

Oklahoma Law Review

Volume 73 | Number 3

2021

Reading Between the (Surplus) Lines: *Genzer v. James River Insurance Co.* and the Tenth Circuit Loosening the Hold of Ridesharing Insurance Policy

William W. Whitehurst

Follow this and additional works at: <https://digitalcommons.law.ou.edu/olr>



Part of the [Insurance Law Commons](#)

Recommended Citation

William W. Whitehurst, *Reading Between the (Surplus) Lines: Genzer v. James River Insurance Co. and the Tenth Circuit Loosening the Hold of Ridesharing Insurance Policy*, 73 OKLA. L. REV. 547 (2021), <https://digitalcommons.law.ou.edu/olr/vol73/iss3/6>

This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact Law-LibraryDigitalCommons@ou.edu.

Reading Between the (Surplus) Lines: *Genzer v. James River Insurance Co.* and the Tenth Circuit Loosening the Hold of Ridesharing Insurance Policy

I. Introduction

The rise of Uber and other popular ridesharing¹ services has revolutionized the way society travels, but at a great cost. A recent study from the University of Chicago’s Becker-Friedman Institute showed that ridesharing has increased traffic deaths and accidents by 987 deaths annually, an increase of three percent per year.² This sobering statistic puts a number on the risk related to the runaway success of Uber, Lyft, and other ridesharing services—and gives credence to the complaints regarding the radical way Uber, in particular, approaches risk management.

Uber began operations in 2010 as a way for passengers to ride directly with commercial drivers, and in 2012, it began its far more well-known “peer-to-peer” ridesharing service (known as UberX).³ As of October 2020, Uber’s market share has since grown to seventy-one percent, well ahead of its main competitor Lyft (at twenty-seven percent).⁴ The essential ingredient to the ascent of Uber and other ridesharing companies—drivers using their own cars to transport passengers—also forms the backbone of its controversy in many areas, including liability.

Uber insists it is not a “common carrier[.]” (as for-hire transportation companies like taxicab companies are); rather, it posits itself as an “interactive computer service,” acting as an intermediary between drivers

1. The term “ridesharing” will be used in this Note as *Genzer v. James River Insurance Co.* uses that term to describe this type of service. 934 F.3d 1156, 1158 (10th Cir. 2019) (describing Genzer as a “rideshare driver for Uber”). Other terms used in this Note’s sources include “transportation network companies/TNCs” (used in state and federal statutes and some cases) and “ride-hailing services” (used in accordance with the Associated Press stylebook). See generally Benjamin Freed, *Why You Shouldn’t Call Uber and Lyft “Ride-Sharing,”* WASHINGTONIAN (June 30, 2015), <https://www.washingtonian.com/2015/06/30/why-you-shouldnt-call-uber-and-lyft-ride-sharing/>.

2. John M. Barrios, Yael V. Hochberg & Hanyi Yi, *The Cost of Convenience: Ridesharing and Traffic Fatalities* 25 (Becker Friedman Inst. UChicago Working Paper No. 2019-49, 2019), https://bfi.uchicago.edu/wp-content/uploads/BFI_WP_201949.pdf.

3. Mark Macmurdo, Comment, *Hold the Phone! “Peer-to-Peer” Ridesharing Services, Regulation, and Liability*, 76 LA. L. REV. 307, 309 (2015).

4. E. Mazareanu, *Leading Ride-Hailing Companies in U.S. by Market Share 2017-2020*, STATISTA (Nov. 30, 2020), <https://www.statista.com/statistics/910704/market-share-of-rideshare-companies-united-states/>.

and riders.⁵ Uber's Terms and Conditions plainly state it does "not provide transportation services . . . and has no responsibility or liability for any transportation services provided to [the user] by such third parties."⁶

In theory, this open-ended condition *should* impose liability on the individual driver's insurer. Indeed, Uber's original insurance structure used this as a guidepost, providing insurance on a contingency basis in the event a driver's insurance policy would not cover them.⁷ However, exclusions in most conventional insurers' policies that would otherwise impose liability generally do not apply to ridesharing.⁸ For example, a policy might apply to "carpools," where drivers pick up riders, but might not extend this to "livery" coverage, where the driver or car owner profits from the ride—with the latter usually requiring a more expensive policy.⁹

Insurance regulators on the national and state levels have warned both Uber drivers and riders of potential coverage gaps.¹⁰ Because of these risks, Uber sources insurance coverage for its drivers and riders through third-party insurers, including those in the surplus lines market.¹¹ A surplus lines insurer, also known as a "specialty insurer," operates outside of a state's regulatory scheme and covers risks that other insurers will not.¹² Uber's

5. R.J. LEHMANN, R ST. INST., POL'Y STUDY NO. 28, *BLURRED LINES: INSURANCE CHALLENGES IN THE RIDE-SHARING MARKET* 3 (2014), <https://www.rstreet.org/wp-content/uploads/2018/04/RSTREET28-1.pdf>.

6. *Id.*

7. See Ron Lieber, *The Question of Coverage for Ride Service Drivers*, N.Y. TIMES (Sept. 5, 2014), <https://www.nytimes.com/2014/09/06/your-money/auto-insurance/offloading-the-risk-in-renting-a-car-ride.html>.

8. LEHMANN, *supra* note 5, at 6.

9. *Id.*

10. See generally *Commercial Ride-Sharing*, NAT'L ASS'N INS. COMM'RS: CTR. FOR INS. POL'Y & RSCH., https://content.naic.org/cipr_topics/topic_commercial_ride_sharing.htm (last updated Mar. 4, 2020); see also *States Warn of Rideshare Risks for Passengers*, NBC NEWS (June 5, 2014, 2:29 PM CDT), <https://www.nbcnews.com/business/consumer/states-warn-rideshare-risks-passengers-n116736> ("California, Connecticut, the District of Columbia, Idaho, Kansas, Maryland, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, Ohio, Rhode Island, Tennessee and Utah have all issued warnings about possible insurance risks from using rideshare services.").

11. Judy Greenwald, *Where a Driver's Personal Coverage Leaves Off and Uber's Picks Up*, BUS. INS. (Apr. 10, 2016), <https://www.businessinsurance.com/article/20160410/NEWS06/304109977/Business-Insurance-2016-Risk-Manager-of-the-Year-Gus-Fuldner-uses-individual-ins>.

12. *Surplus Lines*, NAT'L ASS'N INS. COMM'RS: CTR. FOR INS. POL'Y & RSCH., https://content.naic.org/cipr_topics/topic_surplus_lines.htm (last updated Sept. 22, 2020).

head of insurance has stated the company takes significant advantage of surplus lines insurance on account of this flexibility.¹³

Most of the insurance companies Uber works with, such as Progressive Corp., are household names that issue all types of insurance.¹⁴ Conversely, James River Insurance Company, the defendant in the titular case, exclusively deals in surplus lines insurance, covering businesses with risks other underwriters would “simply decline.”¹⁵ Until James River’s decision in late 2019 to cancel all of its insurance policies issued to Rasier, LLC (a wholly owned subsidiary of Uber that acts as an intermediary for its contracts and insurance policies), Uber was its largest client.¹⁶ As deciding factors in winding down its Uber accounts nationwide, James River cited Florida’s large proportion of uninsured motorists, and California’s recently enacted statute designating Uber’s independent contractors as employees.¹⁷

Even before James River cancelled its Uber policies, some insurance regulators expressed doubt over the company’s insurance model in the ridesharing context.¹⁸ They were concerned James River’s one-size-fits-all Uber policies contravened state regulations and provided inadequate coverage to drivers—particularly during the period between rides when a driver stays logged in to the “UberPartner” or “Uber Driver” app awaiting her next ride.¹⁹

In response to these claims, one Uber representative said the company routinely provides \$1 million in liability coverage during a pickup or ride.²⁰ Uber only feels the need to use “limited backup coverage” during the period in between rides, known as “Period 1” in the industry.²¹ In Uber’s view, “Period 1” is “the same as waiting at home for temp work.”²² On the

13. Greenwald, *supra* note 11.

14. Matthew Lerner, *James River Trades Down on Uber Affiliate’s Policy Cancellations*, BUS. INS. (Oct. 9, 2019), <https://www.businessinsurance.com/article/20191009/NEWS06/912331083/James-River-trades-down-on-Rasier-policy-cancellations>.

