2020: The Year in Review

Ring the bells that still can ring.
Forget your perfect offering.
There is a crack, a crack in everything;
That's how the light gets in.

Leonard Cohen, Anthem.

2020: gone but certainly not forgotten. A year like no other--seared in our memory for its pain, loss, lonely isolation and bleak statistics. Yet at the same time, a year of momentous developments and a strange conjunction of insurance coverage litigation with a desperate existential crisis for small businesses in America. So before we swing the door shut on 2020, let's consider what we saw and (maybe) learned.

I. KEY CLAIM TRENDS IN 2020

The dominant story of 2020 was, of course, the COVID-19 pandemic and the epidemic of insurance coverage litigation that it spawned. Crippling economic losses and an anemic governmental aid response prompted restaurants and small businesses across the country to thrown in with plaintiffs' lawyers in an effort to compel insurance coverage for business interruption losses despite predictions that requiring coverage would wipe out the entire surplus of property and casualty insurers in mere months. By Labor Day, over 1200 suits had been filed and the forecast was grim.

In recent months, the pace of new filings has slowed noticeably and some of the crazier ideas that had surface in the spring and summer (MDL consolidation, state or federal legislation to mandate coverage retroactively) had receded. Meanwhile, aggressive efforts by insurers to obtain early dismissal of these cases had yielded dozens of favorable opinions from courts across the country and had prompted many law firms to drop their clients' claims.

While property insurers begin 2021 in a strong position, the pandemic coverage wars are far from over. Even as small, inexperienced law firms have dropped their claims, large corporations represented by seasoned policyholder counsel have entered the fray with new and more creative arguments for coverage. Furthermore, the U.S. District Court rulings, while heartening, will only be consequential in the long-term if they are sustained on appeal.

Apart from the insurance litigation, the pandemic upended our personal and professional lives, although insurers and law firms proved surprisingly creative and resilient in finding ways to work remotely. And once the Great Toilet Paper Shortage Panic receded, we embarked on a long slog of Zoom calls and Amazon shopping.

The Presidential election aside, the other big story in 2020 was the final chapter in the messy divorce that began when Britain voted four years ago to withdraw from the European Union. While the treaty that was negotiated with hours to spare at the end of 2020 spared Great Britain the messier consequences of a "hard Brexit," the implications of an EU-free Britain left the future of the City of London as a world-wide center of insurance and high finance in a continued state of uncertainty.

As focused as we were on the COVID-19 virus, it was easy to remember how much of an issue computer viruses, malware and ransomware attacks have become in recent years. During 2020, the incidence and size of these attacks continue to grow, even as a growing body of case law is emerging with respect to the scope of cyber-policies and "silent cyber" coverage.

Finally, the appalling spectacle of much of California on fire throughout the summer of 2020 and the growing severity of hurricanes and other natural disasters should remind us that climate change is playing an increasingly important role in the incidence and size of cat claims.

II. THE FIVE MOST SIGNIFICANT INSURANCE RULINGS OF 2020

- ***Gavrilides Management Co. v. Michigan Ins. Co*., No. 20-000258-CB (Mich. Cir. Ct. July 1, 2020)**

It is not usual for a state trial court opinion that for weeks was only available through a YouTube video of the court's oral argument to top our list but this was not just any decision and there was nothing usual about 2020. *Gavrilides*, which was soon thereafter followed by *Diesel Barbershop LLC v State Farm Lloyd's*, 2020 WL 4724305 (W.D. Tex. Aug. 13 2020) and then by *Turek Enterprises, Inc. v. State Farm Mutual Automobile Ins. Co.*, 2020 WL 5258454 (E.D. Mich. Sept 3, 2020), set the tone for the wave of pro-insurer pandemic BI rulings in the Fall of 2020 and gave political cover to judges around the country to stand firm in the face of sympathetic claims for business interruption coverage.

- ***Montrose Chemical Corp. v. Superior Court*, 460 P.3d 1201 (Cal. 2020)**

In adopting a new rule of "vertical exhaustion" in long-tail cases, the California Supreme Court ruled that the Court of Appeal had erred in holding that an insured must exhaust all available insurance in underlying layers before claiming coverage in a higher excess layer. "Reading the insurance policy language in light of background principles of insurance law, and considering the reasonable expectations of the parties, we agree with Montrose: It is entitled to access otherwise available coverage under any excess

policy once it has exhausted directly underlying excess policies for the same policy period." The court ruled, however, that any excess insurers who are triggered on this "vertical' basis could pursue claims for equitable contribution against unexhausted insurers that provided lower layer insurance in other years.

- ***Nash Street v. Main Street America Assurance Company,* 2020 WL 5415325 (Conn. Sept. 9, 2020)**

In this unusual and troubling ruling, the Connecticut Supreme Court ruled that a "potential for coverage" triggering an insurer's duty to defend exists not only when facts are alleged that would be covered ("factual uncertainty") but also in cases where the where there is no clear Connecticut precedent and cases in other jurisdictions are divided on whether there is coverage or not ("legal uncertainty"). Under the circumstances, the Supreme Court ruled that a trial court erred in refusing to find that a CGL insurer had an obligation to defend a property owner's suit for damage that his home suffered when it collapsed while being lifted off its foundation by the insured subcontractor.

- ***In Re Solera Insurance Coverages Appeals*, 2020 WL 6280593 (Del. Oct 23, 2020)**

The Delaware Supreme Court declared that an appraisal action brought by disgruntled stockholders is not a "violation" for purposes of triggering the D&O policies' coverage for "Securities Claims." In reversing the Superior Court, the Supreme Court declared that an appraisal action is not a claim made against the insured "for any actual or alleged violation of any federal, state or local statute regulation or rule or common law regarding securities …" As a result, the court did not reach the secondary issue of whether the violation must be of a law *regulating* securities. Having found for the insurers on the "Securities Claim" issue the Court declined to reach to other arguments raised on appeal with respect to whether pre-judgement interest could be calculated based on underlying amounts that were not covered and whether the applicability of a consent provision contained an implied prejudice requirement.

- ***Travelers Property Casualty Company of America v. 100 Renaissance, LLC*, No. 2019-IA-00586 (Miss. Oct. 29, 2020), *rehearing pending* (Miss. 2021).**

In a case that is now under reconsideration by the Mississippi Supreme Court, the court ruled last October that Travelers had placed communications between its in-house counsel and its claims handler "at issue" where the in-house lawyer had crafted the Company's coverage position and (apparently) drafted the denial letter. The court focused on the fact that the claims handler could not explain the basis for Traveler's denial of a UIM claim and that the denial letter, while signed by the adjuster, had likely been written by the in-house lawyer on whose advice and legal analysis she had likely relied. Under the circumstances, the court found an "implied waiver" of the attorney-client privilege and criticized Travelers' effort to "use the attorney-client-privilege as a sword to prevent Renaissance from discovering the reasons from the

person who had personal knowledge of the basis to deny the claim." The court concluded "if the claims handler relied substantially, if not wholly, on in-house counsel to prepare her denial letter, the reasoning of in-house counsel should be discoverable." Writing in dissent, Justice Ishee argued that the majority has misconstrued the deposition testimony of the insurance claims adjuster and asserted that she had in fact clearly understood the policy provisions upon which she had relied to deny coverage had only "faltered" when asked to respond to legal arguments under Mississippi law concerning questions of statutory interpretation that might have overridden the express policy language. Under the circumstances, Justice Ishee argued that Travelers had not placed the advice of counsel at issue and that the mere fact that in-house counsel's testimony might be relevant was not in and of itself a basis for compelling it. The court has since agreed to reconsider arguments by Travelers that waiver requires an affirmative act by an insurer and that the court ignored key facts in reaching its decision.

