Insurance Law Update
2019: The Year in Review

As the second decade of the Twenty-First Century careens to a close, we pause to look past over the past year to identify claim and coverage developments and trends that emerged in 2019 that may prove consequential in the years to come.

I. Top 10 Insurance Rulings

While there were numerous important insurance coverage and bad faith rulings in 2019, here are ten that stand out:

- James River Ins. Co. v. Doswell Truck Stop LLC, No. 180624 (Va. May 16, 2019)(Virginia Supreme Court ruled that CGL exclusion for losses involving "any auto" precluded coverage even though the auto in question was not owned or leased by the insured).

- Karas v. Liberty Ins. Corp., SC 20149 (Conn. Nov. 12, 2019)("collapse" does not occur until a building is in imminent danger of falling down and therefore unsafe for its intended purpose; later policies requiring abrupt collapses do not apply to gradual deterioration of insured's concrete foundation).

- Keodalah v. Allstate Ins. Co., No. 95867-0 (Wash. Oct. 3, 2019). In a rare win for insurers in Washington, the state Supreme Court ruled that alleged misconduct on the part of a claims adjuster could not form the basis for a bad faith claim pursuant to the state's Consumer Protection Act.

- Pitzer College v. Indian Harbor Ins. Co., S239510 (Cal. Aug. 29, 2019)(California Supreme Court refused to give effect to a New York choice of law in an environmental liability policy as it would give effect to consent language that is contrary to fundamental policy of California of requiring prejudice for notice provisions).

- RSUI Ind. Co. v. New Horizon Kids Quest, Inc., No. 17-3567(8th Cir. Aug. 12, 2019)(excess insurer was not precluded from contesting whether enough of a $7 million verdict against the insured day care center was for sexual molestation as to exhaust the $3 million primary layer).

- R.T. Vanderbilt Company v. Hartford Accident and Indemnity Company, No. SC 20000 (Con. October 8, 2019(Connecticut becomes the first state that

both follows a “pro rata” approach to long-tail allocation issues but also recognizes an “unavailability” exception).

- Sanders v. Illinois Union Ins. Co. 2019 IL 125465 (Ill. Nov. 21, 2019)(the "offense" of malicious prosecution occurs when a criminal defendant is wrongfully convicted rather than the later date when he or she is exonerated of that offense).

- Sapa Extrusions, Inc. v. Liberty Mutual Ins. Co. No. 18-2206 (3rd Cir. Sept 13 2019)(whereas insurers with current "occurrence" wordings were not required to provide coverage for product liability claims against a manufacturer, older policies containing "expected or intended" language were materially different from the more recent "occurrence" forms and required further consideration by the District Court in Pennsylvania).

- Summit Ins. Co. v. Stricklett, No. 2017-185 (R.I. Feb. 5, 2019)(the fiduciary obligation of liability insurers to settle in good faith runs only to the insured and could not support a bad faith claim by a tort claimant absent an assignment of the insured’s rights).

- Universal Cable Productions LLC v. Atlantic Specialty Ins. Co., No. 17-56672 (9th Cir. July 12, 2019)(“war” exclusion did not eliminate first party coverage for losses due to Hamas missile attacks on Jerusalem because the customary usage of “war” in the insurance industry requires that ‘war” involve a conflict between actual or *de jure* governments).

II. New Claim Trends

Cyber-attacks continue to dominate the news, even as growing concerns about data security propel a growing market for cyber-coverage. Travelers’ 2019 Risk Survey of 1200 business leaders found that cyber risks are now uppermost on the mind of policyholders. 55% of survey respondents listed cyber as their biggest worry, followed by medical cost inflation (54%), employee benefit costs (53%), the ability to attract and retain talent (46%) and legal liability (44%). Beazley reported that the incidence of ransomware attacks rose 37% in the third quarter of 2019, with a particular emphasis on attacks against IT vendors and their customers. The FBI is no longer discouraging insureds from ransoming their data and even the City of Baltimore, which was crippled for weeks when it resisted a RobbinHood attack earlier in the year, purchased two $10 million cyber-insurance policies from Chubb and AXA XL. At the same time, a controversial article in ProPublica questioned whether the availability of insurance for cyber-attacks was emboldening thieves to demand more money.

The growing trend towards relaxing statutes of limitations claims for sexual assaults also unleashed a new wave of liability claims in 2019 against institutional insureds such as the Boy Scouts of America, Catholic Dioceses and numerous schools and universities. In New York, over 400 law suits during the first week of the Empire

State's yearlong window for expired claims. At year's end, dozens of claims against former Hollywood mogul Harvey Weinstein were reportedly settled with $25 million in funds contributed by the insurers of Weinstein and Miramax.

On the environmental front, groundwater contamination claims by states and municipalities against E.I. DuPont and other manufacturers and distributors of polyfluoroalkyl (PFA) products) look like the second coming of MTBE.

III. Changes in the Insurance Industry

Guy Carpenter released a new report on the "Changing Nature of Risk" at this year's Rendez-Vous in Monte Carlo concluding that, contrary to past loss cycles, a hardening of insurance and reinsurance markets may now finally be underway and that is being led by losses to property insurers from hurricanes, wildfires and other catastrophic causes.

Brexit is continuing to accelerate the flight of insurance capital from London to Belgium, Luxembourg, Ireland and other European insurance centers.

Technology remains the emerging frontier for insurance underwriting and claims handling. In 2019, Allianz SE announced that it is moving core pieces of its global insurance platform to Microsoft's Azure cloud and will open-source parts of the solution's core to improve and expand capabilities. Meanwhile, Swiss Re became the latest insurer to add telematic features to its personal lines coverage. At year's end, Allstate announced that it is closing down its Esurance and Encompass brands and will consolidate its sales operations to allow consumers to buy car and home insurance through its web site.

At year's end, personal lines insurers in California pushed back against efforts by the state Insurance Commissioner to force them to provide broader coverage for losses due to the wildfires that have become a new normal in the Golden State.

Fresh on the heels of its successful campaigns to persuade several state legislatures to disavow the *Restatement of Law, Liability Insurance*, the National Council of Insurance Legislators has proposed a Model Act for states to adopt, declaring that the RLLI is " is inconsistent or in conflict with: (1) The Constitution of the United States or of this state; (2) A statute of this state; (3) This state's case law precedent; or (4) Other common law that may have been adopted by this state."