15. *Welcome*, JAMES RIVER INS. CO., <https://www.jamesriverins.com/> (last visited Jan. 14, 2021).

16. Lerner, *supra* note 14.

17. Suzanne Barlyn, *Why James River Insurance Dumped Uber Account*, INS. J. (Nov. 8, 2019), <https://www.insurancejournal.com/news/national/2019/11/08/547942.htm>.

18. See Charles Elmore, *Uber’s Florida Fight: Whose Insurance Pays and When*, PALM BEACH POST (Sept. 24, 2015, 4:54 PM), <https://www.palmbeachpost.com/news/news/ubers-florida-fight-whose-insurance-pays-and-when/nkWSg/>.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

litigation front, coverage during “Period 1” with James River’s policies has become a major issue.²³ In *Genzer v. James River Insurance Co.*, the Tenth Circuit upheld a coverage denial for an Uber driver who suffered an accident during “Period 1.”²⁴

This Note will argue that the Tenth Circuit’s holding in *Genzer*, the first federal appellate court case in this emerging area of insurance litigation, continues an unfortunate trend. In recent years, courts have looked at insurance policy terms in the insured’s favor. In the specific context of ridesharing, though, courts seem more willing to strictly construe these terms without factoring in the ways they help ridesharing companies’ insurers avoid liability. By giving insurers the benefit of the doubt, even when a policy’s terms contravene state law, courts are unknowingly leaving a significant regulatory loophole open.

Part II of this Note will detail the history of ridesharing regulation in Oklahoma and other jurisdictions, as well as key Oklahoma insurance laws applicable to *Genzer*’s facts. Part III will detail the facts of the case and the procedural history. Part IV will examine the Tenth Circuit’s holding in *Genzer* in detail. Finally, Part V will analyze the holding as applied to both ridesharing insurance law specifically and Oklahoma insurance law generally.

II. Law Before the Case

A. How Other Jurisdictions Have Generally Treated Uber & James River

Initially, Uber and its competitors operated outside of the complex and vast regulatory frameworks governing urban and for-hire transportation, at both the municipal and state levels.²⁵ Unlike the companies caught in those regulatory webs, such as cab companies and public transit services, ridesharing companies have repeatedly asserted they are not “common carriers.”²⁶

As Uber, Lyft, and other ridesharing services gained in popularity, states took notice; many state and municipal governments began creating separate regulatory schemes specifically for these services instead of placing ridesharing into existing schemes for urban and for-hire transportation.²⁷ In recent years, Uber and Lyft have even been “kicked out” of several

23. See *infra* Section II.A.

24. 934 F.3d 1156 (10th Cir. 2019).

25. Macmurdo, *supra* note 3, at 313–14.

26. See LEHMANN, *supra* note 5.

27. Macmurdo, *supra* note 3, at 315.

municipalities for not complying with tougher regulations on background checks and insurance, among other areas of regulation.²⁸

California, the birthplace of both Uber and Lyft, was one of the first states to impose a statewide regulatory scheme for ridesharing.²⁹ In 2013, the California Public Utilities Commission (“CPUC”) imposed sanctions on Uber and Lyft for having “illegally operated as ‘charter-party carriers’ without licenses,” in violation of a multitude of regulations governing “for-hire transportation” and common carriers in California.³⁰ In September of that year, the CPUC created a new carrier category specifically for ridesharing services: “[t]ransportation [n]etwork [c]ompanies.”³¹

Many other states have since followed suit. A 2017 study by the Texas A&M Transportation Institute found that forty-eight states and the District of Columbia had some form of statewide or districtwide regulatory scheme imposed on ridesharing.³² In June 2018, Vermont imposed a regulatory scheme of its own.³³ As of publication date for this Note, Oregon was the only state without statewide regulation on ridesharing, in part due to a scandal in Portland involving Uber skirting the city’s insurance ordinances.³⁴

Legislators introduced these new schemes shortly after tragedy struck in Uber’s hometown of San Francisco. In a highly publicized incident on December 31, 2013, an Uber driver struck and killed a five-year-old girl during “Period 1.”³⁵ Uber, as well as Evanston Insurance Company, a

28. See Dave Lee, *What Happened in the City That Banned Uber*, BBC NEWS (Sept. 30, 2017), <https://www.bbc.com/news/technology-41450980> (discussing Uber and Lyft’s 2016 ban in Austin, Texas, and its reintroduction one year later after statewide rules preempted the tougher municipal regulations); see also Gwyn Topham, *Uber Granted Two-Month Extension to London Licence*, GUARDIAN (Sept. 24, 2019, 5:23 AM EDT), <https://www.theguardian.com/technology/2019/sep/24/uber-london-licence-transport-for-london> (discussing Transport for London’s decision not to license Uber due to concerns about passenger safety).

29. See Macmurdo, *supra* note 3, at 315.

30. *Id.*

31. *Id.*

32. MAARIT MORAN, BEN ETTelman, GRETCHEN STOELTJE, TODD HANSEN & ASHESH PANT, TEX. A&M TRANSP. INST., NO. PRC 17-70 F, POLICY IMPLICATIONS OF TRANSPORTATION NETWORK COMPANIES: FINAL REPORT 3 (2017), <https://static.tti.tamu.edu/tti.tamu.edu/documents/PRC-17-70-F.pdf>.

33. Owain James, *Uber and Lyft Are Lobbying States to Prohibit Local Regulation*, MOBILITY LAB (July 24, 2018), <https://mobilitylab.org/2018/07/24/uber-and-lyft-are-lobbying-states-to-prohibit-local-regulation/>.

34. *See id.*

35. Macmurdo, *supra* note 3, at 308.

surplus lines carrier that works with Uber and issued the policy,³⁶ denied liability for Uber's driver.³⁷ The companies claimed the driver had no passengers "in between calls," and that Uber's \$1 million liability policy did not cover the girl's wrongful death.³⁸

The resulting case, *Liu v. Uber Technologies, Inc.*, ultimately settled in 2015.³⁹ Uber filed counterclaims against Evanston for bad faith later that year.⁴⁰ Nonetheless, the public outcry ensuing from *Liu's* worst-case scenario compelled California's legislature to enact new statutes requiring minimum coverage during "Period 1."⁴¹

Despite state legislatures' efforts to mandate "Period 1" coverage, courts have generally upheld surplus lines carriers' policy provisions denying liability. For example, in *Jean v. James River Insurance Co.*, the Louisiana Court of Appeals held that James River's practice of waiving uninsured motorist ("UM") coverage during "Period 1" fit within the bounds of the state's rideshare services statute.⁴² The District of Nevada, in *Martin v. James River Insurance Co.*, granted James River's motion to dismiss under similar circumstances, saying the driver's coverage was permissibly waived.⁴³ In *Maxwell v. James River Insurance Co.*,⁴⁴ the District of Colorado upheld another coverage denial and waiver from James River.⁴⁵ The court added that Uber could be considered a "livery service" under her

36. *Evanston Ins. Co. v. Uber Techs., Inc.*, No. C 15-03988 WHA, 2015 WL 8597239, at *1 (N.D. Cal. Dec. 14, 2015).

37. *Id.*

38. *See id.* at *3 ("Evanston argues that the written terms of its policy preclude coverage [for the car accident] as a matter of law."); Answer & Affirmative Defenses of Defendants Uber Technologies, Inc., Rasier LLC, & Rasier-CA LLC to Plaintiffs' Complaint at 2, 6-7, *Liu v. Uber Techs., Inc.*, No. CGC-14-536979 (Cal. Super. Ct. May 1, 2014).

39. Order Granting Petition to Approve Compromise of a Minor's Claim, *Liu v. Uber Techs., Inc.*, No. CGC-14-536979 (Cal. Super. Ct. July 23, 2015).

40. *Evanston*, 2015 WL 8597239, at *1.