- ***Kaiser v. Allstate Ind. Co*., 307 Neb. 562 (Neb. Oct. 23, 2020)**

The Nebraska Supreme Court has refused to require a homeowners insurer to provide first party coverage for smoke damage caused by a tenant's meth lab in light of an exclusion for damage by tenants unless the "act results in a sudden and accidental direct physical loss caused by … smoke." The Supreme Court also sustained the lower court's declaration that methamphetamine fumes are an excluded "contaminant" or a "pollutant" subject to other exclusions. The fact that certain of these terms might have overlapping meanings was not, in the court's view, a basis for finding ambiguity as "a well written insurance policy will likely have terms that overlap, which might suggest the denial of coverage on several grounds in an appropriate case." As the smoke exception, the court found that a loss that occurs over a significant period of time is not "sudden," rejecting the insured's argument that the meth fumes had bonded to surfaces throughout the rental property "quickly".

IV. IMPORTANT RULINGS BY ISSUE AREA

A. ALLOCATION AND TRIGGER

- ***Rossello v. Zurich American Ins. Co.*, 226 A.3d 444 (Md. 2020)**

The Maryland Court of Appeals has rejected arguments that a general liability insurer should be jointly and severally liable for a judgment in an asbestos personal injury lawsuit. The court affirmed that a "time of the risk" pro rata approach to allocation was consistent with the language in the policy as well as abundant precedent from the Maryland Court of Special Appeals since its decision in Utica Mutual in 2002. The court also took note of the fact that since 2002, nine of the ten Supreme Court allocation decisions outside of Maryland have rejected "joint and several" liability and adopted proration based upon time of the risk. The court also clarified its "trigger of coverage" analysis, holding that coverage in "long-tail" cases is not limited to be year of "manifestation" and that in cases of continuing injury, an "injury in fact" approach may trigger coverage in all years when injury occurred. Finally, without explicitly addressing

whether there should be an “unavailability” exception for allocation omitting years in which insurance was commercially available, the court ruled in this case that the insured in this case could not evade its responsibility for loss occurring between 1977 and 1985 since it had failed to prove that it could not buy general liability insurance covering asbestos liability claims during this period.

- ***Gonzalez v. Mid-Continent Cas. Co.*, 969 F.3d 554 (9th Cir. Aug. 13, 2020)**

The Fifth Circuit ruled in this Texas case that a liability insurer must defend a homeowner’s suit for fire damage that occurred in 2016 even though its coverage expired in 2014. Applying the Texas “eight corners” rule, the court ruled that Mid-Continent’s coverage was triggered by allegations in the underlying suit that the 2016 fire "relates back to the construction and/or installation of siding" in 2013 and in particular,, allegations that the contractor negligently hammered siding nails through electrical wiring, causing a dangerous condition that lead to the fire 3 years later. The court also focused on the “loss of use” section of the CGL definition of “property damage,” that "all such loss shall be deemed to occur at the time of the physical injury that caused it."

- ***Carrier Corp v. Allstate Ins. Co.,* 2020 NY Slip Op 05620 (App. Div. Oct. 9, 2020)**

The Appellate Division of the New York Supreme Court has vacated a trial court’s declaration that “as a matter of law, injury-in-fact in an asbestos action occurs from the date of first claimed exposure through death or the filing of suit, thereby triggering each policy in effect from the date of first claimed exposure, The Fourth District sustained the trial court’s declaration of successor liability, declaring that documents prepared contemporaneously with the reorganization, the deposition testimony of employees involved in the reorganization, and evidence of post-reorganization conduct, that the parties to the reorganization agreement, consistent with the language therein, intended to, and did, transfer assets including insurance rights. Nevertheless, the Appellate Division ruled that summary judgment should not have been granted in light of contradictory affidavits with respect to whether asbestos injuries occur immediately after initial exposure and averring instead that harm occurs only when a threshold level of asbestos fiber or particle burden is reached that overtakes the body's defense mechanisms. The Appellate Division affirmed an “all sums” allocation rule, in light of the excess policies’ provision for “non-cumulation.”

- ***Clarendon National Ins. Co. v. Philadelphia Ind. Co.,* No. 19-1212 (1st Cir. April 1, 2020)**

The First Circuit has affirmed a Massachusetts court’s declaration that a subsequent insurer was not obliged to share in the defense of mold liability claims that were known to the insured prior to the policy period. In sustaining anti-*Montrose* wordings in the CGL insuring agreement, the court ruled that allegations that additional mold had occurred during Philadelphia’s policy period due to new leaks and the

landlord's unsuccessful efforts to repair the problem did not create a potential for coverage triggering a duty to defend.

- ***Atain Specialty Ins. Co. v. Carolina Professional Builders, LLC*, No. 18-2352 (D.S.C. Oct. 2, 2020)**

The federal district court ruled in this case that a CGL insurer was not obliged to provide coverage for property damage allegedly resulted from the insured contractor's repairs during the policy period. In granting summary judgment to Atain, the court focused on the Continuous and Progressive Injury Limitation endorsement which states that there's no coverage for the continuation of any injury or damage. The court found that whether or not there was damage during 2009-2010, there was no evidence that the insured or any party was aware of it. Further, the court ruled that the parties had contracted for an insurance policy with this limitation, and there was no reason to refuse to enforce it based upon public policy or some statutory prohibition.