IV. Case Law Developments

A. Auto Insurance

1. Absolute Auto Exclusions

The Virginia Supreme Court ruled in James River Ins. Co. v. Doswell Truck Stop LLC, No. 180624 (Va. May 16, 2019) that a trial court erred in failing to rule that an

incident in which a truck stop customer was fatally injured when a tire that was being installed on his tractor trailer exploded was excluded from coverage as arising out of the "maintenance" of "any" auto. Whereas the trial court had ruled that "maintenance" was ambiguous because it could either "regular repair operations" or a "possessory interest other than ownership or use of an auto," the Supreme Court found that "regular repair operations" was the only reasonable interpretation of "maintenance." that could reasonably be applied to every instance of the term in the James River policy Having found the exclusion was not ambiguous, the Supreme Court went on to declare that the exclusion applied since the underlying injuries clearly "arose out of maintenance of the vehicle." The Supreme Court rejected the insured's argument that the exclusion should not apply to alternative theories of liability such as the insured's negligence in allowing a customer into an area where he was exposed to a dangerous condition.

2. Mandatory Coverages/Notice

In a complex opinion that traces the evolution of late notice law in South Carolina, the South Carolina Supreme Court ruled that recent legislative enactments mandating basic levels of auto insurance did not entirely negate the effect of untimely notice. In Neumayer v. Philadelphia Ind. Co., No. 27902 (S.C. July 24, 2019), the court ruled that although Section 38-77-142 (C) voids any language that would defeat coverage for the mandated $25,000 limits for auto insurance, it did not eviscerate the consequences of an insured's untimely notice. As a result, the court ruled that Philadelphia Indemnity was only obliged to pay $25,000 on behalf of its insured and not the full amount of a $622,500 default judgment against the insured.

B. Bad Faith

1. Consent Judgments

The Supreme Judicial Court of Massachusetts has issued a significant new opinion imposing limitations on the ability of policyholders to assign rights to tort claimants pursuant to consent judgments in cases that their insurer is defending their reservation of rights. In Commerce Ins. Co. v. Szafarowicz, SJC 12655 (Mass. Oct. 1, 2019), the Supreme Judicial Court ruled that a trial judge had not abused his discretion in refusing to permit an automobile liability insurer to intervene in the underlying case given the risk of prejudice to the insured. The court ruled that it was sufficient that the insurer be given the opportunity to bring a post-verdict declaratory judgment action in which it could challenge whether its insured acted negligently or intentionally had been "fairly litigated." As a result, the Supreme Judicial Court also ruled that the trial judge had not abused his discretion in denying Commerce's motion to stay the proceedings in the wrongful death case until its parallel declaratory judgment action could be tried and the issue of coverage resolved. The court also ruled that Commerce's effort to halt post-judgment interest from accruing on the $7 million judgment by offering to pay its $500,000 policy limit was ineffective because the offer was conditional on the money being repaid if Commerce prevailed on its coverage defenses. The court also refused to find that the insured's pre-judgment assignment of rights was necessarily collusive or unreasonable as matter of

law. Rather, the Court ruled that in such cases "the risk of collusion must be balanced against policy considerations that encourage settlement agreements …" The court concluded, therefore, that "an insurer who defends a claim under reservation of rights is bound by the amount of a judgment arising from a prejudgment settlement/assignment agreement where (1) the insurer is given notice of the settlement/assignment agreement and an opportunity to be heard by the Court before a judgment enters; (2) the insurer contests the judgment; and (3) the insured, after hearing, meets his or her burden of showing that the settlement is reasonable in amount." The SJC further found, however, that "because the consequence of a settlement/assignment agreement is that the plaintiff may collect damages only from the insurer, having released the insured defendants from personal liability, a reasonable settlement amount may not exceed the limits of the insured's potential insurance coverage, because the plaintiff may recover damages no more than that from the insurer." Further, the Court found that the issue of whether the resulting judgment was "reasonable" was not immunized from dispute merely because the parties stipulated to liability and allowed the trial judge to determine the amount of damages after a bench trial. The court declared that the amount of post-judgment interest that Commerce would eventually owe will run from the date of the original judgment in the amount that the Court ultimately deems to be reasonable. In an unusual concluding section, Chief Justice Gants observed that whereas the trial judge would have to decide what was "reasonable" in this case, in future cases where a judge concludes that the amount of an assignment/settlement is unreasonable, the parties should be given an opportunity to renegotiate their agreement in an amount that is reasonable.

The Montana Supreme Court has ruled that a trial court erred in sustaining a $10 million consent judgment in a case that a professional liability insurer had been defending under a reservation of rights. Whereas the trial court had ruled that the insurer's failure to settle was equivalent to a breach of the duty to defend and that, having been "abandoned" by its insurer, the insured was to settle over the insurer's objections, the Supreme Court ruled in Draggin' Y Cattle Co. v. Junkermeier, Clark, Campanella, Stevens, PC, 2019 MT 97 (Mont. April 24, 2019) that the claimants' remedy against an insurer for failure to settle was a statutory claim for bad faith under the Montana UTPA but that it was improper for the court below to make a finding that the underlying $10 million consent judgment was both reasonable and enforceable in this case, where the insurer was defending. Rather, in such cases there is no presumption of reasonableness and the claimant must itself establish that the settlement was fair and reasonable. Three justices joined in a concurring opinion in which they argued that New York Marine had a full and fair opportunity to challenge the reasonableness of the settlement amount and should not be permitted to relitigate that issue on remand.

Earlier in the year, the same court ruled in Abbey/Land LLC v. Glacier Construction Partners LLC, 2019 MT 19 (Mont. Jan. 29, 2019) that a $12 million consent judgment was collusive and thus unenforceable. Further, the Supreme Court declared that, as the trial court had found collusion, lit should have dismissed the claims against James River outright and erred in refashioning a remedy for the claimants and allowing them to pursue a demand for $2.4 million. In light of its finding that the underlying parties had "impermissibly colluded to expose Glacier to new liability by amending the parties'

contract to expand the recoverable damages, stipulated to a confessed judgment for damages that attorneys for both parties had at different times criticized as lacking evidentiary basis, and terminated and "shut up" anyone involved in the case who expressed contrary views," the court ruled that the trial court had abused its discretion in failing to dismiss the case outright.

2. Failure to Settle Claims

The U.S. Court of Appeals for the Eleventh Circuit ruled in Cawthorne v. Auto-Owners Ins. Co. No. 18-12067(11th Cir. Oct 25 2019) that a Florida District Court was correct in ruling that a tort claimant could not recover in bad faith against the defendants' liability insurer based upon an oral assignment since he had failed to establish that the insured in the case was exposed to an excess judgment. The Eleventh Circuit refused to find that the settlement, whereby Auto-Owners agreed to pay its $3 million policy limit and the insured consented to an assigned $30 million judgment constituted an "excess judgment" for which the insured faced any liability. The court declined to find a separate exception for consent judgments declaring that if it did so, "insurers would not know whether an insured party and an injured party entered into a consent judgment as adversary, at arm's length and in good faith, or as friends making a strategic decision to undermine the Ins. Co.'s policy."