41. *See* CAL. PUB. UTIL. CODE § 5433(c) (2015) (providing that minimum coverage is required "from the moment a participating driver logs on to the transportation network company's online-enabled application or platform until the driver accepts a request to transport a passenger, and from the moment the driver completes the transaction . . . or the ride is complete . . . until the driver either accepts another ride request . . . or logs off").

42. 274 So.3d 43, 46 (La. Ct. App. 4th Cir. 2019) (citing LA. STAT. ANN. § 201.6 (2020)).

43. 366 F. Supp. 3d 1186, 1189-90 (D. Nev. 2019).

44. 401 F. Supp. 3d 1183 (D. Colo. 2019).

45. *Id.* at 1189, 1192.

separate auto policy with Twin City Fire, which did not have specific ridesharing coverage either.⁴⁶

As these cases illustrate, regulators in nearly every state have imposed a scheme on ridesharing, but courts still seem to view insurance provisions with some degree of stringency. Oklahoma is no exception.

B. Oklahoma's Ridesharing Statute & Insurance Law

1. The OTNC Services Act

Keeping in line with the national trend towards regulating ridesharing, Oklahoma enacted the Oklahoma Transportation Network Company (“OTNC”) Services Act in 2015.⁴⁷ Like several other states, Oklahoma regulates Uber and other ridesharing services as a separate and distinct category of carrier.⁴⁸ The OTNC Services Act’s language openly states ridesharing services are not “considered motor carriers of persons . . . nor . . . considered to provide taxicab, limousine, or similar for-hire motor carrier service.”⁴⁹ Despite the state regulating ridesharing companies as a distinct class of carrier and excluding them from being called “motor carriers,”⁵⁰ another Oklahoma statute, the Motor Carrier Act of 1995, excludes municipal taxi companies from the “common carrier” definition.⁵¹ This has not, however, impacted taxi drivers from similar regulations imposed by Oklahoma’s municipalities, including mandatory insurance⁵² and vicarious liability for drivers in the course of employment.⁵³

Because the Motor Carrier Act of 1995 does not include rideshare drivers, the Oklahoma legislature has imposed somewhat more relaxed regulations. The OTNC Services Act requires ridesharing services to maintain “primary automobile insurance” that covers the driver during one of two periods: “(1) While the driver is both logged on to and available to receive transportation requests on the . . . digital network; or (2) While the

46. *Id.*

47. 47 OKLA. STAT. § 1010 (Supp. 2019).

48. *See id.* § 1012; *see also* MORAN ET AL., *supra* note 32, at 29 (first citing S.B. 14-125, 69th Gen. Assemb., 2d Reg. Sess. (Colo. 2014); and then citing S.B. 396, 64th Leg., Reg. Sess. (Mont. 2015)).

49. 47 OKLA. STAT. § 1012.

50. *Id.*

51. 47 OKLA. STAT. § 230.23(6)(a) (2011).

52. *See, e.g.,* Graves v. Harrington, 60 P.2d 622, 625 (Okla. 1936) (explaining that the city ordinance at issue “requires insurance against liability”).

53. *See* Dixie Cab Co. v. Sanders, 1955 OK 150, ¶ 10, 284 P.2d 421, 424; Safeway Cab Co. v. McConnell, 1938 OK 2, ¶¶ 3–4, 75 P.2d 884, 885.

driver is engaged in providing prearranged rides.”⁵⁴ The *Genzer* case involved coverage during the former period.⁵⁵ The OTNC Services Act allows for ridesharing services to maintain insurance when an outside company would not provide it.⁵⁶ Finally, the Act also allows surplus lines insurers (such as James River) to provide policies.⁵⁷

2. Uninsured Motorist (UM) Coverage in Oklahoma

As with all auto insurance policies in Oklahoma, UM coverage is required by law for ridesharing services “where not waived” pursuant to Oklahoma’s UM statute.⁵⁸ Title 36, section 3636 of the Oklahoma Statutes governs this coverage. UM coverage takes effect when an insured driver brings forward a claim for “bodily injury, sickness, or disease, including death” resulting from “owners or operators of uninsured motor vehicles and hit-and-run motor vehicles.”⁵⁹

The UM statute requires policies “issued, delivered, renewed, or extended” in Oklahoma, to “motor vehicle[s] registered or principally garaged” in Oklahoma, to have UM coverage.⁶⁰ Yet, the statute also allows insureds to reject or waive UM coverage entirely, or select lower liability limits, at the mercy of the insurer.⁶¹ It is important to carefully read the policy language that fits the UM statute, particularly since Oklahoma courts have based their opinions on specific exclusions and whether they contravene the UM statute’s public policy for Oklahoma.⁶²

This focus on specific exclusions encompasses a wide range of issues. For example, the Oklahoma Supreme Court affirmed a denial of UM coverage for a vehicle principally garaged and driven in Texas because Oklahoma’s UM statute specifically applied to cars “registered or principally garaged in” Oklahoma.⁶³ On the other hand, the Oklahoma Supreme Court affirmed a trial court verdict allowing UM benefits to be

54. 47 OKLA. STAT. § 1025(A)(1)–(2) (Supp. 2019).

55. *Id.* § 1025(B)(1); *see Genzer v. James River Ins. Co.*, 934 F.3d 1156, 1159 (10th Cir. 2019) (stating that the accident at issue occurred while Genzer, an Uber driver, was returning from dropping off a passenger).

56. 47 OKLA. STAT. § 1025(D)–(E).

57. *Id.* § 1025(F).

58. *Id.* § 1025(B)(2).

59. 36 OKLA. STAT. § 3636(B) (Supp. 2019).

60. *Id.* § 3636(A).

61. *Id.* § 3636(G).

62. *See Dawn M. Goeres, Oklahoma’s Uninsured Motorist Coverage Statute – An Overview*, 88 OKLA. BAR J. 1951, 1951–52 (2017).

63. *Bernal v. Charter Cty. Mut. Ins. Co.*, 2009 OK 28, ¶¶ 13–14, 209 P.3d 309, 316.

“stacked”⁶⁴ when another state’s law, and the terms of the policy, permit it, even if Oklahoma law does not.⁶⁵ Looking at the UM statute and the terms of the policy in tandem is crucial to understanding whether a given policy violates Oklahoma law.

3. *Surplus Lines Coverage in Oklahoma*

Another type of insurance coverage applicable to ridesharing services is surplus lines coverage, which covers risks not included in conventional policies. In Oklahoma, surplus lines insurers operate through licensees and brokers “on properties, risks or exposures located or to be performed in a state allowing non-admitted insurers to do business.”⁶⁶ These groups can place the coverage with a surplus lines insurer “[i]f a particular insurance coverage or type, class, or kind of coverage is not readily procurable from authorized insurers in Oklahoma.”⁶⁷ Insurance contracts that are “effectuated by a surplus lines insurer” in violation of Oklahoma law are voidable unless the insured says otherwise.⁶⁸ Oklahoma maintains a list of surplus lines insurers that are eligible to operate in the state; the Oklahoma Insurance Commission has named James River as an approved surplus lines insurer.⁶⁹

4. “*Mend the Hold*”

Understanding *Genzer* also requires an explanation of a long-standing jurisprudential relic known as “mend the hold” doctrine. This theory formed one of the central arguments in *Genzer*’s case.⁷⁰ First advanced by the U.S. Supreme Court in 1877, “mend the hold” doctrine was affirmed in principle by the Oklahoma Supreme Court in 1906.⁷¹ Quoting the U.S. Supreme Court case, the language of this theory is as follows: “Where a party gives a reason for his conduct and decision touching anything

64. See *Goeres*, *supra* note 62, at 1952 (defining stacking as “a situation in which multiple vehicles are identified on a policy and the insured pays separate UM premiums for each, thereby permitting the insured to recover the UM limit for each listed vehicle rather than the single UM limit identified on the policy”).

65. *Leritz v. Farmers Ins. Co.*, 2016 OK 79, ¶¶ 3–4, 385 P.3d 991, 993.

66. 36 OKLA. STAT. § 1100.1(10) (2011).

67. *Id.* § 1108.