B. BAD FAITH

- ***Capitol Specialty Ins. Corp. v. Higgins*, 953 F.3d 95 (1st Cir. March 11, 2020)**

In this case, the U.S. Court of Appeals for the First Circuit has affirmed a multi-million dollar bad faith judgment against a strip bar's liability insurer for failing to fully investigate an accident claim involving an exotic dancer but rejected efforts by the dancer to increase the award. In, the court rejected the injured party's claim that her trebled award should have be based upon the $7.5 million consent judgment that she had separately negotiated with the insured bar declaring instead that statutory damages awarded under the Massachusetts Consumer Protection Act (G.L. c.93A) must be based upon the injured party's actual damages. The court also rejected the claimant's argument that the District Court's entry of her $7.5 million consent judgment was a "judgment" to which Chapter 93A applied, especially as there was sufficient evidence of collusion with respect to the settlement. The court also rejected Higgins' claim that she was entitled to a separate award based upon an assignment of rights that she had received from the insured bar. The court ruled that there was no evidence that the bar had suffered any injury due to the insured's investigation (which had been shut down after the bar's owner swore to the insurer that they never served drinks to dancers), nor was the insured's contribution of $50,000 to the consent judgment settlement was not an injury that had been caused by Capitol nor was there evidence of any other independent injuries upon which an assigned claim could be asserted. While therefore rejecting the claimant's cross-appeal, the First Circuit for the most part affirmed the district court's entry of liability as regards the insurer. In particular, the court rejected Capitols' claims that Section 3(9)(d)'s requirement that insurers properly investigate "claims" was triggered by a letter of representation from claimant's counsel, even though the later did not demand any specific dollar amount. The court criticized Capitol for not following the advice of its independent adjuster to interview other individuals, which would have confirmed that the bar did indeed serve alcohol to dancers, as Capitol should likely have already known since it often writes coverage for bars. The court

further found that it was not “clear error” for the District Court to find that the insurer’s breach was “willful.” Similarly, even though Judge Hillman’s opinion provided very little explanation as to how he found $1.8 million in actual damage, the court found that this was not “clear error” as there was some evidence at trial concerning the catastrophic effect of these event on the claimant’s life. On the other hand, the court ruled that pre-judgment interest only applied to the base award and not to the full trebled amount of 93A damages.

- **Progressive Northwestern Ins. Co. v. Gant, 957 F.3d 1144 (10th Cir. 2020)**

In one of the first federal appellate opinions to rely on the newly-enacted American Law Institute *Restatement of Law, Liability Insurance,* the Tenth Circuit ruled in this Kansas case that an automobile liability insurer was not liable for a $7 million judgment that allegedly resulted from its appointed defense counsel's failure to uncover evidence of a separate liability policy issued to the insured's business. In an opinion that discusses and repeatedly relies on one of the more controversial provisions of the RLLI (Section 12), the Tenth Circuit found that both Progressive and defense counsel had made reasonable efforts to investigate whether other coverage existed and had been told by the insured that none did. "We can think of no doctrinal support, or other good reason, for ruling that an insurer cannot rely on its insured's assurance that there is no other coverage with another insurer…" Also, while observing that Section 12 of the *Restatement* suggested the possibility that an insurer might be liable for selecting unqualified defense counsel, the court found that in this case, the scattered reports that Progressive had received concerning the lawyer's habit of impeding settlement were vastly outweighed by the fact that he had tried hundreds of cases over the course of years and that these three complaints might well reflect disgruntled competitors as much as any accurate information. In any event, the Tenth Circuit observed that Section 12 only permits liability in such cases if there was "harm caused by any subsequent negligent act or omission of the selected counsel that is within the scope of the risk that made the selection of counsel unreasonable,” whereas in this case there was no causal relationship between the alleged instances of file mishandling in the past and the failure to locate the business policy in this case. Finally, the court refused to impose vicarious liability on Progressive, since there was no evidence that it had sought to interfere with the lawyer's independent exercise of his professional judgment on behalf of the client. The court rejected Gant’s argument that t Progressive's case management guidelines, noting that the Guidelines explicitly instructed defense counsel not to “allow anything contained in these Guidelines to interfere with any ethical directive or obligation governing conduct as defense counsel.

- ***Mundell v. The Commerce Ins. Co.,* 19-P-1842 (Mass. App. Oct. 30 2020)**

A Massachusetts court has ruled for the first time that auto insurer did not act in bad faith by failing to respond to a “time-limited” policy limits demand. The court ruled that the fact that Commerce had taken 10 days beyond the stated 30 day deadline to offer its limits was sufficient proof that it had "met its obligation of effectuating a prompt, fair and equitable settlement" and that the mere fact that it had not responded within a

unilaterally set deadline was not a basis for finding bad faith on its part. Further, the court declined to find bad faith on the basis of a letter that Commerce sent to its insured after a $50,000.00 judgment had entered suggesting that it might contribute personally to a settlement, noting that claimant's counsel has failed to set forth this allegation in his 93A demand letter. As a result, the court did not reach the question of whether the trial court had correctly ruled that any misrepresentations on the part of Commerce after the judgment had occurred were not causally related to the judgment and therefore could not form the basis for a bad faith claim.

C. CONSTRUCTION LITIGATION

- ***Scottsdale Ins. Co. v. Columbia Ins. Group Inc,*** **2020 WL 5036095 (7th Cir. Aug. 26, 2020)**

The U.S. Court of Appeals for the Seventh Circuit has ruled in this Illinois case that the District Court had not erred in ruling that Scottsdale Insurance, as the liability insurer of a building owner, could shift the obligation to defend its insured from a personal injury lawsuit brought by an injured construction worker to the employer's insurer (Columbia). Despite Columbia's assertion that the accident had not arisen out of its named insured's ongoing operations for the building owner, the court ruled that Columbia owed a defense due to the possibility that the employee's accident arose at least partially out of the insured's ongoing operations at the site. The court rejected Columbia's argument that the fact that the worker had not sued his employer for negligence was controlling and pointed instead to third-party complaints that other defendants had filed alleging that the employer was to blame.

- ***Westfield Ins. Co. v. Miller Architects & Builders,*** **No. 18-2970 (8th Cir. Jan. 30, 2020**

The Eighth Circuit ruled in this case that a Minnesota District Court was correct in requiring a liability insurer to defend claims that a builder's negligence caused construction defects in a luxury apartment complex, including a leaking roof. The court ruled allegations that water had come through a defectively installed roof and damaged the "finishes and electrical work in the building's interior" was sufficient to meet the policy's requirement of "property damage" caused by an "occurrence" and was not subject to Exclusions J(5), J(6) and L. In particular, the court rejected Westfield's argument that the reference to "that particular part of the property" on which the insured was performing operations in Exclusion J should extend to the entire apartment complex because the insured had responsibility for the entire area.