In December, the Massachusetts Supreme Judicial Court ruled that "consent to settle" provisions in professional liability policies are not contrary to public policy and that an insurer's failure to settle due to its insured's insistence was not bad faith. However, the court ruled in Rawan v. Continental Cas. Co., SJC 12691 (Mass. Dec. 16, 2019) that an insurer might still be liable under the Claims Settlement Practice Act (G.L. c.176D) for violating "residual duties" including a thorough investigation of the facts, a careful attempt to determine the value of the claim, good-faith efforts to convince the insured to settle for such an amount and the absence of "misleading, improper or extortionate conduct toward the third-party claimant."

3. Independent Liability of Adjusters

Several 2019 cases addressed the issue of whether third-party administrators or claims adjusters could be sued independently for bad faith.

In Calandro v. Sedgwick Claims Mgt. Services, Inc., No. 18-1637 (1st Cir. Mar. 18, 2019), the First Circuit sustained a Massachusetts District Court's declaration that a TPA did not act in bad faith in failing to settle wrongful death claims a nursing home that went to trial and resulted in a $14 million verdict the court found that there were questions of fact concerning causation with respect to the death claim and that, although defense counsel had stipulated to liability with respect to the personal injuries suffered by the patient prior to her death, the TPA had made reasonable efforts to settle that aspect of claim.

The Iowa Supreme Court ruled in De Rios v. Indemnity Ins. Co. of North America, No. 18-1227 (Iowa May 10, 2019) that because a third-party administrator does not possess the attributes that have led to the imposition of bad-faith liability, an injured employee may not sue a TPA for its claimed bad faith in adjusting his worker's compensation claim. While acknowledging that it had allowed employees to sue self-insured employers for bad faith, the court emphasized that in all of these cases the focus of its analysis was on the relationship between the insurer (or its functional equivalent in the case of self-insurance), whereas TPAs have no relationship to employees and are not subject to the statutory and regulatory requirements that are imposed upon insurers. Two dissenting justices criticized the majority's view of the law as "anachronistic" and argued that the trend of insurers "outsourcing" claims functions to third parties required that those parties be subject to sanction in cases of misconduct.

Finally, a narrowly-divided Washington Supreme Court ruled In Keodalah v. Allstate Ins. Co., No. 95867-0 (Wash. Oct. 3, 2019), that the state Appeals Court had erred in ruling that alleged misconduct on the part of a claims adjuster could form the basis for a bad faith claim pursuant to the state's Consumer Protection Act. The majority held that RCW 4800010030's reference to "all persons in the business of insurance" was not intended to create an implied cause of action for insurance bad faith. Four of the nine justices dissented, arguing that whether or not there was an implied statutory cause of action under RCW 48.01.030, in this case, the adjuster had committed per se violations of the Act for which he might be held individually liable.

4. Third Party Liability

Clarifying an issue that had arisen in the wake of earlier bad faith rulings such as Asermely, Skaling I and II and DeMarco, the Rhode Island Supreme Court has ruled that liability insurers do not have any common law liability to third party claimants in the absence of a reasonable settlement demand within policy limits or an assignment of the insured's rights. In Summit Ins. Co. v. Stricklett, No. 2017-185 (R.I. Feb. 5, 2019), the Supreme Court declared that the fiduciary obligations of insurers to settle in good faith runs only to the insured or to a party to whom the insured have assigned their rights.

C. Cyber-Claims

The Eleventh Circuit ruled in Principle Solutions Group, LLC v. Ironshore Indemnity Inc. (11th Cir. December 9, 2019) that a commercial crime policy's coverage for "Computer and Funds Transfer Fraud" that insured "loss resulting directly from a 'fraudulent construction' directing a 'financial institution' to transfer or pay funds" applied to a "phishing" incident in which fraudsters fooled a business into transferring $1.7 million to an offshore bank account in China. The court ruled that under Georgia law, "proximate cause is not necessarily the last act or cause or the nearest act to the injury" and can also include "all of the natural and probable consequences" of an action unless there is a sufficient and independent intervening cause. In this case, the court ruled that the intervening causes claimed by Ironshore (notably an inquiry by Wells Fargo with respect to the authenticity of the request) were certainly foreseeable if not necessarily inevitable.

Writing in dissent, Judge Tjoflat agreed that the e-mail from the fraudsters was unambiguously a "fraudulent instruction" but argued that the issue of causation presented factual issues that should have been left to the jury and should not have been resolved by the District Court on summary judgment.

A federal district court has denied a professional liability insurer's motion to dismiss a malpractice claim that a client brought against a software company that erroneously transferred $5.9 million of its funds to a fraudster's account in Hong Kong. Despite AIG's argument that coverage was clearly precluded by a policy exclusion for losses "arising out of, based upon or attributable to a dishonest, fraudulent, criminal or malicious act, error or omission, or any intentional or knowing violation of the law," Judge Rakoff ruled in SS&C Technology Holdings, LLC v. AIG Specialty Ins. Co., No. 19-7859 (S.D.N.Y. Nov. 6, 2019) that this exclusion was only meant to apply to criminal or fraudulent acts by the insured. Applying Connecticut law, the District Court ruled that the "provided, however" clause of exclusion clearly indicates that it was only meant to apply to dishonest, fraudulent, criminal, or malicious acts committed by SS&C, and not to these such acts committed by third-party fraudsters.

D. Conditions to Coverage/Consent

The California Supreme Court ruled in Pitzer College v. Indian Harbor Ins. Co., S239510 (Cal. Aug. 29, 2019) that the "notice-prejudice" principle is a fundamental aspect of California public policy. Further, in keeping with Section 187 of the Restatement Second, Conflicts of Law, the Supreme Court ruled that a California court might refuse to give effect to a provision in an environmental insurance policy requiring the insured to obtain the insurer's consent before incurring remediation expenses. Although the policy contained a choice of law clause designating New York law as controlling, the court ruled that such choice of law provisions are not enforceable where they conflict with a fundamental policy of the forum state. In this case, the court found that California had a fundamental interest in preventing "technical forfeitures" of coverage due to untimely notice. However, the court did leave open the issue of whether New York or California would be found to have the greater interest in the outcome of this coverage dispute. Further, while observing that the "notice-prejudice" rule applied to consent requirements in first party policies but not liability insurance, the Supreme Court left open the issue of whether the Indian Harbor policy was first or third party insurance.

E. Coverage B: Personal and Advertising Injury Claims

1. Defamation

A federal district court has ruled in AIX Specialty Ins. Co. v. Dginguerian, No. 18-24099 (S.D. Fla. Sept. 20, 2019) that the insured's unauthorized use of pictures on its web site to advertise a "back to school" party potentially set forth a covered claim for defamation. Despite the insurer's argument that the model's claim were for an infringement of her right of publicity and for unauthorized use of her likeness and therefore

subject to an IP exclusion in the policy, the court ruled that the claims set forth the elements of claim for defamation under Florida law.