68. *Id.* § 1102.

69. *Company Type: Surplus Lines*, NAT’L ASS’N INS. COMM’RS, <https://sbs.naic.org/solar-external-lookup/lookup/company/summary/44197344?jurisdiction=OK> (last visited Jan. 15, 2021).

70. *Genzer v. James River Ins. Co.*, 934 F.3d 1156, 1158 (10th Cir. 2019).

71. *Morrison v. Atkinson*, 1906 OK 25, 85 P. 472.

involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. *He is not permitted thus to mend his hold.*⁷²

Fundamentally, “mend the hold” fits two doctrinal spectra. In the procedural context, by barring defenses to be raised in litigation, it brushes up against the Federal Rules of Civil Procedure.⁷³ In the more accepted substantive context, it limits contracting parties to statements made before litigation.⁷⁴

The Seventh Circuit case *Harbor Insurance Co. v. Continental Bank Corp.* is an oft-cited example of “mend the hold” as applied to insurance claims.⁷⁵ *Harbor* involved a coverage denial by Harbor Insurance Company and Allstate Insurance Company, which provided liability insurance for Continental Bank’s directors and officers.⁷⁶ Harbor and Allstate initially denied coverage for the defendant directors’ “egregious” behavior, but then filed a counterclaim, stating there was no misconduct.⁷⁷ As such, Harbor and Allstate changed their defense theory midway through litigation.⁷⁸

In an opinion written by Judge Posner, the court held this inconsistent denial created a question of fact, and that “mend the hold” formed part of the insurer’s duty of good faith and fair dealing in treating its claim.⁷⁹ Judge Posner agreed with the bank that “one might suppose that the insurance companies owed their insured a fuller inquiry before denying liability on what proved to be an untenable ground” when the insurance companies

72. *Id.* ¶ 8, 85 P. at 473 (emphasis added) (quoting *Ohio & Miss. Ry. Co. v. McCarthy*, 96 U.S. 258, 267–68 (1877)).

73. *See Harbor Ins. Co. v. Cont’l Bank Corp.*, 922 F.2d 357, 364 (7th Cir. 1990) (observing that the “mend the hold” doctrine “embodies an antithetical conception of the litigation process, one in which a party is expected to have all his pins in perfect order when he files his first pleading” because, in contrast, the Federal Rules of Civil Procedure allow a party to state “as many separate claims or defenses as the party has regardless of consistency” (quoting FED. R. CIV. P. 8(e)(2)).

74. *See* Robert H. Sitkoff, Comment, “*Mend the Hold*” and *Erie*: Why an Obscure Contracts Doctrine Should Control in Federal Diversity Cases, 65 U. CHI. L. REV. 1059, 1068–69 (1998) (“Over the last fifty years, courts applying the laws of Delaware, the District of Columbia, Georgia, Iowa, Kansas, Michigan, Nebraska, New Jersey, New York, Oregon, Tennessee, Texas, and Vermont have enforced this version of the doctrine either by name or in practice at least once.”).

75. 922 F.2d 357 (7th Cir. 1990).

76. *Id.* at 359.

77. *Id.* at 359–60.

78. *Id.*

79. *Id.* at 362–63.

defended the counterclaim; Harbor and Allstate could not “mend the[ir] hold.”⁸⁰

In *Harbor*, the Seventh Circuit also addressed concerns about the reach of “mend the hold” by interpreting it in two ways. On one hand, when viewed in a *procedural* manner, Judge Posner’s opinion expressed concern that “mend the hold” would conflict with the Federal Rules of Civil Procedure and force litigants to “have all their pins in order” before asserting defenses.⁸¹ On the other hand, courts in Illinois (*Harbor*’s jurisdiction) applied “mend the hold” as a doctrine that “estops a contract party to change the ground on which he has refused to perform the contract, whether or not it was a ground stated in a pleading, or otherwise in the course of litigation.”⁸² This *contractual* version of “mend the hold” has since applied to the insurance law arena in Oklahoma (although not explicitly by name) as an intersection between the nuances of insurance contract law and an insurer’s duty of good faith and fair dealing in treating an insured’s claim.⁸³

The seminal “mend the hold” case in Oklahoma is *Buzzard v. Farmers Insurance Co.* In *Buzzard*, Farmers’s adjusters sought to introduce evidence that its insured was speeding.⁸⁴ Farmers presented this novel theory despite initially encouraging its insureds to settle with a liability carrier, only to deny coverage after the fact.⁸⁵ Put another way by the Oklahoma Supreme Court, the comparative negligence defense “was neither internally noted by Farmers nor communicated to plaintiffs as a reason for delay or denial of the claim.”⁸⁶ The court also stated Farmers could not rely on testimony from an accident reconstructionist in support of denying the claim because the evaluation happened after Farmers’s denial.⁸⁷

Buzzard ultimately forbade Farmers from introducing evidence of its insured’s negligence without having communicated its intent to the insured’s decedents before litigation started.⁸⁸ Based on this precedent, Oklahoma courts do not permit an insurer to “mend the hold.” In *Genzer*, James River makes a similar shift in theories between initial representation

80. *Id.* at 364.

81. *Id.*

82. *Id.*

83. *See, e.g.*, *Buzzard v. Farmers Ins. Co.*, 1991 OK 127, ¶¶ 11–17, 824 P.2d 1105, 1108–10; *Brown v. Patel*, 2007 OK 16, ¶¶ 12–13, 157 P.3d 117, 122–23.

84. *Buzzard*, ¶¶ 15–17, 824 P.2d at 1109–10.

85. *Id.*

86. *Id.*

87. *Id.* ¶ 43, 824 P.2d at 1114.

88. *Id.* ¶ 17, 824 P.2d at 1110.

to its insured and its theory in litigation, but the court did not specifically apply *Buzzard*'s precedent to *Genzer*'s facts.

III. Statement of the Case

A. Facts

On April 17, 2017, Uber driver Bonni Genzer picked up a passenger at Will Rogers World Airport in Oklahoma City and drove him nearly 140 miles to Woodward.⁸⁹ During Genzer's return drive to Oklahoma City, a large metal object fell from a semi-trailer truck and smashed through her windshield.⁹⁰ After the accident, Genzer made a claim for UM coverage benefits to James River, Uber's insurer, on May 3, 2017.⁹¹ She asserted she was using the UberPartner application while on her return journey.⁹²

The major issue in *Genzer* was whether one of the driver's two James River policies (issued through Uber) applied to her incident. The first policy, known as the "100 Policy," applies when an Uber driver logged into UberPartner is either en route to pick up a passenger or is on public airport premises.⁹³ The other, the "200 Policy," covers "Period 1," when an Uber driver logged in to the application is available for requests but has not yet accepted a ride.⁹⁴ Only the "100 Policy" allowed for UM coverage at the time of incident.⁹⁵ Yet, a James River claims examiner initially used the "200 Policy" to disclaim Genzer's coverage instead, despite Genzer admitting she waived that coverage.⁹⁶

In back-and-forth correspondence between the examiner and Genzer's counsel, the examiner reiterated that Genzer was not logged into the UberPartner application at the time of the incident.⁹⁷ When Genzer asserted she was online and seeking a fare, James River's claims examiner replied that "available or offline, there isn't coverage" for her injuries or any vehicle damage.⁹⁸

89. *Genzer v. James River Ins. Co.*, No. CIV-17-855-SLP, 2018 WL 11240482, at *1, *6 (W.D. Okla. June 4, 2018) (granting summary judgment to James River and denying partial summary judgment to Genzer).

90. *Id.* at *1.

91. *Genzer v. James River Ins. Co.*, 934 F.3d 1156, 1159 (10th Cir. 2019).

92. *Id.*

93. *Id.* at 1158.

94. *Id.* at 1159.

95. *Id.* at 1161.

96. *Id.* at 1161 & n.11.

97. *Id.* at 1159.

98. *Id.* at 1160.

