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American College of Coverage and Extracontractual Counsel

ACCEC Insurance Law Symposium

University of Michigan Law School

Ann Arbor, MI | Friday, October 20, 2017

Why Insurance Matters:

Insurance As A Driving Force for Our Economy

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Agenda

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2017 Law School Symposium
University of Michigan Law School, Ann Arbor, MI
October 20, 2017

Why Insurance Matters: Insurance As A Driving Force For Our Economy

8:30-9:00 am **Registration and Coffee**

9:00-9:15 am **Welcoming Remarks and Introductions**

- Bruce Celebrezze, Sedgwick LLP; President, American College of Coverage and Extracontractual Counsel
- Kyle Logue, Douglas A. Kahn Collegiate Professor of Law, University of Michigan Law School
- Michael Barnes, Dentons, and Christopher Mosley, Sherman & Howard LLC, Program Co-Chairs

9:15-10:05 am From Rain Checks to Real Disasters: Insurance as the Necessary Grease in the Wheels of Commerce

- Leo P. Martinez, University of California, Hastings College of Law
- Christine Haskett, Covington & Burling LLP

Panelists will deconstruct and simplify the core concept of insurance, relate it to other real world examples of risk transfer and absorption, and explain the critical role that insurance plays in permitting a functional market economy.

10:05-10:55 am How Transactional Liability Insurance Has Changed The Way Private Equity Firms and Corporations Approach Public and Private M&A Transactions

- Michael Huddleston, Munsch Hardt Kopf & Harr, PC
- Peter Rosen, Latham & Watkins LLP
- Gary Blitz, Aon Transactional Solutions
- Joseph Finnerty III, DLA Piper LLP (US)

Panelists will briefly trace the development of transactional liability policies and how the M&A markets have increasingly adopted these policies in private and public M&A transactions. The panel will discuss the various types of transactional liability policies, their mechanics and their key provisions. The panel also will discuss how the policies and their provisions have affected the way private equity firms and companies have approached the purchase or sale of a private company. The panel will further discuss the claims history of these policies and give specific examples from known arbitrations and litigations.

10:55-11:10 am **Break**

11:10 -12:00 pm Good Faith/Bad Faith Claims Investigations: Information vs. Evidence - A Distinction with a Difference

- Rick Hammond, HeplerBroom
- Marialuisa Gallozzi, Covington & Burling LLP

According to the Coalition Against Insurance Fraud, insurance fraud impacts approximately ten percent of all property-casualty insurance losses. How does an insurer know which claim is the one out of ten that's purportedly fraudulent? Labeling the wrong claim as fraudulent can have devastating consequences to the policyholder and the insurer. Under that backdrop, this panel will analyze the issue of good faith versus bad faith insurance investigations, and examine the type of insurer conduct that leads to allegations of bad faith claims handling.

12:00 -1:15 pm **Lunch**

Keynote: Kyle Logue, University of Michigan Law School

1:15-2:05 pm Beyond Champerty: The Rise of Third Party Litigation Funding

- Michael F. Aylward, Morrison Mahoney LLP
- Mary Craig Calkins, Kilpatrick Townsend & Stockton LLP

Panelists will discuss the explosion in third-party litigation financing in the United States in recent years, including the ethical conundrums that such funding present for the lawyers in a case and its practical and legal implications for insurers and insureds.

2:05-2:55 pm **Autonomous Vehicles and Aircraft: The Impact on Insurance**

- Ramji Kaul, University of Michigan Law School, Moderator
- Walter Andrews, Hunton & Williams LLP
- Kelly Freeman, WABCO North America, LLC
- Melody Alvarado Latino, Student, University of Michigan Law School
- Christian Robertson, Student, University of Michigan Law School

University of Michigan Law School students will join ACCEC fellows in a roundtable discussion of one of the most current issues in insurance law.