2. Intellectual Property Claims

The First Circuit ruled in in Sterngold Dental, LLC v. HDI Global Ins. Co., No. 18-2084 (1st Cir. July 2, 2019) that a CGL exclusion for personal and advertising injury claims "arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights" precluded any obligation on the part of HDI to defend allegations that the insured had infringed the trademark of a dental product competitor. The First Circuit declared that even if the disputed mark constituted an "advertising idea" (as involving a means of soliciting business), any resulting coverage was clearly excluded as arising out of the claimed infringement of the underlying plaintiff's trademark. The court rejected the insured's argument that language in the exclusion the infringement of "other intellectual property rights" n your "advertisement"" applied to a claim of trademark infringement or any of the other specific IP offenses enumerated in the exclusion. The court distinguished between the enumerated offenses such as trademark infringement and the "other intellectual property rights", finding that this exception only applied to the latter. The court also rejected the insured's argument that this trademark could be considered a "slogan."

3. Invasion of Privacy

The California Supreme Court is expected to rule later this year whether Yahoo is entitled to "privacy" coverage for TCPA claims against it.

4. Malicious Prosecution

Resolving an issue on which Illinois courts have been sharply divided, the state Supreme Court ruled in in Sanders v. Illinois Union Ins. Co. 2019 IL 125465 (Ill. Nov. 21, 2019) that the "offense" of malicious prosecution occurs when a criminal defendant is wrongfully convicted rather than the later date when he or she is exonerated of that offense.

While denying that it was adopting a "continuous trigger," the Fifth Circuit has ruled in a Mississippi case that law enforcement liability policies issued by St. Paul and Scottsdale must cover suits brought against public entities for the wrongful conviction and imprisonment of innocent men decades earlier. In Travelers Ind. Co. v. Mitchell, No. 17-60291 (5th Cir. May 29, 2019), the Court of Appeals declared that "We do hold that coverage was triggered in more than one year by more than one injury. But we do so because Travelers and Scottsdale agreed to policies that permit multiple triggers if there are different injuries, quite apart from any common law 'multiple trigger' principle." The court emphasized that the policies in question were triggered by the occurrence of a "bodily injury" as distinguished from the trigger of coverage as distinguished from the offense-based trigger for the torts of false imprisonment or wrongful detention and similar offenses in a policy's "personal injury" coverage.

F. Cyber-Claims

While cyber-claims have exploded in recent years, the growing number of cases continue to focus on older policy forms, particularly commercial crime coverages, and have yet to address the wordings underlying new cyber-insurance forms.

In a case with significant implications for cyber-disputes and commercial property claims, the Ninth Circuit ruled in Universal Cable Productions LLC v. Atlantic Specialty Ins. Co., No. 17-56672 (9th Cir. July 12, 2019) that a "war" exclusion did not eliminate coverage for losses that a TV production company incurred after they had to abandon production of the "Dig" show in Jerusalem due to Hamas rocket attacks during its 2014 conflict with Israel. The Ninth Circuit ruled that a California District erred in granting summary judgment to Atlantic Specialty based on exclusions in its television production policy for losses due to "war" or "war-like action by a military force." Rather, the court found that both parties should have understood that these attacks did not meet the customary usage of "war" in the insurance industry of a conflict between actual or *de jure* governments. Because the District Court had not considered whether a separate part of the exclusion for "Insurrection, rebellion, revolution", the case was remanded for further findings.

The Eleventh Circuit ruled in Principle Solutions Group, LLC v. Ironshore Indemnity Inc. (11th Cir. December 9, 2019) that a commercial crime policy's coverage for "Computer and Funds Transfer Fraud" that insured "loss resulting directly from a 'fraudulent construction' directing a 'financial institution' to transfer or pay funds" applied to a "phishing" incident in which fraudsters fooled a business into transferring $1.7 million to an offshore bank account in China. The Eleventh Circuit ruled that the email instruction to the insured constituted a "fraudulent instruction," notwithstanding Ironshore's contention that the email had merely instructed the insured to work with counsel to wire funds later in the day and had not instructed the insured to wire a specific amount of money to a specific recipient." The Eleventh Circuit also rejected Ironshore's alternative argument that this loss had not resulted directly from the e-mail instruction. The court ruled that under Georgia law, "proximate cause is not necessarily the last act or cause or the nearest act to the injury" and can also include "all of the natural and probable consequences" of an action unless there is a sufficient and independent intervening cause. In this case, the court ruled that the intervening causes claimed by Ironshore (notably an inquiry by Wells Fargo with respect to the authenticity of the request) were certainly foreseeable if not necessarily inevitable. Writing in dissent, Judge Tjoflat agreed that the e-mail from the fraudsters was unambiguously a "fraudulent instruction" but argued that the issue of causation presented factual issues that should have been left to the jury and should not have been resolved by the District Court on summary judgment.

The Vermont Supreme Court ruled in Rainforest Chocolate LLC v. Sentinel Ins. Co., 2018 Vt. 140 (Vt. Nov. 28, 2018) that a trial court erred in declaring that a theft of funds from "spoofing" was not subject to an exclusion for "physical loss" due to "false pretenses" because the policy was ambiguous with respect to whether electronically-transferred funds were a "physical loss" or not. Although the policy excluded coverage where the four "voluntarily parting with any property by you or anyone else to whom you

have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense", the court noted that the Sentinel frequently referred to both "physical loss and physical damage" and "loss and damage" without clearing defining either. The case was therefore remanded back to the trial court to determine whether the “spoofing” loss was covered under the “forgery” or “money and securities” sections of this commercial property policy, although the court did observe in passing that the loss clearly fell outside the scope of the policy’s “computer fraud” section.

G. Declaratory Relief

The Tennessee Supreme Court ruled in Tennessee Farmers Mut. Ins. Co. v. DeBruce, No. E2017-02078-SC-R11-CV (Tenn. Oct. 15, 2019) that an intermediate appellate court erred in setting aside a default judgment and allowing an accident victim to intervene to pursue claims for coverage. Whereas the Court of Appeals had ruled that the default judgment was not binding on the accident victim, inasmuch as she was a “necessary party” to the coverage litigation but had not been named as a defendant when the insurer brought this declaratory judgment action, the Supreme Court ruled that only the insured was a necessary party. The court declared that “The claimant, who had no judgment against the insured and could not bring a direct action against the Ins. Co. to collect any damages caused by the insured, had no interest affected by the dispute between the company and its insured.”