Ultimately, James River denied the claim on the sole basis that Genzer had not been logged into the UberPartner application at the time of injury—leaving open the question of whether Genzer operated a covered “auto” under the “100 Policy.”⁹⁹

B. Procedural History

After James River denied Genzer’s benefits, she filed a breach of contract suit in Blaine County District Court.¹⁰⁰ Along with the coverage issue, Genzer argued “mend the hold” was applicable.¹⁰¹ Since James River asserted the defense that Genzer was offline at the time of the incident, it waived any possibility of asserting the defense that she was *not* operating a covered “auto” at the time of the incident.¹⁰² James River subsequently removed the case to the Western District of Oklahoma.¹⁰³ James River then filed a motion for summary judgment on the grounds that Genzer did not have coverage, albeit not relying on Genzer’s “alleged offline status.”¹⁰⁴ Genzer filed a motion for partial summary judgment the same day, claiming coverage under a “100 Policy” provision endorsement—subpart (a)(2)—for “traveling to the final destination[s] of the requested transportation services including, but not limited to, dropping-off of passenger(s).”¹⁰⁵

The Western District of Oklahoma subsequently granted James River’s motion and denied Genzer’s.¹⁰⁶ The order found *Morrison v. Atkinson* and “mend the hold” inapplicable, because it did not believe James River had “taken opposite positions on the same issue during this litigation.”¹⁰⁷ The order also asserted the main policy provision Genzer called ambiguous—“traveling to the final destination[s] of the requested transportation services including, but not limited to, dropping-off of passenger(s)” —was not ambiguous after all.¹⁰⁸ In the trial court’s view, “[a] passenger who hires a

99. *Id.*

100. *Id.*

101. *Genzer v. James River Ins. Co.*, No. CIV-17-855-SLP, 2018 WL 11240482, at *5 (W.D. Okla. June 4, 2018).

102. *Id.* Genzer argued that “an insurance company must decide which defenses apply and assert those when it denies a claim. In doing so, *all other defenses that the insurance company knew of at the time it denied the claim are waived.*” *Id.* (emphasis added) (citation omitted).

103. *Genzer*, 934 F.3d at 1160.

104. *Id.* at 1163.

105. *Id.* at 1158, 1167.

106. *Id.* at 1160.

107. *Genzer*, 2018 WL 11240482, at *5–*6.

108. *Id.* at *3–*4.

driver via Uber surely does not care where the driver goes after dropping the passenger off at his or her desired destination.”¹⁰⁹ The court only briefly addressed Oklahoma’s UM statute and James River’s “200 Policy” in a footnote, calling both irrelevant to Genzer’s cause of action.¹¹⁰

IV. The Tenth Circuit’s Decision—A Strict Approach

On appeal, the Tenth Circuit affirmed the district court order granting summary judgment to James River.¹¹¹ *Genzer*’s issues, as interpreted by the Tenth Circuit, were (1) whether “mend the hold” applied in Oklahoma as asserted by Genzer, and (2) whether the covered auto endorsement of the “100 Policy” was ambiguous.¹¹² The Tenth Circuit concluded that neither was the case, rejecting Genzer’s claim for coverage.¹¹³

The Tenth Circuit started its analysis by first examining whether “mend the hold” applies to James River’s differing rationale for denying coverage during litigation.¹¹⁴ It asserted James River shifted its rationale simply because it “tracked *Genzer*’s shifting theory of coverage.”¹¹⁵ In the Tenth Circuit’s view, the “200 Policy” applied to the facts “as Genzer had recited them” in her initial representation to James River because she “had been ‘available’ for ride requests.”¹¹⁶ Yet, Genzer’s actual suit invoked the “100 Policy,” and she stated in her complaint that “she had in fact been ‘providing’ transportation services.”¹¹⁷ Without addressing the subtle difference between “available for” and “providing” ride requests, the court ends by saying “[t]he mend-the-hold doctrine’s applicability in these circumstances is unlikely in any jurisdiction.”¹¹⁸

Next, the Tenth Circuit seemed to question whether “mend the hold” applies in Oklahoma at all, citing an unpublished Eastern District of Oklahoma case and its appeal in the circuit.¹¹⁹ The Tenth Circuit interpreted *Morrison*’s mention of “mend the hold” as part of the overarching contract

109. *Id.* at *4.

110. *Id.* at *2 n.4.

111. *Genzer*, 934 F.3d at 1158.

112. *Id.*

113. *Id.* at 1169.

114. *Id.* at 1160–61.

115. *Id.* at 1163.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 1164 & n.20 (first citing *Fry v. Am. Home Assurance Co.*, No. CIV-14-131-RAW, 2015 WL 519706, at *2 (E.D. Okla. Feb. 9, 2015); and then citing *Fry v. Am. Home Assurance Co.*, 636 F. App’x 764, 766 (10th Cir. 2016)).

rule that “arguments not asserted at trial are waived on appeal.”¹²⁰ Ergo, the “mend the hold” doctrine does not bar parties from switching rationales during litigation entirely.¹²¹ Even though the Tenth Circuit noted that several cases after *Morrison* use “mend the hold” language, it stated the Oklahoma Supreme Court “has never endorsed the doctrine as a constraint on an alleged nonperforming party in a breach-of-contract action changing its prelitigation defenses.”¹²² The Tenth Circuit then set aside the cases that Genzer cited using the prelitigation “mend the hold” doctrine, including *Buzzard*,¹²³ by saying the court does not explicitly invoke it, stating:

Any resemblance [to the precedents Genzer cites] is irrelevant, though, because Genzer does not allege that James River initially denied coverage in bad faith. In fact, she seeks to limit James River to its prelitigation denial irrespective of its good-faith basis for that denial. Such an absolute bar to changing positions is plainly incongruous with a conception of the mend-the-hold doctrine rooted in the duty of good faith.¹²⁴

James River’s denial of coverage, in the Tenth Circuit’s view, was not in bad faith; it seemingly gave “fair notice” of its rationale during litigation—citing the unpublished *Fry v. American Home Assurance Co.* appellate opinion as its primary metric for “mend the hold.”¹²⁵ The court also assumed that because James River “continues to argue that Genzer had been offline . . . even as it argues that she had already completed the accepted services,” James River was maintaining “additional, consistent defenses to contract performance” in its denial of Genzer’s coverage.¹²⁶

The Tenth Circuit accused Genzer of relying on extra-jurisdictional authority in citing cases such as *Harbor*, adding that “Oklahoma courts haven’t seen fit to adopt” the doctrine.¹²⁷ Interestingly, the Tenth Circuit’s conclusion, that applying “mend the hold” in *Genzer* “would be

120. *Id.* at 1164.

121. *Id.*

122. *Id.* at 1164–65.

123. *See supra* Section II.B.4 (discussing this case’s applicability to “mend the hold” in Oklahoma).

124. *Genzer*, 934 F.3d at 1165.

125. *Id.* at 1166 (stating that, according to the *Fry* opinion, “the mend the hold doctrine ‘seems to require only fair notice of the theory for denying coverage’”) (citing *Fry v. Am. Home Assurance Co.*, 636 F. App’x 764, 766 (10th Cir. 2016)).

126. *Id.*

127. *Id.* at 1165 (noting Genzer’s reliance on *Harbor Ins. Co. v. Cont’l Bank Corp.*, 922 F.2d 357, 363 (7th Cir. 1990)).

unreasonable to the point of absurdity,” relied on language from another Seventh Circuit case.¹²⁸

In its analysis of Genzer’s breach of contract issue, the Tenth Circuit strictly construed the “100 Policy.” Specifically, the court looked at the policy’s covered-auto endorsement provision of “traveling to the final destination of the requested transportation services including, but not limited to, dropping-off of passenger(s).”¹²⁹ It upheld the district court’s view of this provision: Genzer’s coverage ended at the final destination of the *passenger*, not that of the *driver*, regardless of the distance.¹³⁰ A different result would theoretically mean that “after accepting a single ride request, a driver would continue occupying a ‘covered auto’ throughout her travels, even when offline and driving for strictly personal reasons.”¹³¹ This would go beyond the “discrete stages of the ridesharing process” instituted in the provision.¹³² The court ended its analysis by citing another provision of the “100 Policy” where, “immediately following the conclusion of the requested transportation services,” the policy covers the driver “while in the course of exiting [airport premises].”¹³³ In the court’s view, then, the coverage omission for cases like Genzer’s was “deliberate.”¹³⁴

Ultimately, the Tenth Circuit concluded the *Genzer* opinion by stating “there is no ambiguity to construe in Genzer’s favor Though we sympathize with Genzer’s misfortune and injuries, this outcome is dictated by the covered-auto endorsement’s plain terms.”¹³⁵

V. Analysis

The Tenth Circuit’s decision in *Genzer* constricts the policy to the plainest terms and confuses the issues. The court’s flat rejection of “mend the hold” in Oklahoma does not account for that doctrine’s complex intersection with contract and tort law. Further, the court places too much weight on the language of James River’s insurance policy *prima facie*. In doing so, it failed to account for James River’s history of issuing policies contravening Oklahoma law, the “reasonable expectations” doctrine governing Oklahoma insurance contracts, and the novel nature of Uber as a

128. *Id.* at 1156 (citing *Ryerson Inc. v. Fed. Ins. Co.*, 676 F.3d 610, 614 (7th Cir. 2012)).

