No. 17-2014

In The

United States Court of Appeals For The Sixth Circuit

AMERICAN TOOLING CENTER, INC.,

Plaintiff-Appellant,

v.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

APPELLEE TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA'S PETITION FOR REHEARING OR REHEARING EN BANC

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RULE 35 STATEMENT

The panel's decision directly conflicts with this Court's decision in *Tooling, Mfg. & Technologies Ass'n v. Hartford Fire Ins. Co.*, 693 F.3d 665 (6th Cir. 2012). While the *Tooling* Court held that Michigan law requires a "direct means direct" standard when determining whether the "directly caused by" or "directly resulting from" requirement in commercial crime policies was satisfied, the panel's decision does not follow *Tooling*, but rather, applies a tort-based "proximate-cause" standard, relying on a case that *Tooling* rejected. The full Court's consideration is necessary to secure and maintain uniformity of the Court's decisions.

INTRODUCTION

This matter turns on what the word "directly" means when used in crime policies issued in Michigan. The panel's published opinion directly conflicts with existing Sixth Circuit precedent regarding the proper interpretation of the phrase "directly caused by" in such policies. This Court and the Michigan Supreme Court have long recognized that the same words and phrases should be interpreted in the same way. That is, the words "directly caused by," or "resulting directly from," cannot be given one meaning one day and another the next.

This Court has also long held that precedent should be controlling. This is particularly important in the context of insurance coverage, where insurers and policyholders rely on the courts to interpret policy language consistently. The

panel's decision conflicts with these principles and creates confusion over whether a tort-based proximate cause standard applies to the crime policy, or to any particular insuring agreement in the policy, and if so, which ones. Rehearing en banc will allow this Court to reconcile the conflicting opinion and restore uniformity.

The commercial crime policy Travelers issued to American Tooling Center ("ATC") covers "direct loss" of money "directly caused by," among other perils, Computer Fraud. *Tooling* addressed the same issue presented here: what does loss "resulting directly from," or, as here, "directly caused by," mean when used in a crime policy. After analyzing the purpose of the word "directly" in the crime policy, and conducting an exhaustive review of cases addressing the specific issue, the *Tooling* Court was "convinced that the Michigan Supreme Court would adopt a 'direct-is-direct' approach" to determine whether a loss was "directly caused by" the covered peril. Thus, the word "directly" in crime policies means "immediately and without any intervening space, time, agency, or instrumentality." *Id.* at 673. No Michigan court since *Tooling* has held otherwise.

Bound by *Tooling*, the district court granted summary judgment to Travelers because ATC did not sustain a loss "directly caused by" a covered peril (here, Computer Fraud). Instead, the record shows numerous undisputed events occurred and time passed between the alleged fraud and ATC's loss.

On July 13, 2018, this Court reversed, finding ATC's loss was "directly caused by" Computer Fraud under a proximate-cause approach referred to in an unpublished Michigan state court case, *Acorn Inv. Co. v Mich. Basic Prop. Ins. Ass'n*, No. 284234, 2009 WL 2952677 (Mich. Ct. App. Sept. 15, 2009). *Tooling* expressly rejected *Acorn* because, among other reasons, it involved a property policy vastly different from the crime policy. But Travelers' policy is a crime policy, just like the one at issue in *Tooling*.

As a result of the panel's decision, this Court has two published opinions, addressing the same language in the same policy in the same jurisdiction, with two diametrically opposed standards and results. *Tooling* instructs that "directly caused by" means immediately and without any intervening events or time, while the panel's decision instructs that "directly caused by" does not require immediacy, and is satisfied despite intervening events and time. As demonstrated by the facts, which approach applies can affect whether coverage is available.

Travelers seeks rehearing because the panel's decision, which squarely conflicts with *Tooling,* creates uncertainty as to how Michigan law applies to crime policies. Travelers also seeks panel rehearing because the panel decided several matters that should be left to the district court in the first instance, because they were not decided below and the general rule is to decide such matters on remand, particularly where new authorities, arguments, or facts are required to resolve

them. The absence of a lower court record hampered the panel's deliberations on the question of whether several exclusions apply and on the amount of loss. The panel's decision on the exclusions, in particular, is predicated on errors of fact and law as well as factual determinations essentially substituting judicial notice for factual, and potentially expert, development. At a minimum, because these issues were never decided below, this Court should vacate that portion of its decision discussing these issues and remand the case to develop a full record to address the exclusions, as well as the amount of any actual loss.