H. D&O Coverage Claims

The Delaware Supreme Court ruled in In Re Verizon Insurance Coverage Appeals, No. 558, 2018 (Del. Oct. 31, 2019), that a trial court erred in failing to interpret the term “securities claims” within the context of securities statutes and regulations. In ruling that Verizon was not entitled to coverage for a bankruptcy trustee’s claims for breach of fiduciary duty, unlawful dividend and fraudulent transfer claims arising out of the disastrous 2006 spinoff of its print directory, the high court agreed with Verizon's insurers that the term "regulating securities" limited coverage to specific securities activities, as opposed to matters of general applicability. Whereas, Verizon had argued that definition of “Securities Claims” as a violation of "any regulation, rule or statute regulating securities" should be given broad scope, the court emphasized that these words were aimed at a particular legal area – securities law – and was not meant to be a general application to other areas of the law. The court also rejected Verizon's contention that "rules" regulating securities should also encompass "common law rules."

The Eighth Circuit has ruled in Brand v. National Union Fire Ins. Co. of Pittsburgh, P.A. No. 18-1372 (8th Cir. Aug. 16, 2019) that a Minnesota District Court did not err in granting summary judgment to a directors and officers insurer on the issue of allocating defense costs between insured and uninsured parties. The Eighth Circuit emphasized that the directors have taken a "all or nothing" approach asserted that they were entitled to be reimbursed for 100 percent of the defense costs and could not now make an intermediate demand alleging that they should be reimbursed for 40 percent or 82 percent based upon alternative theories of allocation.

I. Discovery Disputes

In 2019, the Alabama Supreme Court issued two significant opinions construing the ability of coverage litigants to obtain discovery of privileged communications.

In Ex parte Dow Corning Alabama, Inc., 1171118 (Ala. Nov. 27, 2019), the court ruled that an insured does not waive the privilege attached to its communications with defense counsel by bringing an action to obtain reimbursement for a settlement. While agreeing that the insured has the burden of establishing the reasonableness of the settlement that it negotiated, the court declared that the reasonableness of this agreement could be established without compelling the disclosure of the contents of privileged communications in keeping with prior cases involving disputes over the reasonableness of attorney's fees as well as out-of-state authority on this specific issue.

The Alabama Supreme Court ruled in Ex Parte Alfa Insurance Corp., 1170804 (Ala. April 5, 2019) that a trial court erred in requiring a liability insurer to disclose legal opinion letters from its outside coverage counsel. The court ruled that Alfa had not asserted an advice of counsel defense or otherwise waived the privilege. Further, the court declined to expand the 'crime fraud" exception or to otherwise establish a new exception to for cases involving insurance coverage disputes. Further, the court ruled that even if it was inclined to adopt section exception, it should be done by the legislature and not by judicial fiat.

On a certified question from the Fourth Circuit in a bad faith case, the South Carolina Supreme Court declared in In Re Mt. Hawley Ins. Co., No. 27892 (S.C. June 13, 2019) that an insurer's "denying liability and/or asserting good faith in the answer does not, standing alone, place the privileged communications 'at issue'." However, the court justified this result based on State Farm Mutual Automobile Ins. Co. v. Lee, 13 P.3d 1169 (Ariz. 2000), in which the Arizona Supreme Court required a disclosure of privileged legal advice from the insurer's coverage counsel based upon its conclusion that the insurer had, in fact, placed that advice "at issue" by contending that the coverage positions adopted by its claims adjusters had been "informed by counsel." The court therefore seemingly opened the door to requiring disclosure in cases where the insurer made an affirmative claim of good faith that expressly or impliedly relied on counsel's advice.

In Ironshore Europe DAC v. Schiff Hardin, LLP, No. 18-40101 (5th Cir. Jan. 2, 2019), the Fifth Circuit has ruled an insured's personal counsel was immune from a law suit by an excess insurer alleging that the firm was liable for negligent misrepresentations in withholding information concerning the value of a case that went to trial and resulted in a large excess verdict. The court ruled that "attorney immunity doctrine" under Texas law shields an attorney against claims by a non-client based on negligent misrepresentations made in the course of a counsel's representation of his clients. Whereas the Texas District Court had ruled that Schiff Hardin could not be liable for statements actually made in reports that were provided to the excess insurer but might be liable for *omissions* in its reporting, the Fifth Circuit ruled that both types of conduct were within the scope of the lawyer's client representation and therefore immune from

suit under the theory of negligent misrepresentation set forth in Section 552 of the Restatement (2nd) of Torts.

J. Duty to Defend

There is an on-going dispute within Texas, a state that firmly follows the "eight corners" rule, as to whether courts may consider extrinsic facts concerning an insurer's claimed duty to defend under policies that lack language that was historically contained in CGL policies requiring a defense even if the underlying suit's allegations are false, groundless or fraudulent.

Following on his August 24, 2018 ruling that a broker was not entitled to coverage for a settlement that it entered into with a client whose funds it mistakenly wire transfer to a bogus offshore account, Judge Bennett ruled in Quality Sausage Company, Inc. v. Twin City Fire Ins. Co., No. 17-111 (S.D. Tex. Sept. 19, 2019) that Twin City should have provided a defense. Although the District Court had refused to impose an indemnity obligation because the underlying claims were clearly barred by the statute of limitations and therefore did not create any liability on the part of the insured for which coverage might be required, Judge Bennett ruled that there was nonetheless a duty to defend in light of language in the policy requiring a defense even if a case is false, groundless or fraudulent. In light of the Fifth Circuit's recent certification of "eight corners" issues to the Texas Supreme Court, Judge Bennett declared that he had erred in his 2018 ruling in not granting judgment to the insured on the duty to defend.

In Sapa Extrusions, Inc. v. Liberty Mutual Ins. Co. No. 18-2206 (3rd Cir. Sept 13 2019), the Third Circuit rejected a Pennsylvania insured's argument that the court should look beyond the "four corners" of the underlying complaint in assessing the claimed indemnity obligations of the defendant insurers. The Third Circuit declared that whereas such facts might be considered in determining an insurer's duty to defend and whereas an insurer could rely on evidence outside of the complaint to ultimately prove that it has no duty to indemnify, no similar right exists on the part of the policyholder.

K. Emerging Claims

2019 saw the first reported decisions concerning two major areas of U.S. commerce: drones and fracking.

In XTO Cas. Co. v. Great West Cas. Co., (D.N.D. Jan. 2019), a federal district court ruled that injuries suffered by two oil field workers in the course of a well fire are excluded from coverage as "arising, in whole or in part, out of "hydrofracking" or the storage or disposal of any "flowback." The court refused to find that the use of the term "arising out of" rendered the exclusion ambiguous under Montana law, nor should the exclusion be voided as rendering the coverage "illusory."

In Philadelphia Indemnity Insurance Co. v. Hollycal Production Inc., No. 18-00768 (C.D. Cal. Dec. 7, 2018), a federal district court refused to find coverage for liability claims

against a wedding photographer whose drone blinded a wedding guest in one eye, finding that the claims were subject to the policy's aircraft exclusion.