129. *Id.* at 1167.

130. *Id.* at 1168.

131. *Id.* at 1169.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

service. By taking James River at its word, the *Genzer* decision ultimately furthers a detrimental public policy, not just in giving insurers the benefit of the doubt in switching rationales for denying coverage, but in refusing to close a regulatory loophole for ridesharing services.

A. No More “Mend the Hold” in Oklahoma?

While Oklahoma courts have not applied “mend the hold” by name, they frequently apply its principles, phrased as a sort of cousin to equitable estoppel.¹³⁶ Both the district court’s order and Tenth Circuit’s opinion cast doubt on the “mend the hold” doctrine’s application in insurance, and the Tenth Circuit’s opinion erred further in failing to consider Oklahoma’s precedent on the matter. Insurers owe insureds a *tort* duty of good faith and fair dealing in handling claims such as *Genzer*’s, and Oklahoma courts have extended this *tort* duty to an insurer’s *contractual* duty as well.¹³⁷

Besides resorting to unpublished cases in saying “mend the hold” does not apply in Oklahoma by name,¹³⁸ the Tenth Circuit seems to misinterpret the Seventh Circuit’s *Harbor* case governing “mend the hold” as applied to *Genzer*’s case:

Of course, the analysis is different for during-litigation positional shifts. A party that asserts one defense to contract performance in response to the complaint, then when that defense fails asserts a different defense—even a consistent one—might be attempting unfairly to take a better hold. But here, James River . . . denied coverage before litigation based on *Genzer*’s factual account, then asserted different grounds for denial in response to the complaint.¹³⁹

Yet, the Tenth Circuit seems to neglect the clear distinction in *Harbor* between *procedural* “mend the hold,” which bars parties from switching litigation defenses, and *contractual* “mend the hold,” which bars parties from switching grounds for contract denial.¹⁴⁰ It is admittedly a subtle difference, but a key one. *Genzer* never attempted to stop James River from

136. See *supra* Section II.B.4.

137. *Christian v. Am. Home Assurance Co.*, 1977 OK 141, ¶¶ 6, 25, 577 P.2d 899, 901, 904–05 (“Breach of the duty sounds in tort, notwithstanding that it also constitutes a breach of contract . . .”).

138. See *supra* Part IV.

139. *Genzer*, 934 F.3d at 1166 n.25 (citing *Harbor v. Cont’l Bank Corp.*, 922 F.2d 357, 363 (7th Cir. 1990)).

140. See *Harbor*, 922 F.2d at 364 (explaining the difference between the procedural and substantive (i.e., contractual) versions of “mend the hold”).

asserting the defense that she did not operate a covered “auto.” In using “mend the hold,” she attempted to stop James River from asserting different grounds for denial than those already communicated to her.

As with Farmers in *Buzzard*,¹⁴¹ James River decided to change its theory midway through litigation to assert a different reason for denying its contract performance. In *Buzzard*, Farmers could not introduce evidence obtained after the beginning of litigation to present a new theory denying liability for its insured.¹⁴² Similarly, James River should not have been allowed to explicitly say “available or offline, there isn’t coverage” without having communicated to Genzer *why* there was no coverage. The Tenth Circuit even implicitly said as much in footnote 16 of the opinion:

[E]ven accepting James River’s interpretation [that uninsured-motorist coverage was available and that a different policy was being discussed], it doesn’t explain why James River disclaimed coverage. The phrase “available or offline, there isn’t coverage” states only the *conclusion* that there isn’t coverage, not *why* there isn’t coverage. It certainly does not contemplate James River’s current rationale for denying coverage, *i.e.*, that Genzer had already dropped off her passenger before the accident. The rationale that there isn’t coverage whether Genzer was “available or offline” doesn’t admit of such a specific meaning.¹⁴³

Footnote 23 of the opinion also serves as an extreme example of strict construction in acknowledging why “mend the hold” would not apply here. The Tenth Circuit stated that Genzer acknowledged an inherent difference between bad faith and “mend the hold,” simply because her reply brief used the word “or” in describing the two.¹⁴⁴ Perhaps the Tenth Circuit aimed to nullify the precedents Genzer brought forth to show that modern “mend the hold” forms part of the duty of good faith and fair dealing, even if “mend the hold” was never mentioned by name in the body of the case.

At any rate, the differences alleged by the Tenth Circuit amount to little more than semantics. The Oklahoma Supreme Court’s language in *Buzzard*

141. See *Buzzard v. Farmers Ins. Co.*, 1991 OK 127, ¶¶ 13–18, 824 P.2d 1105, 1109–10 (stating that the insurance company raised a defense that was neither “internally noted by [the insurance company] nor communicated to plaintiffs as a reason for delay or denial of [plaintiffs’] claim”).

142. *Id.*

143. *Genzer*, 934 F.3d at 1162 n.16.

144. *Id.* at 1165 n.23 (stating that Genzer “[used] the disjunctive ‘or’ to distinguish ‘a bad faith theory or a mend-the-hold theory’”).

necessarily implied “mend the hold” in an insurance bad faith claim. According to the *Buzzard* court, an “insurer must conduct an investigation reasonably appropriate under the circumstances,” centering the inquiry on “[t]he knowledge and belief of the insurer during the time period the claim is being reviewed.”¹⁴⁵

As such, before the *Genzer* decision, an insurer was not permitted to “mend its hold.” Yet, the *Genzer* decision throws this precedent into doubt, despite the Tenth Circuit previously upholding *Buzzard* as good law several months prior to the *Genzer* decision.¹⁴⁶ Unlike the Oklahoma Supreme Court in *Buzzard*, the Tenth Circuit in *Genzer* allowed the insurer to say it denied its insurer’s claim for a different reason than it had initially expressed to its insured.

B. James River’s Insurance Policies and Oklahoma Law

Genzer also failed to address some major ambiguities in Oklahoma’s insurance law that have become increasingly important with the rise of ridesharing. The *Genzer* opinion does not mention any Oklahoma insurance statutes applicable to waiving UM coverage or surplus lines coverage, even though the case’s claims indirectly raise both issues. The district court’s order brushed off the nuances involving *Genzer*’s UM coverage waiver with the following footnote: “Because Plaintiff does not claim a violation of this statute (if she could do so in a civil action), the statute is irrelevant to the issues before the Court.”¹⁴⁷ Outside of a brief mention that James River disclaimed its “200 Policy” coverage,¹⁴⁸ the Tenth Circuit’s opinion does not mention this issue at all.

Of course, conventional insurers still express a degree of wariness towards ridesharing’s distinct risks. A 2015 report by the National Association of Insurance Commissioners (“NAIC”) stated that personal auto insurance carriers’ concerns about ridesharing included, inter alia, “[c]onfusion regarding which insurer has a duty to defend,” and which insurer has a duty to indemnify.¹⁴⁹ This confusion arises from the unique

145. *Buzzard*, ¶ 14, 824 P.2d at 1109.