ARGUMENT

I. *Tooling* and this case both involve commercial crime policies and the use of "directly" in each must be given the same meaning.

The panel chose not to follow *Tooling* because *Tooling* was "entrenched in the jurisprudence of interpreting employee-fidelity bonds," thus presenting a "unique" context that warranted rejecting *Acorn*'s tort-based proximate-cause standard. (Op. 6). But *Tooling* involved a crime policy, exactly like the one here.

The commercial crime policy provides first-party coverage through a series of standard insuring agreements that include, among others, employee theft and computer fraud.[1] *Tooling* recognized two fundamental features in these policies: "(1) they are fidelity contracts to protect against employee theft, fraud, destruction of property, or other misfeasance against the insured; and (2) they protect against a loss 'directly resulting from,' 'resulting directly from,' 'resulting solely and directly from,' or 'directly caused by' said fraud, theft, or other misfeasance." 693 F.3d at 674.

The conduct in *Tooling* involved the employee theft insuring agreement, while this matter involves the Computer Fraud insuring agreement. That

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[1] The *Tooling* policy included insuring agreements for employee theft, "depositor's forgery, non-employee theft, disappearance and destruction, and computer and funds-transfer fraud." *See Tooling*, 693 F.3d at 668. Travelers' policy is no different. (*See* Policy, R. 23-14, Page ID #777-80).

distinction is not relevant: each insuring agreement in the crime policy includes the same causation requirement (the second fundamental feature *Tooling* identified), which is the issue here. *Tooling* controls interpretation of the crime policy before the Court and requires that *Acorn* be rejected.

II. When used in the crime policy, *Tooling* instructs that "directly" means "immediately and without any intervening space, time, agency, or instrumentality," while the panel's decision instructs that "directly" is satisfied through a broader proximate-cause standard.

Tooling involved the same issue that is presented here: what does the word "directly" mean? After analyzing over twenty cases that addressed whether that word required a "direct-means-direct" or a broader "proximate-cause" approach to causation in the crime policy, the *Tooling* Court was "convinced that the Michigan Supreme Court would adopt a 'direct is direct' approach" because that approach is "more persuasive." 693 F.3d at 674-76. In considering the proximate-cause approach, *Tooling* explicitly rejected *Acorn* because, among other reasons, *Acorn* did not actually apply a proximate-cause standard, leaving the Court to "speculate, to some extent, as to how the rule would even function in a Michigan court." *Id.* at 677. *Tooling* also recognized that *Acorn* involved a property policy; an "apples and oranges" comparison to the crime policy. *Id.* "Convinced" that the Michigan Supreme Court would apply the "direct-is-direct" approach, *Tooling* holds that, as

used in the crime policy, "directly" means "immediately and without any intervening space, time, agency, or instrumentality." *Id.* at 673.[2]

In direct conflict with *Tooling*, the panel applied *Acorn*'s proximate-cause standard to determine whether ATC's loss was "directly caused by" Computer Fraud. (Op. 9-10).[3] "Without taking a case en banc, a panel cannot reconsider a prior published case that interpreted state law, absent an indication by the [state] courts that they would have decided [the prior case] differently." *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009) (alterations in original). *Tooling* was published six years ago and no Michigan court has indicated that it would decide differently. Principles of stare decisis require the panel apply *Tooling*'s precedent that "direct is direct" and means "immediately and without any intervening space, time, agency, or instrumentality."

Insurers and policyholders depend on precedent for certainty as to how courts will interpret policy provisions. The applicable causation standard can often directly impact the availability of coverage. Despite *Tooling*'s instruction that "direct means direct," the panel's holding injects uncertainty as to what "directly"

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[2] *Tooling* recognized that "directly" is used elsewhere in the policy to "place[] an emphasis on 'direct' harms," as well *See Id.* at 668, n.3 (observing that, like the policy here, "directly" is also used in the Consideration Clause).

[3] Although the panel cited *Acorn* and *Tooling*, its causation analysis relies on the proximate-cause standard. *See, e.g.,* Op. 9-10.

means in crime policies, making it impossible to accurately predict the outcome of future cases involving this language (*i.e.*, each insuring agreement in the policy). Such panel inconsistencies create difficulties for district courts in adhering to precedent and undermine the Court's credibility with the public. Rehearing or en banc review to establish a predictable and certain answer is necessary for both insurers and policyholders.