L. Estoppel Claims

On a certified question from the Ninth Circuit, the Washington Supreme Court ruled in T Mobile USA v. Selective Ins. Co. of America, No. 96500-5 (Wash. Oct. 10, 2019) that a statement that an authorized agent made in a certificate of insurance extending additional insured coverage to an affiliated corporation was binding on the insurer even though the policy itself was not intended to insure that entity. While agreeing that a certificate of insurance is not the same as a policy and does not ordinarily convey coverage rights, the Supreme Court held that the certificate had binding effect in this instance because it contained representations made by an authorized agent of Selective that explicitly named T Mobile USA as an additional insured. The court found that "Otherwise, an insurance company's representations would be meaningless and it could mislead without consequence."

M. Excess Policies

The U.S. Court of Appeals for the Eight Circuit gave broad effect to the "follow form" language in an excess liability policy in a North Dakota case. In Houston Cas. Co. v. Strata Corp., No. 17-3405 (8th Cir. Feb. 6, 2019), the court rejected the claimant's argument that the policy's follow form language should not extend to endorsements and merely refer to the main body of the underlying Liberty Mutual policy. The Eighth Circuit agreed with a North Dakota District Court that the follow form language clearly applied to exclusions, whether they were in the main body of the policy or added by endorsement and that the exclusion in question unambiguously precluded coverage for allegations in the underlying wrongful death action that the mine operator's deliberate and intentional acts had caused the employee's death.

N. Long-Tail Claims

1. Allocation and Trigger Issues

In a surprisingly incomplete opinion, the Connecticut Supreme Court has ruled in R.T. Vanderbilt Company v. Hartford Accident and Indemnity Company, No. SC 20000 (Con. October 8, 2019 that the Court of Appeals did not err in adopting a "continuous trigger" for his asbestos/talc bodily injury claims or in declaring that the insured was not required to pay a "pro rata" share of defense costs or indemnity for years after 1993 when it could not purchase insurance for asbestos claims. The Supreme Court declared, without any analysis, that it agreed with the intermediate court's analysis. As a result, the court's opinion was solely devoted to the issue of whether the Court of Appeals had erred in declaring that there was no coverage for these under certain policies containing an "occupational disease" exclusion. In affirming the lower court's opinion that the "occupational disease" exclusion was not limited solely to claims by Vanderbilt's own employees but clearly unambiguously excluded from coverage claims brought by non-

employees who developed asbestos-related diseases while using Vanderbilt's talc in the course of working for other employers, the Supreme Court held that "occupational disease" is a term of art that exists independently of workers' compensation statutes as applying to illnesses caused by conditions arising out of the claimant's employment.

2. Exclusions

The Eighth Circuit ruled in Restaurant Recycling LLC v. Employers Mut. Cas. Co., No. 17-2792 (8th Cir. April 29, 2019) that claims against a restauranteur for selling contaminated recycled fat that a pork producer used to manufacture animal feed have been declared to arise out of the "dispersal" of a pollutant. The court declared that Minnesota law does not require that the dispersal be intentional and that it was sufficient in this case that at least one of the impurities have caused property damage.

The Eleventh Circuit has ruled that Georgia District Court did not err in declaring that a CGL insurer was not obligated to provide coverage for allegations by a railroad employee that he suffered an occupational disease known as "welders lung" in light of the absolute pollution exclusion contained in the Evanston policy. In light of rulings of the Georgia Supreme Court giving broad effect to such exclusions, the Eleventh Circuit declared in Evanston Ins. Co. v. Sandersville Railroad Company, No. 17–14487 (11th Cir. Feb. 8, 2018) (unpublished) that injuries arising from the inhalation of welding fumes containing iron particles clearly constituted an exposure to an "irritant or contaminant including…fumes" and were therefore excluded from coverage.

A federal district court has ruled that a liability insurer must defend a case involving personal injuries suffered by a warehouse worker who was exposed to nitrogen fumes as the result of accidental emissions from cryogenic storage freezers inside the insured's facility notwithstanding an absolute pollution exclusion in the policy. In Evanston Ins. Co. v. Xytex Tissue Services, Inc., No. 17-140 (S.D. Ga. Mar. 27, 2019), Judge Wall ruled that nitrogen is not always harmful (e.g. air). Further, in light of cases such as Barrett and conflicting APE rulings in Georgia, the District Court declared that it could not find that nitrogen case is an "irritant" for purposes of summary judgment. The court also declined to bar the testimony of a chemist who offered an expert opinion that nitrogen gas is not considered to be an "irritant," finding that while such testimony is improper with respect to an issue of law, it might be permitted to resolve factual issues concerning the characterization or properties of nitrogen gas.

O. "Occurrence"

The First Circuit ruled in Zurich American Ins. Co. v. Electricity Maine, LLC, No. 18-1968 (1st Cir. June 17, 2019) that allegations that a utility negligently misrepresented the cost of electrical services to consumers constituted an accidental "occurrence" under Maine law. While agreeing that the plaintiffs'' RICO claims were not covered, the court declared that Zurich was obliged to provide a defense since other claims in the suit did not require proof of intentional acts on the part of the insured. Further, the court ruled that these claims potentially sought recovery for "bodily injury" because, even though the

claims in no way alleged emotional distress due to the utility's overbilling, such damages might be awarded based on the facts otherwise alleged. The court ruled that the Zurich's policy's definition of "bodily injury," which restricted coverage for emotional distress to mental anguish resulting from an otherwise covered "bodily injury" was ambiguous.

The Third Circuit ruled in Sapa Extrusions, Inc. v. Liberty Mutual Ins. Co. No. 18-2206 (3rd Cir. Sept 13 2019) that liability insurers with more recent "occurrence" wordings were not required to provide coverage for a lawsuit brought against a manufacturer of aluminum extruded profiles by customers who claimed that its producers were not what they had contracted for.. In an unusually nuanced opinion, the Third Circuit ruled that Pennsylvania law precludes coverage for claims based upon an insured's failure to perform according to its contractual obligations. Nevertheless, the court drew a distinction between liability policies that define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" and those, including seven policies issued by National Union and four by Liberty Mutual, that also required that such damage not be "expected or intended" by the insured. While affirming the District Court's ruling with respect to the more recent "occurrence" policies, the Third Circuit ruled that the older policies containing "expected or intended" language were materially different from the more recent "occurrence" forms and required further consideration by the District Court.