146. *Thomas v. Farmers Ins. Co.*, 774 F. App’x 430, 432 (10th Cir. 2019) (“[E]vidence that supports a post-denial rationalization, rather than the evidence that the insurance company actually relied on when initially denying a claim, is inadmissible under *Buzzard*.”).

147. *Genzer v. James River Ins. Co.*, No. CIV-17-855-SLP, 2018 WL 11240482, at *2 n.4 (W.D. Okla. June 4, 2018).

148. *Genzer*, 934 F.3d at 1163.

149. NAT’L ASS’N OF INS. COMM’RS, TRANSPORTATION NETWORK COMPANY INSURANCE PRINCIPLES FOR LEGISLATORS AND REGULATORS 8 (2015), https://www.naic.org/prod_serv/TNC-OP-15.pdf.

way ridesharing services use surplus lines coverage; in addition to insuring the ridesharing company's risks, the surplus lines carrier also covers any losses "resulting from the [ridesharing] drivers using their personal autos."¹⁵⁰

In theory, the surplus lines carrier's allocation of risks from the ridesharing company and its drivers should make the coverage operate in tandem with the drivers' personal policies. Yet, again, this is usually not the case.¹⁵¹ The NAIC urged regulators and legislators to "consider requiring UM [coverage] in the same amount as liability coverage" for ridesharing.¹⁵² In a similar vein, the NAIC warned that omitting UM coverage would leave "a passenger injured in an accident caused by an uninsured . . . motorist . . . without recourse."¹⁵³

The Oklahoma statute fits the NAIC's standard. It states that, "while a [ridesharing] driver is both logged on to the [ridesharing company]'s digital network and available to receive transportation requests but is not engaged in prearranged rides"—in other words, "Period 1"—there must be "[UM] coverage where not waived."¹⁵⁴ The Oklahoma ridesharing statute also implicitly acknowledges the complicated nature of Uber's insurance policy by allowing for insurance "with an insurer authorized to do business in this state or with a surplus lines insurer eligible under [the surplus lines statute]."¹⁵⁵ As such, neither the district court's order, nor the Tenth Circuit's opinion, raised the issue that James River, as a surplus lines insurer, is not licensed to sell policies in Oklahoma.

The Northern District of Oklahoma, however, explicitly recognized this issue in another case involving a James River policy with terms that might potentially contradict Oklahoma law on waiving an insurance policy. Although the district court in that case ultimately ruled in James River's favor,¹⁵⁶ the statute and waiver involved share some key differences with the UM and ridesharing statutes at issue in *Genzer*.

In *James River Insurance Co. v. Blue Ox Dance Hall, LLC*, the insurer sued for declaratory judgment against a night club and its owners on the

150. *Id.* at 9.

151. *See supra* Part I.

152. NAT'L ASS'N OF INS. COMM'RS, *supra* note 149, at 17.

153. *Id.*

154. 47 OKLA. STAT. § 1025(B)(2) (Supp. 2019).

155. *Id.* § 1025(F).

156. *James River Ins. Co. v. Blue Ox Dance Hall, LLC (Blue Ox I)*, No. 16-CV-0151-CVE-FHM, 2017 WL 2367052, at *8 (N.D. Okla. May 31, 2017).

grounds that a provision in its liability policy was valid.¹⁵⁷ The policy provision at issue, called “defense within limits,” allowed James River to deduct claims expenses and defense costs from the assault and battery coverage limit on its premium.¹⁵⁸ Blue Ox argued the deductions violated an Oklahoma statute that prohibited defense costs from being included within the limits of liability of any insurance policy “made, issued, or delivered by any insurer or by any agent” operating within the state.¹⁵⁹

James River’s motion for partial summary judgment in *Blue Ox I* asserted, rather strikingly, that its status as a surplus lines carrier gave it the ability to include a provision contrary to Oklahoma law.¹⁶⁰ The court opted to defer a ruling and have James River brief the issue more fully in a second motion.¹⁶¹ After James River briefed a second motion for partial summary judgment, the court dismissed the case.¹⁶² The court cited the Oklahoma Insurance Commissioner’s waiver, which stated that preventing an insurer from including a “defense within limits” provision otherwise contrary to Oklahoma law would “cause a market availability problem for the persons or risks covered by such insurance policies, *forcing consumers to obtain coverage from non-admitted insurers.*”¹⁶³

The Oklahoma ridesharing statute does implicitly acknowledge the complicated nature of Uber’s insurance policy by allowing for insurance “with an insurer authorized to do business in this state or with a surplus lines insurer eligible under [the surplus lines statute].”¹⁶⁴ Of course, the risks of ridesharing are indeed distinct from those in a conventional insurance policy.¹⁶⁵ Yet, this discrepancy does not reconcile James River’s disclaimer of coverage, even if the facts do not allege any impropriety with a coverage waiver.

157. *Id.* at *1.

158. James River Ins. Co. v. Blue Ox Dance Hall, LLC (*Blue Ox II*), No. 16-CV-0151-CVE-FHM, 2017 WL 5195877, at *1 (N.D. Okla. Nov. 1, 2017).

159. *Blue Ox I*, 2017 WL 2367052, at *6 (citing OKLA. ADMIN. CODE § 365:15-1-15 (2020)).

160. *Id.*

161. *Id.*

162. *Blue Ox II*, 2017 WL 5195877, at *4.

163. *Id.*

164. 47 OKLA. STAT. § 1025(F) (Supp. 2019).

165. See *Commercial Ride-Sharing*, *supra* note 10 (“Ride-sharing is different, however, than taking a traditional taxi or limousine. Taxis and limousines are typically licensed by the state and/or local transportation authority. . . . [Ride-Sharers] may not be subject to the same requirements that apply to taxis and limousines.”).

For example, James River's "200 Policy" allowed for UM coverage in Kansas, but not Oklahoma, without explanation as to why.¹⁶⁶ While the Oklahoma Supreme Court has acknowledged the UM statute's "legislative intent . . . could arguably be satisfied with the acceptance of UM insurance with agreed-upon exclusions from coverage,"¹⁶⁷ this premise relies on the policyholder's decision to accept or reject UM coverage.¹⁶⁸ As such, the court has repeatedly voided comparable insurance policy provisions "[purporting] to condition, limit, or dilute" coverage in violation of the UM statute, from insurers licensed to do business in the state.¹⁶⁹

Surplus lines coverage does fit an important niche in insurance law. It should not, however, give insurers free reign to introduce policies that contradict Oklahoma law, at least without arguing their exclusion would, in a similar vein to the *Blue Ox II* case, cause a "market availability problem" for Uber and other ridesharing services.¹⁷⁰

C. "Unambiguous" Terms and "Reasonable Expectations"

Insurance contracts, like Genzer and James River's, are considered contracts of adhesion because of the disproportionate bargaining power between two parties.¹⁷¹ Oklahoma courts must, therefore, construe any ambiguities in insurance contracts against the insurer.¹⁷² Even though the Tenth Circuit called James River's policy exclusions unambiguous on their face,¹⁷³ the devil is in the details. The footnotes accompanying the opinion's rationale for strict construction seem to preclude summary judgment. Given Uber's history with insurance coverage, the Tenth Circuit's construction does not sit well with one of Oklahoma's major contract law doctrines.

According to the Tenth Circuit in *Genzer*, "[The James River policy] plainly defines coverage as being coterminous with a passenger's 'requested transportation services,' which conclude when the passenger reaches his or her 'final destination' and fully exits the vehicle with his or her belongings."¹⁷⁴ The court further stated that to "construe the

166. Genzer v. James River Ins. Co., 934 F.3d 1156, 1162 n.15 (10th Cir. 2019).

167. Ball v. Wilshire Ins. Co., 2009 OK 38, ¶ 28, 221 P.3d 717, 727.

168. *Id.*

169. Brown v. United Servs. Auto. Ass'n, 1984 OK 55, ¶ 6, 684 P.2d 1195, 1198 (collecting cases).

170. See *supra* note 163 and accompanying text.

171. Wilson v. Travelers Ins. Co., 1980 OK 9, ¶ 8, 605 P.2d 1327, 1329.

172. *Id.*

173. Genzer v. James River Ins. Co., 934 F.3d 1156, 1167 (10th Cir. 2019).

174. *Id.*

passenger's 'requested transportation services' as somehow including the *driver's* destination" would also be illogical.¹⁷⁵

Yet, the Tenth Circuit's construction of James River's policy language clashes with Oklahoma's contract law precedent, particularly the "reasonable expectations" doctrine. In the case *Max True Plastering Co. v. United States Fidelity & Guaranty Co.*, the Oklahoma Supreme Court adopted the "reasonable expectations" doctrine, which provides that any ambiguities creating a "reasonable expectation of coverage in the insured" must be viewed as including that expectation.¹⁷⁶ The *Genzer* decision did cite *Max True* for its provision that "insurance contracts are ambiguous only if they are susceptible to two constructions,"¹⁷⁷ but failed to consider the true reach of *Max True's* holding.