D. CYBER CLAIMS

- ***G&G Oil Company of Indiana v. Continental Western Ins. Co.*****, 143 N.E.3d 842 (Ind. App. Ct. 2020)**

The Indiana Court of Appeals has ruled that a trial court did not err in ruling that a policy's Commercial Crime and Fidelity Coverage did not cover a ransomware attack that shut down the insured's computer systems until it paid nearly $35,000 in BitCoins to buy back its data. Whereas G&G had argued that the policy's coverage for fraud should be interpreted broadly as including "unconscionable dealing" such as the fraudster's phishing scheme, the Court of Appeals ruled that "the hijacker did not use a computer to fraudulently cause G&G to purchase Bitcoins to pay as ransom. The hijacker did not pervert the truth or engage in deception in order to induce G&G to purchase the Bitcoin. Although the hijacker's actions were illegal, there was no deception involved in the hijacker's demands for ransom in exchange for restoring G&G's access to its computers. For all of these reasons, we conclude that the ransomware attack is not covered under the policy's computer fraud provision"

- ***National Ink and Stitch LLC v. State Auto Property & Cas. Ins. Co.*, 2020 WL 374460 (D. Md. Jan 23 2020)**

A federal district court ruled in this case that an embroidery and screen printing business was entitled to coverage for first party losses that it suffered as the result of a December 2016 ransomware attack that prevented the insured from accessing its art files and other data on its computer servers. The insured had unsuccessfully sought to ransom its data and thereafter employed a security company which replaced and reinstalled the software although the programs thereafter operated slowly and inefficiently. In requiring State Auto to provide coverage for this loss pursuant to the Business Owners Special Form Computer Coverage endorsement, Judge Gallagher ruled that the ransomware attack had caused "direct physical loss of or damage" to the insured's computer systems and that State Auto was therefore obliged to reimburse the insured for the entire cost of replacing the system. The court emphasized that the insured was not solely seeking the cost of replacing its data but rather had paid for a fully functioning computer system that was not slowed by the necessary remedial and protective measures or risk of reinfection from a dormant computer virus. Finally, the court rejected State Auto's contention that the policy requirement that there by "physical loss or damage" equated with an utter inability on the part of the computer system to function. The court found that loss of use, loss of reliability and impaired functionality demonstrated that the computer system had suffered a physical loss or damage" to it without any requirement that the system become "completely inoperable."

- ***Midlothian Enterprises, Inc. v. Owners Ins. Co.*, 2020 WL 836832 (E.D. Va. Feb. 20, 2020)**

In Virginia, a federal court ruled that a "money and securities" endorsement did not provide coverage for financial losses that a business suffered after employees transferred funds to off-shore accounts that were later found to be controlled by fraudsters. The court ruled that any coverage under this section of the policy was excluded as involving property with which the insured had voluntarily parted. The court also declined to find coverage under a "forgery or alteration endorsement," rejecting

the insured's argument that the fraudster's instructions were a covered "direction to pay."

- ***RealPage, Inc. v. National Union Fire Insurance Company of Pittsburg, PA,* No. 19-1350 (N.D. Tex. April 1, 2020)**

A federal district court denied AIG's argument that its commercial crime coverage was in the nature of fidelity insurance and, therefore, not subject to the Texas Prompt Payment of Claims Act. In denying National Union's motion to dismiss efforts to compel coverage for a "phishing" scheme, Judge Boyle ruled that although such coverage included fidelity components, it also insured Computer Fraud and Funds Transfer Fraud that were not in the nature of fidelity insurance.

- ***Authentic Title Services, Inc. v. Greenwich Ins. Co.,* 2020 WL 6739880 (D.N.J. Nov. 17, 2020)**

The federal district court in this case ruled that an errors and omissions policy did not provide coverage for losses relating to an e-mail spoofing scheme that duped an insured into sending real estate loan proceeds to a fraudulent account. In granting summary judgment to Greenwich, Judge Hayden ruled that these claims were subject to an exclusion in the E&O policy for claims based on or arising out of the "theft, stealing, conversion, embezzlement or misappropriation of funds or accounts." The court held that under New Jersey law, the phrase "arising out of" means "originating from, growing out of or having a substantial nexus" and that in this case, Fidelity's claim against the insured undeniably originated from, grew out of or had a substantial nexus to funds belonging to Quicken that were mistakenly transferred to a fraudulent account and then withdrawn by a person or entity other than Quicken and never recovered.

E. DUTY TO DEFEND

- ***Clarendon National Ins. Co. v. Philadelphia Ind. Co.,* No. 19-1212 (1st Cir. April 1, 2020)**

The First Circuit ruled in this Massachusetts mold case that a liability insurer does not have an independent duty to investigate to search for facts supporting coverage where there are no allegations in the Complaint presenting a potential for coverage. In *dicta*, the court also observed that even where a Complaint alleged facts triggering coverage, an insurer might be relieved of any defense obligation if "there is 'undisputed, readily knowable, and publicly available information' in court records that demonstrates that the insurer has no duty to defend" and if "there is 'an undisputed extrinsic fact that takes the case outside the coverage and that will not be litigated at the trial of the underlying action.'"

- ***Richards v. State Farm Lloyds,* 597 S.W.3d 492 (Tex. 2020)**

On a certified question from the U.S. Court of Appeals for the Fifth Circuit, the Texas Supreme Court ruled that there is no exception to the "eight corners" rule for determining a liability insurer's to defend based on an insured's willful misstatement with respect to who is occupying an off-road motor vehicle at the time of an accident. The court ruled that State Farm could not "contract away" the eight corners rule merely by changing its policy to eliminate the “groundless, false or fraudulent" language from its duty to defend. Rather, the court ruled that its interpretation of the scope of an insurer's duty to defend was consistent with longstanding precedent in Texas. However, the court left open the question of whether an insurer might consider extrinsic facts on issues where a complaint is silent.

- ***Loya Ins. Co. v. Avalo*, 603 S.W.3d 385 (Tex. 2020)**

In contrast to its recent strict adherence to the eight corners ruling in *Richards v. State Farm Lloyd’s*, the Texas Supreme Court ruled a few weeks later that courts may consider extrinsic facts in cases involving false statements made by an insured in a collusive attempt to secure coverage. Relying on *dicta* in its 2009 opinion in *Pine Oak*, the court adopted "an exception to the eight corners rule…where the parties to underlying suit collude to make false allegations that would invoke the insurer's duty to defend." The Supreme Court drew a distinction between cases where an insurer has been prevented from looking behind false allegations in the plaintiff’s suit against the policyholder and cases like this, where the fraudulent statements were made by the insured. Further, in such cases, the court ruled that an insured is not required to bring a declaratory judgment action to determine its duty to defend before withdrawing any representation of the insured.

F. ENVIRONMENTAL AND MASS TORT CLAIMS

- ***Eastern Concrete Materials Inc. v. ACE American Ins. Co*., 2020 WL 254822 (5th Cir. Jan. 17, 2020)**

The Fifth Circuit has sustained a lower court's declaration that liability claims arising out of an unplanned discharge of "rock fines" from the insured's quarry operations were subject to an absolute pollution exclusion in an umbrella policy. The dispute arose out of an incident in which mineral debris from blasting operations at the insured's stone quarry in New Jersey had inadvertently been discharged into adjoining creeks as a result of the insured's effort to avoid flooding in the face of severe rainstorms, resulting in clean up directives from the New Jersey Department of Environmental Protection. Applying Texas law, the Fifth Circuit ruled that rock fines are a "contaminant" subject to this exclusion notwithstanding Eastern Concrete's contention that rock fines are simply small particles of rock that are neither inherently dangerous or contaminants. While conceding that the New Jersey EP was not claiming that the release of rock fines caused any threat of harm to drinking water or local water supplies, the Fifth Circuit concluded that their release nonetheless constituted a discharge of " contaminants " since their presence in water supplies might change the flow and

contours of the stream including areas used for trout spawning and would affect the available food sources for fish and other species.