P. Opioid Claims

A federal district court has ordered a general liability insurer to reimburse a drug distributor for $3.5 million that it paid the State of West Virginia resolve claims that its sales caused or contributed to the opioid epidemic. Having previously ruled that Cincinnati had an obligation to defend these claims, Judge Mills now rules in Cincinnati Ins. Co. v. H.D. Smith Wholesale Drug Co,, 12-3289 (N.D. Ill. Sept. 26, 2019) that under Illinois law an insured is not required to allocate between covered and non-covered claim if it is able to demonstrate that the primary focus of the underlying action was a "covered loss" and it settled in reasonable anticipating of liability. In this case, the court found it was reasonable for H.D. Smith to settle, as all of the other defendants had also settled, and that claims that were covered under the policy were the "primary focus" of the State's claims. The court declined to enter a summary judgment with respect to the insured's bad faith claims, finding that there were issues of fact as to whether Cincinnati had acted "vexatiously" in violation of Section 155.

P. Property Insurance

In a case with significant implications for cyber-disputes and commercial property claims, a federal appellate court has ruled that a "war" exclusion did not eliminate coverage for losses that a TV production company incurred after they had to abandon production of the "Dig" show in Jerusalem due to Hamas rocket attacks during its 2014 conflict with Israel. in Universal Cable Productions LLC v. Atlantic Specialty Ins. Co., No. 17-56672 (9th Cir. July 12, 2019), the Ninth Circuit ruled that a California District erred in granting summary judgment to Atlantic Specialty based on exclusions in its television

production policy for losses due to "war" or "war-like action by a military force." Rather, the court found that both parties should have understood that these attacks did not meet the customary usage of "war" in the insurance industry of a conflict between actual or *de jure* governments. The court found that Hamas was not the governing authority in Palestine and that these attacks were a form of terrorism that should be covered in the absence of a terrorism exclusion. The court declined to rely on the doctrine of *contra proferentem* in light of the fact that this exclusion was the product of negotiations between two sophisticated parties. Because the District Court had not considered whether a separate part of the exclusion for "Insurrection, rebellion, revolution", the case was remanded for further findings.

The Eleventh Circuit ruled ruled in ACE American Ins. Co. v. The Wattles Co., No. 17-15392 (11th Cir. July 19, 2019) that that a commercial property policy did not provide coverage for a landlord's claims against the insured for damage to leased property in Washington due to the release of corrosive chemicals from the manufacture of batteries. In a lengthy and complex opinion, the court that the insured's settlement fell outside of the third party liability coverage provided by the policy's Tenants and Neighbors Provision. As that provision of the policy only applied to "liability incurred in those countries in which a Napoleonic or other civil or commercial code," the Court of Appeals ruled that this coverage only applied to "civil law" jurisdictions, including several foreign countries where the insured did business, and was not triggered merely by state law "Codes" such as the Uniform Commercial Code. While conceding that the insured's argument was a "possible" interpretation of the meaning of this language in the policy, the Eleventh Circuit emphasized that Georgia's view of contra proferentem required that the insured's interpretation of the policy be "reasonable" and that the language, taken as a whole, made clear that this coverage only applies to civil code jurisdictions that followed rules similar to the Napoleonic Code.

In November, the Connecticut Supreme Court issued a trio of opinions that appear likely to shut down the wave of crumbling foundation suits by homeowners in Eastern Connecticut. In Karas v. Liberty Ins. Corp., SC 20149 and Vera v. Liberty Mutual Fire Ins. Co., SC 20178). the court declared that the "substantial impairment of structural integrity" standard for "clients" that it had adopted years ago in Beach continued to apply to "collapse" claims. Having adopted the Beach standard, however, the court proceeded to rule that a collapse does not occur until a building is in imminent danger of falling down and therefore unsafe for its intended purpose. The court found that any contrary interpretation would nullify the policy exclusions for "settling, cracking, shrinkage, bulging or expansion." The court also ruled that the exclusion for collapse of a home's "foundation" unambiguously extended to basement walls. Finally, in Jemiola v. Hartford Cas. Ins. Co., SC 19978, the court upheld a more recent policy form that limited "collapse" coverage to an "abrupt falling down."

R. Sexual Assault Claims

. In United Fire and Casualty Co. v. Kent Distributors, Inc., No. 18-50134 (5th Cir. Jan. 11, 2019), the Fifth Circuit has ruled that a retailer's CGL insurer did not owe

coverage for the sexual assault of one employee by a fellow employee. The Fifth Circuit held that Texas District Court was correct in declaring that a liability insurer declared that the plaintiff's claims fell within the scope of a policy exclusion for bodily injury suffered by employees. Furthermore, the court ruled that any liability on the part of the insured was subject to the Texas Abuse or Molestation Exclusion. Although the plaintiff had argued that this exclusion was ambiguous in that it failed to define what it meant for the victim of molestation to be "in the care, custody or control of any insured," the Fifth Circuit agreed with the Texas District Court that "control" should be interpreted in accordance with its commonly understood meaning as "in the power or authority to manage, direct, govern, administer or oversee" which applied in this situation where the assaulted victim was in the store at the time as an employee.

The Eighth Circuit has ruled that a Minnesota judge erred in ruling that an excess insurer had failed to show that a sexual molestation exclusion in an excess policy did not preclude coverage for a $7 million verdict against the insured day care center. Whereas the District Court has ruled that RSUI had failed to show what portion of the verdict was for injuries due to sexual assault (as opposed to claims of physical assault that would have been covered), the Eighth Circuit ruled in RSUI Ind. Co. v. New Horizon Kids Quest, Inc., No. 17-3567(8th Cir. Aug. 12, 2019) that as RSUI had not been a party to the underlying trial and as the jury had not categorized the damages awarded, RSUI was entitled to litigate whether the damages for physical assault were $3 million or less and therefore fully within the limits of the underlying Travelers policy.

S. Subrogation

The Supreme Court of Washington ruled in Daniels v. State Farm Mutual Automobile Ins. Co., No. 9618-9 (Wash. July 3, 2019) that lower courts had erred in holding that an auto insurer that was only able to recover 70% in a subrogation act was not required to reimburse its insured for 100% of the policy deductible. The court ruled that the "made whole" doctrine required a first party insurer to reimburse the full amount of the insured's deductible before it could retain any portion of the subrogation proceeds for itself. The court declared that "whether in the context of a reimbursement request, off set or direct subrogation action, a false-free insured must be made whole for their entire loss before an insurer may offset or recovery its own payments." Furthermore, the Supreme Court found that State Farm's policy violated WAC 284-30-393, a regulation promulgated by the Washington Insurance Department that require insurer's to include deductible in its subrogation demands. The court appears to have been persuaded by an amicus brief that the Insurance Department filed asserting that State Farm's policy was inconsistent with the purpose underlying this regulation.

