business Income With Extra Expense and the Civil Authority coverage provisions of the Great Northern Insurance Company policy satisfied by a loss of full use of property caused by contamination from SARS-CoV-2 and [COVID]-19 or is a structural alteration and change in property necessary for coverage to exist?

See Motion To Certify Three Unresolved Questions of Maryland Law To The Maryland Court of Appeals, *Bel Air Auto Auction Inc. v. Great Northern Insurance Co.*, No. 21-1493 (4th Cir. January 7, 2021).

Bel Air also requested the District Court to defer ruling on the motion for a summary declaratory judgment until the Maryland Court of Appeals had answered the certified questions, which would have fully resolved the appeal.

Great Northern, although it had denied almost all the allegations of the complaint, moved for judgment on the pleadings. Great Northern opposed the motion for summary judgment but did not contest the material facts Bel Air proffered as not being in genuine dispute as required by Fed. R. Civ. P. 56(c).

The District Court denied the motion to certify and the motion for declaratory summary judgment and granted Great Northern's motion for judgement on the pleadings under Fed. R. Civ. P. 12(c). The appeal to the Fourth Circuit followed.

The District Court determined both that the material facts were not in genuine dispute and the Maryland Court of Appeals had not ruled on the questions of law but still refused certification.

4. **The District Court in its Memorandum Opinion determined that “there is no genuine issue of material facts as to Plaintiff Bel Air’s claims.” *Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, 534 F. Supp. 3d 492, 510 (D. Md. 2021). Based on this finding, the District Court determined that only issues of Maryland law remained to be resolved.**

The District Court also acknowledged that the Maryland Court of Appeals had not addressed the questions of law before it, but held that it could rule based on general principles of contract interpretation under Maryland law. *Id.* at 502.

In the Fourth Circuit, Bel Air again moved for certification of the novel question of Maryland law to the Maryland Court of Appeals. The Clerk, purportedly on behalf of the Court, denied the motion. Bel Air moved for reconsideration, but the Clerk again denied the motion. The Clerk gave no reason or explanation for the denials.

A *Petition for Certiorari* followed the denials by the Clerk but was denied by this Court.

III. The *Tapestry* case.

In 2021, Tapestry, Inc. sued Factory Mutual Insurance Company in the United States District Court for the District of Maryland for business interruption coverage under the property policy issued by Factory

Mutual. On Tapestry's motion, the District Court on April 25, 2022, certified the principal issue raised in the case, which essentially was the same issue raised by Bel Air in its case, to the Maryland Court of Appeals. *Tapestry, Inc. v. Factory Mutual Insurance Company*, No. CV GLR-21-1941, 2022 WL 1227058 (D. Md. Apr. 25, 2022) (ECF Doc. 45).

The certified issue came before the Maryland Court of Appeals. *Tapestry, Inc. v. Factory Mutual Insurance Company*, No. COA-MISC-000102022 (Md. June 13, 2022). The certification appeal was promptly briefed, with Bel Air and others filing *amicus* briefs. The Maryland Court of Appeals held oral argument on September 9, 2022. A decision is expected to be issued shortly.

IV. Bel Air's motion to stay.

When the issue in *Tapestry* was certified to the Maryland Court of Appeals, the Fourth Circuit had not heard oral argument in Bel Air's appeal or issued a decision. Bel Air moved the Fourth Circuit to defer any decision until after the Maryland Court of Appeals had issued a decision in the *Tapestry* appeal, arguing that this decision would fully resolve Bel Air's appeal, either in favor of Bel Air or in favor of Great Northern. *Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, No. 21-1493 (4th Cir. June 5, 2022). Despite Bel Air's motion to defer, the Fourth Circuit issued a decision on June 14, 2022, affirming the District Court and denying the motion to defer. *Bel Air Auto Auction, Inc. v. Great N.*

Ins. Co., No. 21-1493 (4th Cir. June 14, 2022). Bel Air petitioned for panel or *en banc* review. *Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, No. 21-1493 (4th Cir. June 24, 2022). This petition was denied on July 26, 2022. *Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, No. 21-1493 (4th Cir. June 26, 2022). This Petition for Certiorari followed and has been filed within 90 days of the denial of the petition for rehearing and rehearing *en banc*.



ARGUMENT IN SUPPORT OF THE PETITION

- I. **The issue before the Maryland Court of Appeals in the *Tapestry* appeal is an unresolved question of Maryland contract law as to which only the Maryland Court of Appeals can give a binding, precedential answer under *Erie v. Thompkins*.**

The question of law before the Maryland Court of Appeals in the *Tapestry* appeal is as follows:

When a first-party, all-risk property insurance policy covers “all risks of physical loss or damage” to insured property from any cause unless excluded, is coverage triggered when a toxic, noxious, or hazardous substance—such as Coronavirus or COVID-19—that is physically present in the indoor air that property damage is the property or cause of loss, either in whole or in part of the functional use of the property?