III. Under *Tooling*, ATC did not sustain a "direct loss" "directly caused by" Computer Fraud.

The panel's analysis of the policy's "direct loss" and "directly caused by" requirements compel a different result under *Tooling*'s controlling precedent. Although the loss and cause issues are separate, they work in tandem: ATC's loss, whenever sustained, must be "[immediately, and without intervening space, time, agency, or instrumentality,] caused by" the Computer Fraud. Assuming, for purposes of discussion, that ATC suffered a "direct loss" when it wired its purchase payment, the loss was not "directly caused by" Computer Fraud.

The panel found Computer Fraud because a third party sent ATC fraudulent emails, using a computer, and these emails deceived ATC and prompted it to send money to the wrong person. (Op. 8). Travelers disputes that receiving an email

constitutes "Computer Fraud" under the policy.[4] Regardless, *Tooling* requires determining whether ATC's loss was "[immediately and without any intervening space, time, agency, or instrumentality,] caused by" receiving the emails. *See Tooling*, 693 F.3d at 673. The panel's observation that "[t]he chain of events that was precipitated by the fraudulent emails and led to the wire transfers involved multiple internal actions at ATC" prohibits such a finding. (Op. 9).

By its very nature, a "chain of events" is not "direct" because there is no immediacy between the actual loss and the loss-inducing event. *See Interactive Commn's Int'l, Inc. v. Great Am. Ins. Co.*, No. 17-11712, 2018 WL 2149769, at *4 (11th Cir. May 10, 2018) (applying direct-means-direct approach and holding no Computer Fraud coverage because, even though the fraudsters' actions in manipulating the insured's computers "set into motion the chain of events that ultimately led to [the insured's] loss, their use of the computers did not 'directly'—which is to say immediately and without intervention or interruption—cause that loss"); *Apache Corp. v. Great Am. Ins. Co.*, 662 F. App'x 252, 258-59 (5th Cir.

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[4] There is no record evidence the *emails* themselves, such as through some attached malware or software, caused any transfer. Rather, the words in the emails induced ATC to transfer funds. "Computer Fraud" is limited to situations where the computer use "fraudulently cause[s] a transfer," not where it "induces someone to make a transfer." (Policy, R. 23-14, Page ID #779). Finding coverage based on the persuasiveness of an email's written words improperly transforms the crime policy into a "General Fraud" policy. *Pestmaster Servs., Inc. v. Travelers Cas. & Sur. Co. of Am.*, 656 F. App'x 332, 333 (9th Cir. 2016).

2016) (applying direct-means-direct approach and holding no coverage available due to number of intervening events between email and transfer, because the "fraudulent transfer was the result of other events and not directly [caused] by the computer use"). Immediacy requires no links, much less a chain of intervening space, time, agencies, and instrumentalities. Even one link is insufficient—*Tooling* precludes "*any* intervening space, time, agency, or instrumentality."

The panel's recitation of some events demonstrates the intervening events, time, and human agency between the receipt of any email and the purported loss when ATC sent a transfer:

> *After* receiving each fraudulent email, ATC *verified* that YiFeng had completed the tasks required for the next scheduled payment. Gizinski *subsequently determined* which outstanding invoices to pay, and *chose to pay* the YiFeng invoice. He *then* signed into the banking portal and *manually entered* the fraudulent banking information emailed by the impersonator. Finally, *after* Gizinski submitted the wire transfer, ATC's Assistant Comptroller *approved the payment*.

(Op. 9 (emphasis added) (citations to record omitted)). The panel's observation does not reflect the time over which these events took place. On March 19, 2015, ATC received an email attaching invoices and requesting payment. (R. 23-4, Page ID #683). On March 27, ATC received an email with new bank account information for payments. (*Id.* #698). Three days later, ATC made a payment, which was returned on April 7. (*Id*. #658, 664). New bank instructions were emailed April 8, and ATC then later sent another payment. (*Id*. #707, 708). ATC

made another transfer the next day. (R. 23-13, Page ID #753). On April 30, ATC received an email with more invoices, and on May 7, it received new banking details. (*Id*. #713-17; 720-21). The next day, ATC began the process to send the wire. (R. 23-1, Page ID #666-67).

Apart from the actions, or inactions, of various human actors between the emails and the transfers, days passed between the purported "Computer Fraud" and the loss. The recipients of the emails had to decide what to do, or not to do. Based on those decisions, numerous subsequent events then occurred before any transfer could happen. *Tooling* instructs that "directly" means immediately, and without *any* intervening time or events. Receiving the emails did not immediately cause any loss.