2:55-3:10 pm **Break**

3:10-4:00 pm **Crisis Management and Incident Response: Using Insurance As A Loss Mitigation And Business Resiliency Tool**

- John Bonnie, Weinberg Wheeler Hudgins Gunn & Dial
- Meghan Magruder, King & Spalding

This panel will discuss the importance of planning and preparation for major events that companies may face, such as natural disasters, explosions, fires, floods, regulatory investigations, and cyber-attacks, by incorporating insurance as a tool for risk management so that companies survive and thrive following these events.

4:00-4:45 pm **Tour of the Law Quad, including the Reading Room (optional)**

4:45-6:15 pm **Networking Reception**

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Presentations

From Rain Checks to Real Disasters: Insurance as the Necessary Grease in the Wheels of Commerce

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University of California, Hastings College of the Law

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Fight manager Joe Jacobs
– describing Max Schmeling's loss to Jack Sharkey, June 21, 1932

"We wuz robbed"

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Michael Aylward
– partner Morrison Mahoney

"We wuz robbed"

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Michael Aylward
– partner Morrison Mahoney

"Liability insurance, to an extent that would be unknown and astonishing to lay people, both drives and manipulates the arc of tort law, inspiring law suits where none might otherwise be filed and fueling litigation that would otherwise be unprofitable. It may truly be said that insurance is the invisible hand that shapes the course and conduct of tort law."

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Amy Toro
– Life Sciences Transactions Partner
Covington & Burling LLP

"When negotiating a collaboration on behalf of a large company with, for example, a smaller biotech company, we need to allocate liability in case something goes wrong, either during clinical trials or after the product is on the market. It's important to make sure the smaller company has adequate levels of insurance, or we'll be on the hook. We typically require clinical trials insurance and products liability insurance and will negotiate coverage limits, access to copies of policies, insurer ratings, etc. Because of the massive potential liabilities inherent in developing drugs, the industry relies heavily on these types of insurance."

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Lorelie (Lorie) S. Masters
– partner Hunton & Williams

"Insurance protects assets and income and thus drives innovation across industries. From the Lloyd's Coffeehouse to today's internet insurance platforms and "InsurTech," insurance has helped fuel the modern economy over the generations. A well-functioning insurance system is key to continued growth and invention and inventiveness."

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Ingrid Rechtin
– M&A and Transactions Partner
Covington & Burling LLP

"Insurance can be used to solve all kinds problems that arise in deals. For example, a company selling an asset understandably wants to be free of any currently unknowable liabilities that might be associated with that asset in the future. But the buyer is also worried about being on the hook for liabilities that are uncertain. One solution to this problem is insurance. Either the buyer or the seller can agree to pay for a policy that will protect the buyer against future liabilities. This allows the seller to be finished with the asset and the buyer to feel secure. These types of gaps between the interests of buyers and sellers can't be bridged without insurance."

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Julia Molander
Partner Cozen O'Connor

Insurance is the office pool in the lottery of life, except the pool is for losings, not winnings. Without insurance, we would not have capitalism because no one investor would ever agree to bear the entire risk of loss. Insurance supported the world's first attempt at globalization by guaranteeing the safe return of ship's cargo from over the high seas.

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Doug Sprague
– White Collar Criminal Defense Partner
Covington & Burling LLP

"I represent company executives in criminal and civil proceedings, and some of my clients could not afford this type of representation without Directors and Officers ("D&O") insurance coverage. Without this type of insurance, it would be extremely difficult to find qualified people to act as officers and directors. As one executive told me, without this type of insurance coverage, 'I would never agree to be an officer of a company.'"

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Douglas C. Richmond
– Managing Director AON Insurance

"Something like 80 percent of civil litigation in the U.S. is funded in some part by insurance. Many of the businesses that have been affected by hurricanes Harvey and Irma are dependent upon business interruption coverage to recoup commercial losses, while the fortunes of ravaged homeowners may rise or fall on their homeowner's coverage or flood insurance. Transactional liability insurance is now a regular feature on the corporate landscape. Life insurance accounts for a substantial part of Americans' wealth and retirement planning. How much more needs to be said?"