Appellant's Brief, *Tapestry, Inc. v. Factory Mutual Insurance Company*, No. COA-MISC-000102022 (Md. June 13, 2022).

The question of law before the Fourth Circuit in Bel Air's appeal was as follows:

Is the "direct physical loss or damage" requirement in the Business Income With Extra Expense and the Civil Authority coverage provisions of the Policy satisfied by a loss of full use of property caused by contamination from a ubiquitous virus like SARS-CoV-2 and COVID-19 or is a structural alteration and change in the property necessary for coverage to exist?

Brief of Appellant, Bel Air Auto Auction, Inc., *Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, No. 21-1493 (4th Cir. June 7, 2022).

The question of law before the Maryland Court of Appeals in *Tapestry* and in Bel Air's appeal are essentially the same and present an issue that is solely a question of Maryland insurance contract law. While federal courts have the power to adjudicate cases based on Maryland law as to the parties before it, a federal court's doing so cannot conclusively determine any questions of Maryland law that would be binding precedent in other cases. Only the Maryland Court of Appeals can conclusively state what Maryland law is and have its pronouncement constitute binding precedent in all federal or state cases based on Maryland law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)

(“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.”); *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940) (“[T]he highest court of the state is the final arbiter of what is state law.”); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015) (“Although we may doubt that the Court of Appeal has correctly interpreted California law, we recognize that California courts are the ultimate authority on that law.”). The decision of the Maryland Court of Appeals in *Tapestry* will establish Maryland law on the issue addressed by the decision and that was ruled upon by the Fourth Circuit before the decision issued despite Bel Air’s motion to defer.

II. A conflict exists between the orders of the Fourth Circuit and that of the First and Ninth Circuits.

The First Circuit and the Ninth Circuit had similar appeals pending that depended on Massachusetts and Washington law. At the time these appeals were pending, the same issue before the First Circuit and the Ninth Circuit was pending before the Massachusetts Supreme Judicial Court and the Washington Supreme Court. On the motion of the appellants, as insureds, each of these Circuit Courts, in contrast to the Fourth Circuit, stayed further proceeding pending the issuance of decisions by the Massachusetts Supreme Judicial Court and Washington Supreme Court. See *Legal Sea Foods, LLC, v. Strathmore Insurance Company*, No. 21-1202 (1st Cir. Dec. 16, 2021); *Hillbro*

LLC v. Oregon Mutual Insurance Company, No. 21-35810 (9th Cir. June 14, 2022); *NUE LLC v. Oregon Mutual Insurance Company*, No. 21-35813 (9th Cir. June 14, 2022).

While the Supreme Judicial Court of Massachusetts and the Washington Supreme Court issued opinions contrary to the position of insured in each of the appeals, the Circuit Courts respected the *Erie* doctrine and waited until the state appellate courts had ruled before deciding their appeals.

Although the Supreme Judicial Court of Massachusetts and Washington Supreme Court decided the issue contrary to the insured's position, other state appellate courts have ruled in favor of insured. Vermont's highest court, the Vermont Supreme Court recently ruled in favor of the insured. *Huntington Ingalls Industries, Inc. v. Ace Am. Ins. Co.*, No. 2021-173, 2022 WL 4396475 (Vt. Sept. 23, 2022). Intermediate appellate courts in Louisiana and California have likewise ruled in favor of insured. *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, No. 2021-0343 (La. App. 4 Cir. June 15, 2022), *on reh'g* (Aug. 8, 2022); *Marina Pac. Hotel & Suites, LLC v. Fireman's Fund Ins. Co.*, 81 Cal. App. 5th 96, 296 Cal. Rptr. 3d 777 (2022). A Texas jury also ruled that the insured had coverage for Covid-19 losses. *Baylor College of Medicine v. XL Insurance America Inc.*, No. 2020-53316 (295th Dist. Ct., Harris Cty., Tex., Sept. 2, 2022).

The outcome of the *Tapestry* appeal is unknown but will be known shortly. If the Maryland Court of

Appeals rules in favor of Tapestry and Bel Air's appeal has already been decided in a manner contrary to the holding of the Maryland Court of Appeals, an injustice will have been imposed upon Bel Air by the Fourth Circuit. Bel Air will have lost an appeal it should have won under the binding law established by the Maryland Court of Appeals in *Tapestry*.

◆

CONCLUSION

Bel Air requests the Supreme Court to grant the petition for certiorari, all to the end of vacating the decision of the Fourth Circuit and deferring any proceedings in the appeal until such time as the Maryland Court of Appeals has issued a decision in *Tapestry* and then to decide Bel Air's appeal in a manner consistent with the decision of the Maryland Court of Appeals in *Tapestry*.

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