- ***Greene v. Westfield Ins. Co.,* 2020 WL 3476959 (7th Cir. June 25, 2020),**

The Seventh Circuit has affirmed an Indiana District Court's ruling that the neighbors of a wood recycling facility could not obtain coverage for a $50 million dollar judgment that they had obtained against the insured. The court gave effect to an exclusion for the continuation of bodily injuries or property damage of which the insured was aware prior to the issuance of this policy. The Seventh Circuit was unpersuaded by an affidavit provided by the insured that although he was aware of complaints about fugitive dust, he did not realize that this constituted "property damage" for purposes of insurance coverage. The court also observed that if the claimants were correct that their claims were not for "property damage", they would have argued themselves out of coverage. . Finally, the court ruled Westfield was not estopped to assert this exclusion both by reason of the fact that the insured had not given a timely notice or tendered the defense of this action to it as well as the fact that Westfield had done what is provided for under Indiana law by filing an action for declaratory judgment.

- ***General Casualty Company of Wisconsin v. Burke Engineering Corp.,* 2020 WL 5514189 (Ill. App. Ct. Sept. 14, 2020)**

One of the longest running environmental coverage disputes in Illinois finally came to an end in September when the Illinois Appellate Court ruled that allegations that an engineering firm concealed its knowledge of the presence of toxic substances in the municipal water supply of the Village of Crestwood and counseled Village leaders not to disclose these problems to town residents failed to allege an “occurrence.” Furthermore, the Appellate Court ruled that General Casualty's failure to defend or bring an action for declaratory relief did not stop it from disputing coverage, in light of the fact that it did not owe any duty to defend. Justice Walker dissented from the majority opinion, arguing dissented from the majority, finding that General Casualty's duty to defend was triggered by allegations that the insured had negligently breached its fiduciary duties to the local citizenry by failing to disclose the harmful chemicals in the municipal water supply.

- ***Rogowski v. Safeco Ins. Co. of Oregon*, 306 Or. 505 (Or. App. 2020)**

A tenant’s suit against his landlord for exposures to unsafe levels of carbon monoxide due to a clogged chimney has been held to trigger a duty to defend, notwithstanding an absolute pollution exclusion in the landlord’s liability policy that expressly identified carbon monoxide as an excluded “pollutant.” The Oregon Court of Appeals ruled that the tenant’s suit could reasonably be read as seeking recovery for damages due to “degraded air quality” generally and was not solely dependent on the presence of carbon monoxide fumes. Although Safeco also argued that “degraded air quality” is simply the condition of air when it is mixed with irritants and contaminants, the court found that it could also mean air that has a reduced level of oxygen.

- ***Barber v. Arch Ins. Co.,* No. 19-142 (W.D. Ky. Oct. 15, 2020)**

A federal district court has ruled that criminal proceedings brought against a mining company for violations of the Federal Mine Safety and Health Act of 1977 fell outside the scope of a Directors and Officers policy issued by Arch. Notwithstanding Barber's argument that the underlying criminal charges were for a fraudulent reporting of dust monitoring and sampling requirements of the mine act and did not arise out of an actual or threatened discharge of coal dust, Judge McKinley declared that the underlying claims clearly arose out of an actual or threatened release of pollutants and furthermore contained separate language for losses involving testing or monitoring for pollution. The court also rejected the insured's argument that coal dust inside a coal mine is not itself a "pollutant." The court distinguished the Kentucky Court of Appeals' 2011 ruling in *Abundance Coal*, which had declared that terms such as "discharge" and "dispersal" were terms of art that indicated an intention to limit the scope of absolute pollution exclusions to environmental contamination claims, noting that the exclusion in question also contained language with respect to investigations, monitoring and cleanup claims. In this case, the court found that the relevant provisions of the federal Mine Act required the insured to test for and monitor coal dust and therefore fell within Subsection B of the absolute pollution exclusion.

G. EXCESS INSURANCE

- **Chen v. Insurance Company of the State of Pennsylvania, No. 77 (N.Y. November 20, 2020)**

The New York Court of Appeals has ruled that an excess insurer is not obligated to pay the entire personal injury judgment awarded to the plaintiff in a case where the underlying Arch policy had been voided by reason of misrepresentations by the insured in its coverage application. In addition to holding that ICSOP had no drop down obligation by reason of the unavailability of the Arch primary coverage, the court ruled that it was not obligated to pay pre- or post-judgment interest on the entire amount of the judgment, notwithstanding the plaintiff's argument that it was compelled to do so by the "ultimate loss" language in its policy and the fact that it followed form to the primary insurance. Rather, the court ruled that the excess policy, by its express terms, only covered losses in excess of those that would have been paid by the primary insurer and its coverage obligations were not increased by the fact that the primary insurance in this case was unavailable due to the voiding of the Arch primary policy. Inasmuch as Arch would ordinarily been obligated to pay this interest as a Supplementary Payment under its primary policy, the court ruled that this was not an obligation that ICSOP would have ordinarily have borne and that it should not now be required to do so by reason on the unavailability of the Arch coverage. Writing in dissent, Judge Fahey contended that ICSOP should be responsible for all post-judgment interest on the basis that its "follow form" language incorporated by reference to supplementary payment obligations of the primary policy.

- ***AXIS Reinsurance Co. v. Grumman-Northrop Corp.,* 2020 WL 5509743 (9th Cir. Sept. 14, 2020)**

The Ninth Circuit has ruled that a California District Court erred in allowing an excess insurer to dispute underlying exhaustion by lower layer insurers absent evidence of fraud. In rejecting the excess insurer's theory of "improper exhaustion," the Ninth Circuit ruled that allowing excess insurers to "contest the soundness of underlying insurers' payment decisions—'would undermine the confidence of both insureds and insurers in the dependability of settlements,' eliminating one of the primary incentives for obtaining insurance in the first place." Furthermore, the court found that such a rule would introduce a host of inefficiencies into the insurance industry, with no obvious countervailing benefits to insurers or policyholders. Although excess insurers may still dispute underlying insurance if there is evidence of fraud or bad faith, the Ninth Circuit expressed skepticism that a remedy was needed for other types of cases since it doubted "that there are many instances where an insurance company will pay out claims—let alone its policy's limit—when it is not obligated to do so…"

H. EXCLUSIONS

- ***Dorchester Mutual Insurance Company v. Krusell*, SJC-12856 (Mass. Aug 13, 2020)**

The Massachusetts Supreme Judicial Court ruled in this case that an exclusion for "bodily injury… arising out of the sexual molestation, corporal punishment or physical or mental abuse" did not apply to an incident in which the insured shoved his companion during a fishing argument, causing him to fall and injure himself. The court ruled that abuse and molestation exclusions were added to liability insurance policies to reinforce the intentional acts exclusion for claims where the other exclusion did not apply either because the abuse victim alleged liability based upon the insured's negligent supervision of the assailant or where the abuser is deemed incapable of intentional conduct due to a mental disease or other incapacity. The court ruled that intentional acts may be deemed "abusive" where there is an imbalance of power as opposed to cases of simple assault. As a result, the court concluded "that a reasonable insured would interpret "physical abuse" to apply only to a limited subset of physically harmful treatment, where the treatment is characterized by an "abusive" quality such as a misuse of power or, perhaps, a conduct so extreme as to indicate an abuser's disposition towards inflicting pain and suffering." While, therefore, reversing the Superior Court's entry of summary judgment for Dorchester Mutual, the SJC declined to impose 93A liability based upon the insurer's failure to settle the claim. The court focused on the fact that up until 3 days before the case actually settled, the only information available to Dorchester Mutual was that the insured had intentionally attacked his companion with such force that he became airborne. Only on the eve of settlement was the report of a forensic psychiatrist who had been retained to evaluate Krusell in connection with underlying criminal proceedings made available, then Dorchester Mutual might reasonably have concluded that its liability was unclear.