Max True also encompassed "contracts containing unexpected exclusions arising from technical or obscure language or which are hidden in policy provisions."¹⁷⁸ Arguably, James River's initial and subsequent rationales for its exclusion of Genzer's coverage both fit this sphere. James River's bare statement in its initial denial—that "available or offline, there isn't coverage"—served as a conclusion without a rationale.¹⁷⁹

The Tenth Circuit's strict construction of "requested transportation services,"¹⁸⁰ however, seems to fit right in line with Uber's original policy not to provide insurance coverage during the time between requests.¹⁸¹ Indeed, Uber's policy before the *Liu* case¹⁸² targeted an even narrower window, with "providing services" meaning the time when a driver had passengers in her car.¹⁸³ This creates a problem, because a ride request cannot be fulfilled if the driver has not logged in to the Uber app.¹⁸⁴ The driver would effectively have been "offline" at this time, creating a coverage gap.

The Tenth Circuit's construction of these terms in *Genzer* seems to provide a similar result. It appears "unexpected" to not account for Uber's checkered regulatory history or an Uber driver's availability to take

175. *Id.* at 1168 (emphasis added).

176. 1996 OK 28, ¶¶ 8, 24, 912 P.2d 861, 864–65, 870.

177. *Genzer*, 934 F.3d at 1167 (citing *Max True*, ¶ 20, 912 P.2d at 869).

178. *Max True*, ¶ 17, 912 P.2d at 868.

179. *Genzer*, 934 F.3d at 1162 & n.16.

180. *See supra* Section III.B, Part IV.

181. *See Genzer*, 934 F.3d at 1168; Lieber, *supra* note 7.

182. *See supra* Section II.A.

183. *See Lieber, supra* note 7.

184. *See Emily Dobson, Transportation Network Companies: How Should South Carolina Adjust Its Regulatory Framework?*, 66 S.C. L. REV. 701, 706–07 (2015).

requests during a return drive. As such, the Tenth Circuit erred by not reading the James River policy's provisions in line with the "reasonable expectation" that Genzer would have received coverage for her injury while returning from a passenger drop-off.

D. The Tenth Circuit's Decision Furthers a Detrimental Public Policy

The Tenth Circuit's strict construction of Genzer's policy sets back regulators' efforts to rein in ridesharing. Even if the problems of UM coverage, ineffective surplus lines coverage, and Oklahoma's ridesharing statute were not raised as potential issues in *Genzer*, the facts implicate all three and would, in tandem, undermine the language in James River's insurance policy as the Tenth Circuit reads it.

Just as transportation regulations are a state law issue, so, too, is insurance (and perhaps even on the municipal level, particularly in cases where state law preempts municipal law).¹⁸⁵ Yet, just because Uber, Lyft, and other ridesharing services began their operation outside of the normal regulatory scheme does not give them free reign to hire insurers that operate on a lesser standard.

Uber itself argued as much when it sued another one of its surplus lines insurers, Evanston Insurance Company, for bad faith based on the policy at issue in the *Liu* case.¹⁸⁶ In the resulting case, *Evanston Insurance Co. v. Uber Technologies, Inc.*, the Northern District of California denied Evanston's motion to dismiss Uber's bad faith claim.¹⁸⁷ Evanston argued its policy only applied to Uber's business, and not "any loss resulting from automobile use away from Uber's office buildings," and further argued Uber's payment of reformation "somehow forfeited [its] right to allege a bad faith claim."¹⁸⁸ The Northern District of California called Evanston's application "absurd," stating its policy "would only apply to car accidents occurring in the hallways of Uber office buildings."¹⁸⁹ It also stated Uber's reformation did not create an issue, explaining "the written terms themselves" were the basis of the alleged bad faith denial.¹⁹⁰

185. See *supra* Part I; Eliana Dockterman, *Uber and Lyft Are Leaving Austin After Losing Background Check Vote*, FORTUNE (May 8, 2016, 2:02 PM CDT), <https://fortune.com/2016/05/08/uber-lyft-leaving-austin/>; Douglas MacMillan & Lisa Fleisher, *How Sharp-Elbowed Uber Is Trying to Make Nice*, WALL ST. J. (Jan. 29, 2015, 10:33 PM ET), <https://www.wsj.com/articles/hard-driving-uber-gives-compromise-a-try-1422588782>.

186. See *supra* Section II.A.

187. No. C 15-03988 WHA, 2015 WL 8597239, at *4 (N.D. Cal. Dec. 14, 2015).

188. *Id.* at *3-4.

189. *Id.* at *3.

190. *Id.* at *4.

From California to Oklahoma, it seems Uber has not learned from its attack on Evanston's insurance policy. Uber's service might very well be one-size-fits-all, but that should not factor into the creation of similarly uniform insurance policies. Ultimately, the Tenth Circuit's strict analysis in *Genzer* proves harmful. Courts should look far more carefully at insurance policy exclusions such as James River's.

VI. Conclusion

At first blush, *Genzer* might seem like a simple insurance law case upholding a policy exclusion, particularly when divorced from the circumstances surrounding the case. But as the first federal appellate court case to tackle policy exclusions put forward by an insurer of a ridesharing company, *Genzer* sets a precedent of strict construction that gives insurers too much deference in this emerging area of litigation.

Genzer also casts uncertainty on the longstanding "mend the hold" contract doctrine's application in Oklahoma, even with clear state precedent that the doctrine has barred insurers from switching their rationales for denying coverage. It also conflicts with another longstanding Oklahoma contract doctrine, the "reasonable expectations" doctrine, in its construction of a coverage denial. Allowing insurers, especially surplus lines insurers that do not even operate in applicable states, to essentially waive coverage based on minutiae should raise eyebrows.

After James River's business decision to part ways with Uber, "conventional" insurers including Liberty Mutual,¹⁹¹ Farmers,¹⁹² and CSAA, through a new subsidiary called Mobilitas,¹⁹³ have begun offering coverage specifically for ridesharing. Whether the retention of "conventional" insurers, as opposed to a "surplus lines" insurer like James River, will have an impact on Uber's policies on the judicial front remains to be seen. Any resulting circuit split would not only require similar litigation to move past the settlement or arbitration stage, but would also

191. Matthew Lerner, *Liberty Mutual Signs on as Uber Insurer*, BUS. INS. (Jan. 2, 2020), <https://www.businessinsurance.com/article/20200102/NEWS06/912332397/Liberty-Mutual-to-be-Uber-Technologies-auto-insurer>.

192. Press Release, Farmers Insurance, *Farmers Insurance Begins Year Providing Commercial Auto Insurance Coverage to Uber Drivers in 13 New Markets* (Jan. 6, 2020), <https://newsroom.farmers.com/2020-01-06-Farmers-Insurance-R-Begins-Year-Providing-Commercial-Auto-Insurance-Coverage-to-Uber-Drivers-in-13-New-Markets>.

193. Amy O'Connor, *An Insurance Lyft: CSAA Forms Rideshare Carrier; Allstate, Liberty Mutual Offer Coverage*, INS. J. (Oct. 6, 2020), <https://www.insurancejournal.com/news/national/2020/10/06/585458.htm>.

require another jurisdiction to have the tenacity to go against the ridesharing juggernaut.

William W. Whitehurst