Relying on *Acorn*, the panel placed no significance on these intervening time or events. Based on the panel's analysis, if ATC received an email with fraudulent instructions in May, the loss is "directly caused by" the email even if ATC wired the funds in December because the transfer would represent an immediate loss and complete the chain of events associated with the "Computer Fraud." This analysis incorrectly measures the time from the transfer, not from when ATC received the email, which the panel contends is Computer Fraud.

The panel's analysis produces a result opposite from *Tooling*. *Tooling* dictates no coverage exists under these facts, while the *Acorn* analysis, rejected by

Tooling, finds coverage due to a chain of various events. Absent guidance as to what standard applies, insurers and policyholders must now guess on issues that directly affect whether coverage is available. The uncertainty and conflicting analysis created by the panel's opinion requires a rehearing to ensure uniformity among this Court's published decisions.

IV. The Court failed to properly apply the exclusions.

The panel decided issues regarding the applicability of exclusions although the district court did not decide these issues in the first instance. Even under a proximate-cause standard, panel rehearing is warranted to address whether a proper basis to apply the exclusions exists, and if so, remand the question of their applicability. To reach a decision on several exclusions, the panel essentially relied on a previously uncited, publicly-inaccessible academic treatise, to decide what constitutes "Electronic Data" and how computers work in the context of a wire transfer. These factual matters are best left to argument, proofs, and trial court decisions. The matter should be remanded for further proceedings on the exclusions so a record can be developed with evidence that supports, or refutes, the Court's factual observations regarding how computers operate and what strokes constitute "Electronic Data." Because these factual determinations underlie the panel's decision, Travelers requests that portion of the decision be vacated and the case remanded to the district court.

A. Exclusions are interpreted as written.

Although exclusions are construed in favor of an insured, "this does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefiting an insured." *Citizens Ins. Co. v. Pro-Seal Serv. Grp., Inc.*, 730 N.W.2d 682, 685 (Mich. 2007). Focusing on the fact the policy's definition of "Electronic Data" excludes "instructions or directions to a Computer System," the panel improperly relied on a relatively inaccessible, academic writing[5] to give esoteric meaning to words ("instructions or directions") that contradict their common meaning. (*See* Op. 12). Because the article apparently states that instructions to display specific values are sent anytime one presses a keyboard button or mouse, the panel posits ATC's manual entry of banking details was not "Electronic Data" because, when ATC's treasurer, Gizinski, pressed a button, "instructions" were sent to display that button's value on his monitor.

Although the panel does not indicate what "facts or information" is being converted in this instance, the panel's reliance on the paper for this factual determination is not a proper matter for judicial notice. *See* Fed. R. Evid. 201;

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[5] Access to the Encyclopedia Britannica link (Op. 12) requires an account at an academic institution.

Toth v. Grand Trunk R.R., 306 F.3d 335, 349 (6th Cir. 2002). Taking judicial notice by using academic internet sources relating to adjudicative facts is particularly problematic on appeal because it precludes the parties from being able to contest the accuracy or reliability of the information or source.

Moreover, the panel's "alien construction" is not reasonable because there could never be "Electronic Data," and Exclusions G. (applying to "input" of Electronic Data) and H. (applying to "preparation" of Electronic Data) could never apply. Under the panel's interpretation, the very act of inputting information precludes the information from being Electronic Data. Michigan law requires courts to give effect to every word and clause in a contract and avoid interpretations rendering any part surplusage or nugatory. *Klapp v. United Ins. Grp. Agency, Inc.*, 663 N.W.2d 447, 453 (Mich. 2003). No other court has applied this broad interpretation. When addressing this same language under nearly identical facts, the Ninth Circuit held the exclusion was unambiguous and applied when employees, having authority to enter the insured's computer system, "input" wiring information that caused wire payments to be sent to a third party's account. *Aqua Star (USA) Corp. v. Travelers Cas. & Sur. Co.*, 719 F. App'x 701, 702 (9th Cir. Apr. 17, 2018).

Rather than inaccessible writings, courts are to look to the common understanding of an undefined word in "a lay dictionary such as *Webster's*."

Citizens, 730 N.W.2d at 686. *Webster's* provides a far less technical meaning of "instructions," *specific to computers*, than the panel's: "a code that tells a computer to perform a particular operation."[6] But if the plain dictionary meaning is not clear, then factual development regarding technical computer terms of art was required. Here, there is no record evidence that by converting the facts and information from the printed invoices into ATC's computer system, Gizinski coded or told any computer to perform a particular operation. The proponent did not raise this argument, produce supporting evidence, nor did any expert presented such testimony. The panel cannot view facts and inferences against Travelers, as the non-moving party, especially when Travelers had no opportunity to contest them.