- ***Gage County v. Employers Mut. Cas. Co.,* 304 Neb. 926 (2020),**

The Nebraska Supreme Court has declared that rape convictions that were wrongfully obtained by the County's cold case squad of police investigators and prosecutors triggered EMC's "personal injury" coverage notwithstanding a policy exclusion for "professional services." The court declined to follow the broad definition of "professional services" that it had adopted decades ago in Marx. Instead, it looked to the fact that the umbrella and "linebacker" policies that were issued to the County as part of a suite of coverages accompanying the CGL form listed various excluded professions, none of which included law enforcement activities. The case was therefore remanded for further findings with respect to the scope of coverage available under the EMC CGL and umbrella policies.

I. FRAUD AND RESCISSION

- ***Nationwide Mutual Fire Insurance Company v. Pusser*, 2020-Ohio-2778 (Ohio May 6, 2020)**

The Ohio Supreme Court has ruled that an insured's failure to disclose that her sister lived with her was sufficient to void the coverage *ab initio* and preclude coverage for an auto accident caused by the sister. The Supreme Court declared that language in the Nationwide Policy that expressly incorporated the information in the policy application and that advised the insured that its responses were deemed to be warranties was sufficient to put the insured on notice of the consequences of any misrepresentation. The Supreme Court reversed the intermediate appellate court, which had found that the policy language was insufficiently clear because it merely said that misrepresentations "could" render the coverage void. Further, the court ruled that insurers are not required to declare their coverage void and return the insured's premium before filing a complaint for declaratory judgment based upon a misrepresentation. The court observed that any contrary finding would be "uneconomical" and would have the undesirable effect of leaving policyholders without insurance during the pendency of the coverage litigation.

J. "OCCURRENCE" COVERAGE

- ***Lexington Ins. Co. v. Chicago Flameproof & Wood Specialties Corp.,* 950 F.3d 976 (7th Cir. 2020)**

The Seventh Circuit has ruled that an Illinois District Court did not err in ruling that a CGL insurer did not owe coverage for three law suits in which property owners alleged damage due to the installation of the insured's fire retardant treated lumber products. The Seventh Circuit ruled that the insured's decision to ship products without obtaining certification for them pursuant to the International Building Code (IBC) failed to allege an "occurrence." Not only was the insured's decision to ship uncertified lumber was not an unexpected event but the subsequent "ripping and tearing out of the FlameTech lumber was the natural and ordinary consequence of supplying lumber that

was not IBC-certified." The court declined to find a duty to defend based upon allegations of negligent misrepresentation and the like, declaring that "although some of the allegations used the language of 'negligence' or 'reasonable care,' the injury alleged stems from Chicago Flameproof's "unilateral decision" to supply the uncertified lumber and concealment of having done so.

- ***American Family Mutual Ins. Co., S.I., vs. Mid-American Grain Distributors, LLC,* 958 F.3d 748 (8th Cir. 2020)**

The U.S. Court of Appeals for the Eighth Circuit has ruled in this Missouri case that a contractual dispute between a grain storage company and a designer with respect to plans to design and construct a grain storage facility fall outside the scope of any obligation to defend under a CGL policy inasmuch as the insured's defective constructive work was not an "occurrence" under Missouri law. In keeping with the Missouri Appeals Court's decision in *American States Ins. Co. vs. Mathis*, 974 S.W.2d 647) (Mo. Ct. App. 1998), the Eighth Circuit declared that the claimant's damages would be "normal, expected consequence of Mid-American's allegedly shoddy work were the foreseeable or expected result of that work as a matter of law."

- ***T.H.E. Ins. Co. v. Estate of Booher,* No. 18-1550 (Iowa June 5, 2020)**

Having previously ruled in *Weber v. IMT Ins. Co.*, 462 N.W.2d 283 (Iowa 1990) that an injury is "expected" if there is a "substantial probability" that it will occur, the Iowa Supreme Court has now ruled that a lower court erred in ruling that allegations that an employer's gross negligence caused the death of an amusement park employee were not "expected." In light of the statutory definition of "gross negligence" in Iowa Code § 85.20, the court found that a finding of gross negligence on the part of the insured's employee did not necessarily mandate a finding that any resulting injuries were so substantially probable so as to be "expected." "It appears that a co-employee may act in a fashion that meets the definition of "gross negligence" when an injury is more probable than not and that such conduct might not be outside the scope of the term "accident" in the CGL policy." As a result, the court declared that the allegations of gross negligence were sufficient to allow the estate to avoid the immunity conferred upon employers by Iowa Law while still obtaining coverage for their claims. However, the Iowa Supreme Court declined to adopt the insured's alternative argument that a conflict existed between the grant of insurance coverage under Section I and the "Who is the Insured" provision in Section II. Despite the insured's argument, that Section II separately conferred coverage on all employees who were acting in the scope of their employment, the court found that Section II merely interpreted the individuals who qualified as insureds and was not itself a separate grant of insurance coverage.

- ***Olson v. Progressive Northern Ins. Co.,* 2020 S.D. 21 (S.D. April 8, 2020)**

The South Dakota Supreme Court has ruled that a domestic dispute that erupted into shooting between two vehicles that fatally killed a young girl failed to trigger coverage under either the shooter's policy. As a preliminary matter, the court rejected the insured's argument that although the insured had fired with an attempt to kill his

wife, he had not intended to shoot his daughter and that her death was therefore the result of an "accident." Rather, the court concluded that it was sufficient that the insured had acted intentionally to cause injury when he discharged his handgun. "The applicable rule is that an act is inherently injurious if it is certain to result in some injury, although not necessarily the particular alleged injury." In any event, the court declared that it was the settled public policy of South Dakota that "insurance coverage cannot extend to an individual who intentionally harms others, even where the harm is unforeseen by the victim." Finally, the court ruled that the incident did not involve the insured's use of a covered auto as the vehicle was the mere "situs" from which the accident resulted and was not causally connected to the discharge of the insured's gun.