U. Supplementary Payments

The Massachusetts Appeals Court ruled in Styller v. National Fire & Marine Ins. Co., No. 18-P-983 (Mass. pp. Ct. June 26, 2019) that the Supplementary Payments provision in a CGL Policy did not cover attorneys' fees and expert fees and expenses awarded against the insured for violations of the Massachusetts Consumer Protection Act

(GL Ch. 93A). Whereas the Superior Court had ruled that the award of fees for the 93A recovery were "costs taxed" against the insured, the Appeals Court declared that under Massachusetts law, “costs” only encompass the items identified in G.L. c. 261§1. Further, the court declared that expert fees and expenses were clearly not “costs;” the fact that Chapter 93A allows these sums to be awarded to a prevailing party does not effect a change in the meaning of the term "costs taxed" in the context of a legal proceeding. Further, because none of the damages that had been awarded against the insured at trial were covered in the policy, the Appeals Court held that the insured had no obligation to pay post-judgment interest in any amount.

U. Tripartite Issues

The Florida Supreme Court will rule in Arch Ins. Co. v. Kubicki Draper LLP, No. 19-673 whether “an insurer has standing to maintain a malpractice against counsel hired to represent the insured where the insurer has a duty to defend.” Early in 2019, the Fourth District Court of Appeals ruled that Arch could not sued its chosen defense counsel because the parties were not in privity, nor was Arch an intended third-party beneficiary of the relationship between the law firm and Arch’s insured.

The U.S. Court of Appeals for the Fourth Circuit ruled in Mora v. Lancet Indemnity Risk Retention Group, No. 18-1566 (4th Cir. May 7, 2019)(unpublished that a professional liability insurer was bound by a default judgment that entered after appointed defense counsel withdrew because he concluded that Maryland’s rules of professional responsibility barred him from defending a case without a consenting client. The Fourth Circuit agreed with the U.S. District Court that neither ethical rules, nor Maryland law or the terms of this terms of the Lancet policy prevented Lancet from defending the malpractice action.), the court interpreted the “right and duty” language in this policy as giving “advanced consent” by the insured to its insurer’s right to defend. The court also faulted Lancet for not consulting with other lawyers before accepting the conclusion of appointed defense counsel and withdrawing from any further effort to defend its absentee insured.

A federal district court has asked the South Dakota Supreme Court to declare whether the cost of an insured tearing down their house pursuant to a court injunction are “damages” covered under a liability policy. In Sapienza v. Liberty Mut. Fire Ins. Co., 2019 U.S. Dist. LEXIS 84973 (D.S.D. May 17, 2019), the District Court separately adopted the “inadequate defense” theory of liability set forth in Section 12 of the ALI *Restatement of Law, Liability Insurance,* declaring that Liberty Mutual might be liable for overriding the advice of the insured’s own chosen counsel and refusing to engage an independent expert architect or contractor to support the insured’s defense. While concluding that the insured’s factual allegations failed to sustain a finding of liability on this basis, the District Court allowed the insured an additional 14 days to supplement its claims. The court did dismiss the insured’s bad faith claims, ruling that the insured’s alleging decisions to “hinder” the insured’s defense were not support by the facts alleged and were unrelated to the allegedly “deficient” defense that the insurer had provided.

During the Fall, the Ethics Committee of the New Hampshire Bar Association has issued Advisory Opinion No. 2018-19/2 declaring that New Hampshire law is unsettled with respect to whether insurance companies are clients of appointed defense counsel that, until this issue was settled by the New Hampshire Supreme Court, law firms should be clear about who they represent. The committee recommended to law firms that "if they want to have a relationship only with the insured, something that will avoid future conflicts if the insured provides information such as in the above example, they should make this clear to the insurance company."

V. Where Will Coverage Disputes Come From in 2020?

1. Sexual abuse
2. Ransomware
3. Drones
4. New Biometric privacy requirements
5. Data security
6. Cannabis
7. Climate change
8. Wildfires

VI. Insurance Coverage Appeals to Watch In 2020

1. California: *TCPA/Coverage B*

In late March, the California Supreme Court agreed to accept a certified question from the Ninth Circuit in Yahoo! Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, No. 17-16452 (9th Cir. Jan. 16, 2019), asking whether TCPA claims involve an "oral or written publication of material that violates a person's right of privacy" and, in particular, whether this privacy "offense" covers the right to secrecy, seclusion or both.

3. Florida: *Tripartite Relationship*

In June, the Florida Supreme Court accepted jurisdiction in Arch Ins. Co. v. Kubicki Draper LLP, No. 19-673. At issue is whether "an insurer has standing to maintain a malpractice against counsel hired to represent the insured where the insurer has a duty to defend."

4. Maryland: *Allocation*

The Maryland Court of Appeals heard oral argument in September in Rossello v. Zurich American Ins. Co. in a case where a lower court ruled that Zurich was only obligated to pay a *pro rata* share of a $3 million judgment that Rossello recovered against its policyholder.

5. Massachusetts: *Trigger of Coverage/Continuing Losses*

The First Circuit is expected to rule soon in Clarendon National Ins. Co. v. Philadelphia Indemnity Ins. Co. No. 19-1212. At issue is whether a federal district court erred in ruling that a subsequent liability insurer had no obligation to provide coverage for a tenant's mold claims in light of the fact that the mold problem had begun prior to the beginning of Philadelphia's 2007 policy period and had resulted in numerous complaints to the insured property management company prior to the issuance of the policy.

6. Massachusetts: *Estoppel/Reservations of Rights*

The Supreme Judicial Court will hear oral argument in February in the matter of Dorchester Mutual Ins. Co. v. Russell, SJC-12856 on the issue of whether a "physical abuse" exclusion applied to a reckless assault and/or whether the insurer was estoppel to raise the abuse exclusion since its original reservation of rights had not mentioned it.

7. Nevada

Briefing is nearing completion in Nautilus Insurance Co. v. Access Medical, LLC, 79130. July 2, 2019), a case in which the Nevada Supreme Court is considering a certified question from the Ninth Circuit with respect to whether "an insurer entitled to reimbursement of costs already expended in defense of its insureds where a determination has been made that the insurer owed no duty to defend and the insurer expressly reserved its right to seek reimbursement in writing defense has been tendered but where the insurance policy contains no reservation of rights?"

8. Pennsylvania: *Bad Faith/Standard of Review*

In March, the Pennsylvania Supreme Court agreed to accept review of Berg v. Nationwide Mutual Insurance Co., No. 569 MAL 2018 (Pa. Mar. 29, 2019), in which the Superior Court set aside a $21 million bad faith award against an auto insurer on the basis of apparent bias by the trial judge and insufficient evidence of bad intent on the part of the insurer. The key issue before the Supreme Court is whether the intermediate appellate court abused its discretion by reweighing and disregarding clear and competent evidence upon which the trial court relied to support its finding of insurance bad faith [pursuant to the standard set forth in *Rancosky v. Washington Nat'l Ins Co.*, 170 A.3d 364 (Pa. 2017).