Similarly, there is no record evidence that allowed the panel to find, without explanation, that any entered "values combined to form 'instructions or directions' to act in a specific manner; i.e., to transmit the entered values from ATC to the banking portal." (Op. 12). But even under this broad observation, it remains that there is "Electronic Data" at least until the values "combined to form" the instruction to transmit the entered values. (*See Id.*). Gizinski, a natural person with authority to enter ATC's Computer System, input facts from the fraudulent

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[6] *Merriam-Webster's Dictionary*, https://www.merriam-webster.com/dictionary/instruction.

invoices, which were converted to a form (electronic) usable in a computer system. These facts remained that way, and within the definition, until at least, as the panel maintains, they combined to form instructions to transmit the entered values. Exclusion G. applies even under the panel's interpretation.

Moreover, Exclusion H. applies under the panel's analysis. "[P]reparation" of Electronic Data in Exclusion H. necessarily precedes the "input" of Electronic Data in Exclusion G. There is no dispute that Gizinski relied on the fraudulent documents when preparing the numbers and other information that later, per the panel, combined to transmit the entered values. Gizinski converted the facts and information on the fraudulent documents to electronic form, usable in the computer system, and there is no record evidence that any instructions were provided while he prepared the Electronic Data.

Finally, citing *Harrah's Entertainment v. Ace American Ins.*, 100 F. App'x 387 (6th Cir. 2004), the panel inappropriately construed Exclusion R. against Travelers under the guise that it is *potentially* ambiguous. (Op. 11). *Harrah's* rejected the invitation to find the exclusion ambiguous and applied its natural and ordinary meaning to preclude coverage. *Id.* at 391. Michigan law instructs that "the terms of a contract must be enforced as written where there is no ambiguity." *Citizens Ins. Co.*, 730 N.W.2d at 685. As in *Harrah's*, Exclusion R., enforced as written, applies. YiFeng sold ATC dies. After receiving the dies, ATC sought to

pay for them. That an unknown party received that payment does not mean ATC was not "giving … Money … *in* any exchange or purchase." It is undisputed that ATC was paying for dies that it actually received in a purchase, and its loss arose, "directly or indirectly," from that purchase.

B. Remand for further proceedings on the exclusions and amount of loss is appropriate if the proximate-cause standard is upheld.

It is inappropriate to grant summary judgment to ATC based on unresolved facts not in the record. Courts evaluate cross-motions on their own merits and view all facts and inferences in the light most favorable to the nonmoving party. *Taft Broad. Co. v. United States*, 929 F.2d 240, 247, 248 (6th Cir. 1991). While summary judgment in Travelers' favor would have been proper, the facts necessary to grant ATC summary judgment are not part of the record. Thus, if the Court upholds the *Acorn* standard and maintains the academic article controls the interpretation of "Electronic Data," the entire matter should be remanded for further proceedings to allow the parties to fully develop the issues raised by the panel and afford Travelers the opportunity to defend itself based on that article's observations. Remand for further proceedings is also necessary as to ATC's actual loss, as opposed to any remaining liability it may have to YiFeng, as the district court did not address those issues.

CONCLUSION

The proper causation standard in crime policies, dictated by precedent, is of utmost importance to insurers and policyholders. Insurers write policies and adjust claims based on an assurance that courts will interpret provisions consistently and precedent will be applied. The panel's opinion directly conflicts with *Tooling*, and more so, relies on an unpublished decision that *Tooling* explicitly rejected. Based on the need for uniformity in the Court's decisions, Travelers respectfully requests a rehearing en banc, or alternatively, a panel rehearing to readdress the issues under *Tooling*, and, if coverage is still available, apply the exclusions based on record evidence or remand to further develop these issues and the amount of loss.

Respectfully submitted,

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Dated: July 27, 2018

CERTIFICATE OF COMPLIANCE
Required by Fed. R. App. P. 32(g)(1)

This petition was drafted using Microsoft Word 2016/Office Pro Plus 2016. The font is Times New Roman, proportional 14 point type, which includes serifs. The word count total is 3,897.

Dated: July 27, 2018 /s/Mary Massaron

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2018, I electronically filed the Petition for Rehearing of Defendant-Appellee with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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