K. OPIOID CLAIMS

- ***Acuity v. Masters Pharmaceutical, Inc*., 2020–Ohio–3440 (Ohio App. Ct. June 24, 2020)**

The Ohio Supreme Court announced in late 2020 that it had accept review of the Court of Appeals' ruling that a liability insurer was obliged to provide a defense to claims that a pharmaceutical distributor improperly prescribed opioids. Whereas the trial court had ruled that Acuity had no duty to defend because this suit was for economic loss and not did not seek "damages" on account of bodily injury. Instead, the Ohio Court of Appeals adopted the Seventh Circuit's recent analysis in *H.D. Smith,* finding that coverage extended to losses to organizations and were not limited to bodily injury suffered by the original victim. The Ohio Court of Appeals also set aside the trial court's conclusion that these claims were subject to a "loss of progress" exclusion in light of the fact that MPI was aware of the opioid epidemic before it purchased insurance from Acuity. While agreeing with Acuity that this language in the insurance agreement was part of the insured's burden of proof, the Court of Appeals nonetheless ruled that although MPI was clearly on notice of illegal prescriptions and had even received demand letters from the DEA, mere knowledge that injuries might be occurring was not enough to bar coverage under the "loss in progress" provision.

- ***Giant Eagle, Inc. v. American Guarantee and Liability Ins. Co. and XL Specialty Ins. Co.,* No. 19-904 (W.D .Pa. Nov. 9, 2020)**

A federal judge in Pittsburgh has declared that various excess liability insurers must provide a defense to opioid lawsuits against a drug distributor. Judge Colville declared in a 41-page opinion that his predecessor's January 2020 ruling in this case had determined that the insured did not have to prove that the underlying $2 million primary limits had been exhausted by the payment of covered claims and that, as this was now the law of the case, he was bound to follow it. Rather, in keeping with the Superior Court's 2013 ruling in Lexington v. Charter Oak, he found that the excess insurers' duty to defend only required allegations that set forth a potential for coverage. In keeping with cases such as the Seventh Circuit's ruling in H.D. Smith, the court ruled that the underlying suits sought damages because of "bodily injury" and that allegations of negligence were sufficient to establish an "occurrence." The court declined to find that

the opioid epidemic was the “natural and expected result” of the insured’s marketing activities. Finally, the court rejected the insurer’s argument that the insured was required to satisfy more than a single $1 million “occurrence” SIR and ruled that the $5 million in defense costs that it had incurred was a “loss” that exhausted the underlying insurance and triggered the excess insurers’ defense obligations.

L. “PERSONAL AND ADVERTISING INJURY” COVERAGE

- ***Hartford Cas. Ins. Co. v. Gelshenen & Davis Co. LLP*, No. 19-1578 (4th Cir. Feb. 13, 2020)**

The Fourth Circuit ruled in this North Carolina case that allegations that a law firm violated the federal Driver’s Data Privacy Protection Act by mailing advertisements to accident victims whose names and addresses they had legally collected from official accident reports submitted to the state Department of Motor Vehicles are excluded from CGL coverage by the policy’s exclusion for claims arising out of the distribution of material or information.

- ***Brighton Collectibles, LLC v. Certain Underwriters at Lloyd's, London,* No. 18-56403 9th Cir. Mar. 16, 2020)**

The Ninth Circuit ruled in this case that a California district court erred in ruling that Lloyd's had no obligation to defend claims that the insured collected and sold customers' personal information in violation of California's Song-Beverly Credit Card Act. The court ruled that the claims alleged "oral or written publication or material that violates a person's right of privacy" and were therefore covered in keeping with the court’s TCPA decision in *Los Angeles Lakers v. Federal Ins. Co.,* 869 F.3d 795 (9th Cir. 2019). Further, the court noted that the California Supreme Court had separately ruled that the intent of this Act is to protect the personal privacy of consumers. Having found coverage, the court refused to eliminate Lloyd's duty to defend based on the policy exclusion for "advertising, publishing, broadcasting or telecasting done by or for you." Despite the fact that the privacy "offense" required that there be "publication" of material invading a person's right of privacy, the Ninth Circuit ruled that the reference to "publishing” in the exclusion did not have the same root meaning as 'publication'." Rather, the court ruled that this exclusion only applied to insureds that engaged in "broad, public-facing marketing activities."

- ***West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.,* 2020 IL App (1st) 191834 (Ill. App. Mar. 20, 2020)**

The Illinois Appellate Court ruled in this case that a liability insurer was obliged to provide coverage for allegations that a tanning salon violated the Illinois Biometric Information Privacy Act by transmitting customers’ fingerprints to an out of state vendor. In keeping with the Illinois Supreme Court's 2005 TCPA decision in *Swiderski Electronics*, the First District ruled that the claims alleged a “publication” of material that invaded a person’s right of privacy. The court declined to limit the scope of "publication"

to widespread dissemination of information. Further, the Appellate Court ruled that the Violation of Statutes exclusion in the policy applied only to statutes that govern certain methods of communication, such as emails, faxes, and phone calls, and not to all statutes that limit the sending or sharing of information.

M. PROPERTY INSURANCE

- ***Robinson v. Liberty Mutual Ins. Co*., 958 F.3d 1157 (11th Cir. 2020)**

The Eleventh Circuit ruled in this case that damage suffered by an Alabama homeowner as a result of a massive infestation of venomous "brown recluse spiders" was excluded from coverage as involving a loss "caused by…birds, vermin, rodents or insects." Notwithstanding the insured's argument that arachnids are not technically a type of "insect," the Eleventh Circuit agreed with the Alabama District Court that the common and ordinary meaning of "insect," as exemplified by popular dictionaries, certainly includes spiders. Whatever the technical meaning of this term within the scientific community, the court ruled that "Alabama law cautions against using technical or scientific definitions to interpret the terms of an insurance contract." In any event, the court ruled that the spiders were clearly vermin as being a small, harmful or objectionable animal that is difficult to control. The court ruled that it was appropriate for the trial judge to take judicial notice of these dictionary definitions without providing the insureds an opportunity to provide contrary testimony.

- ***Aquino v. United Property & Cas. Co.,* 483 Mass. 820 (2020)**

The Supreme Judicial Court of Massachusetts has ruled that a spouse is entitled to recover property insurance for a fire that was deliberately set by her husband without any involvement or knowledge on her part. In adopting the so-called "innocent co-insured" doctrine, the court emphasized that the standard fire policy mandated by G.L. c. 175 Section 99 which only avoids coverage for losses intentionally caused by "the insured." The court observed that Massachusetts recognizes the distinction between the articles "the" and "and" and that had the legislature intended to preclude recovery for innocent co-insureds, it would have drafted the statutory exclusion to apply to "an insured" rather than "the insured." The court ruled, however, that the innocent spouse was only entitled to recover half of the insured loss as that was the extent of her insurable interest in the property. Further, the court declined to impose 93A liability on the insurer, finding that its coverage position was arguably justified by "cryptic and confusing" language on this issue in its 1938 *Kosior* decision. The court was critical of United Property's use of exclusionary language that was inconsistent with Section 99's requirements but held that no injury had resulted from this misconduct.

- ***Kurach v. Truck Insurance Exchange,* J-3AD-20 (Pa. Aug 18, 2020)**

The Pennsylvania Supreme Court has ruled that property insurers may withhold from any actual cash value payment the overhead and profit of a general contractor unless and until the insured repairs the damaged property. In three consolidated cases,

the court rejected the insured's argument that GCOP must be included as part of ACV under policies of this sort whenever it is determined that the services of a general contractor are likely to be necessary in order to effectuate the repair of the damaged property. Unlike the cases relied on by the insureds, the court focused on the fact that these policies explicitly conditioned payment of GCOP on the policyholder actually incurring such costs upon the commencement of repairs. In light of the fact that none of the policyholders in these cases had made repairs, the court ruled that the insurer was justified in withholding GCOP from its actual cash value payments.

N. TRIPARTITE RELATIONSHIP ISSUES

- ***Persichette v. Owners Ins. Co*., 2020 CO 33 (Colo. May 4, 2020)**

The Colorado Supreme Court ruled in this case that Rule 1.9(a) of the Colorado Rules of Professional Conduct, which precludes a lawyer who "formerly represented a client in a matter" from representing a second client "in the same or a substantially-related matter" if the second client's interests are materially adverse to the interests of the former client, precluded a policyholder from hiring an attorney to sue Owners Insurance for under-insured motorist's benefits in light of the fact that the lawyer in question had represented Owners in nearly 500 cases between 2004 and 2017, including 23 UIM disputes similar to those at issue in this case. The Supreme Court concluded that the trial court had erred in failing to grant Owners motion to disqualify because it had misconstrued "substantially related" to mean the "same" matter. Further, while observing that a general knowledge of insurer practices would not necessarily disqualify a lawyer from subsequently suing his former client, the Court found that in this case Levy had worked closely with the claims adjuster involved, had trained him with respect to serving as an effective witness and had intimate knowledge of the claims executives supervising the case including knowledge of their personalities and tendencies and how they might come across as witnesses.

- ***Plein v. USAA Cas. Ins. Co.*, 2020 WL 2568541 (Wash. May 21, 2020)**

Two weeks after the Colorado Supreme Court decided *Persichette*, the state Supreme Court reached a diametrically opposite result in this case, declaring that the present and former matters were not “substantially related,” The Washington Court analyzed both Comments 2 and 3 to Rule 1.9(a). Comment 2 emphasizes that the “scope of a ‘matter’ … depends on the facts of a particular situation or transaction” and that “a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.” According to the Washington Supreme Court, “comment 2 anticipates the exact situation presented by this case: a lawyer representing a current client against a former organizational client on a ‘factually distinct problem’ of the same type as the prior representation. And it allows such representation of the current client, despite objection by the former client. Under this comment 2, [the firm’s] representation of the [insured] is clearly permissible.”

O. CHANGES IN THE MARKETPLACE

Shareholders of Aon and Willis Towers Watson voted in 2020 to approve the merger of the two insurance brokers, which is now under review by the European Union.

Zurich agreed to pay Metropolitan Life $3.94 billion to acquire its property and casualty division.

On January 1, 2021, Sentry Insurance was converted from a mutual insurance company to a stock company.

AIG's new CEO Peter Zaffino announced plans to sell off its life and retirement business by means of an IPO or a staggered private sale.

P. APPEALS TO WATCH

London's High Court announced in October that it would fast track the appeal of various insurers from a lower court's ruling in favor of the Financial Conduct Authority concerning the scope of property insurance coverage for pandemic-related business interruption lawsuits. In its 162-page September 15 ruling, the High Court had distinguished among different policy wordings but ruled that most of these forms required coverage. Note that these UK forms differ from U.S. policies in that they lack "direct physical loss" language or virus exclusions.

One of the most important D&O cases in years was argued to the Delaware Supreme Court last month. In *Arch Ins. Co. v. Murdock*, the court will consider, among other consequential issues, whether, in the absence of a clear choice of law provision, Delaware law should apply to a Delaware corporation that is headquartered in California.

The Texas Supreme Court heard oral argument on September 17 in *In Re Farmers Texas County Mut. Ins. Co.* on the issue of whether a *Stowers* suit against an insurer for failing to settle within policy limits was viable in light of the fact that no excess judgment ever entered against the insured.

The George Supreme Court is considering several questions certified to it by the Eleventh Circuit with respect to whether O.C.G.A. § 33-7-15, which insulates a liability insurer from coverage for judgments involving claims for which it never received notice, also protects against a bad faith claim for failing to settle. In *Fifeside v. GEICO Cas. Co.,* No. 18-15074 (11th Cir. Sept. 28, 2020), the Court of Appeals asked the Georgia Supreme Court to answer three questions: (1) When an insurer has no notice of a lawsuit against its insured, does O.C.G.A. § 33-7-15 and a virtually identical insuring provision relieve the insurer of liability from a follow-on suit for bad faith? (2) If the notice provisions do not bar liability for a bad-faith claim, can an insured sue the insurer for bad faith when, after the insurer refused to settle but before judgment was entered

against the insured, the insured lost coverage for failure to comply with a notice provision? (3) Does a party have the right to contest actual damages in a follow-on suit for bad faith if that party had no prior notice of or participation in the original suit?

The New York Court of Appeals has agreed to consider novel issues certified to it by the Second Circuit concerning a healthcare center's refusal to address the special needs of the plaintiff's disabled 7 year old son in violation of the Americans with Disabilities Act. The Second Circuit has asked the court to clarify whether discrimination based upon a "failure to accommodate" constitutes an "occurrence" under New York law. In *Brooklyn Center for Psychotherapy, Inc. v. Philadelphia Ind. Ins. Co.,* No. 19-2266 (2nd Cir. April 9, 2020), the Second Circuit declared that a plaintiff alleging disability discrimination may seek recovery on three theories (1) disparate treatment; (2) disparate impact; or (3) failure to make a reasonable accommodation." The court observed that New York courts had refused to allow coverage for disparate treatment claims but had suggested the possibility that insurers might be required to defend "disparate impact" claims.

In Rhode Island, the state Supreme Court has agreed to give guidance to the U.S. Court of Appeals for the First Circuit with respect to questions certified in *Johnson v. Johnson,* No. 19-1719 (1st Cir. Mar. 13, 2020) concerning whether Rhode Island's Rejected Settlement Offer Interest Statute (RIGL § 27-7-2.2) applied in a case where an automobile liability insurer had failed to respond to a settlement demand for policy limits within the prescribed 30-day period. At issue is whether a District Court erred in granting summary judgment to State Farm on the basis that the statute applies to offers made "in any civil action," whereas State Farm's untimely acceptance had occurred before suit was filed.