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Don Brown
– Insurance Coverage Partner
Covington & Burling LLP

"Insurance facilitates – it allows society to engage in – all manner of productive and rewarding activities despite a level of risk that would be prohibitive or, at least, would strongly discourage such activity, but for the availability of insurance. Driving is an obvious example because it is a very dangerous and risky enterprise. But this also applies to other activities most of us would agree are public and private goods, such as pharmaceutical research and development . . . such as the construction of large public works projects . . . such as the Olympics . . . and the list goes on."

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Tom Baker
– William Maul Measey
Professor, University of
Pennsylvania Law School

"Insurance is an 'uncertain business,' characterized by competition for premiums that pushes insurers into the unknown."

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Robert H. Jerry II
– Isadore Loeb Professor of Law
University of Missouri School of Law

"No one said it better than Justice Black in *South-Eastern Underwriters*: 'Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.' The only thing I'd change in the quote is to substitute 'without a doubt' for 'perhaps.'"

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Trends and Features of Transactional Liability Insurance and Its Effects on the M&A Marketplace

Peter Rosen, Partner
Latham & Watkins

Gary Blitz, Senior Managing Director
Aon Transaction Solutions

Transaction Risks

Due Diligence

Risk Assessment

Traditional Solutions

- Additional Due Diligence
- Additional Representations and Warranties
- Broader/Larger Indemnities/Escrows
- Reduction of Purchase Price, Earn-outs, Purchase Price Adjustment Mechanisms, Holdbacks
- Other Contractual Arrangement

Insurance Solution

TRANSACTIONAL INSURANCE

Transactional Insurance Products

- Facilitate mergers, acquisitions, divestitures and other business transactions, especially in an auction process
- Provide access to the insurance industry's capital and allow the transfer of certain transaction-related risks to the insurance markets
- Transactional Insurance Products include:
  - Representations & Warranties Insurance (General)
  - Tax Indemnity Insurance
  - Successor Liability Insurance
  - Fraudulent Conveyance Insurance
  - Litigation Insurance
  - Wage and hour coverage for M&A transactions
  - Environmental Insurance for M&A transactions
  - CFIUS Insurance for M&A transactions

Transactional Insurance Market Overview

- Continued Evolution: More flexible and innovative insurance solutions than ever before
- Insurance market now offers:
  - Broader coverage with more limited exclusions
  - A more streamlined process
  - Significantly increased limits of liability
  - Material reduction in premium rates and deductible levels
  - Ability to issue policies out of more countries than ever before
  - U.S. style policies for deals with an international component

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Transactional Insurance Market Overview

Already an established product in certain markets, and has seen significant recent growth in North America.

Total Policies Bound in 2015

- North America ~750
- Worldwide ~2,250

Specific Broker Activity in North America (past four years)

Aon:

- 2016 – $12.6 billion in limits / 350 closed transactions
- 2015 – $6.9 billion in limits / 227 closed transactions
- 2014 – $5.2 billion in limits/ 157 closed transactions
- 2013 – $2.1 billion in limits / 54 closed transactions

Marsh:

- 2016 -- $6.0 billion in limits / 212 closed transactions
- 2015 – $4.3 billion in limits / 159 closed transactions
- 2014 – $2.7 billion in limits / 130 closed transactions
- 2013 – $1.3 billion in limits / 66 closed transactions

Lockton:

- 2016 – ~120 closed transactions
- 2015 – ~80 closed transactions
- 2014 – 35 closed transactions

Willis

- 2016 -- $2.6 billion in limits / 145 closed transactions
- 2015 – $2.0 billion in limits / 132 closed transactions
- 2014 – $1.2 billion in limits / 86 closed transactions
- 2013 – $684 million in limits / 47 closed transactions

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Transaction Liability (TL) Insurance Market and Players

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Uses of Transactional Risk Insurance Products

Buyers	Sellers
Risk Management Uses	**Risk Management Uses**
• Increase maximum indemnity/ extend survival period for breaches of reps & warranties • Ease collection concerns • Manage jurisdictional issues (i.e., cross-border deals) • Provide recourse when no seller indemnity possible (i.e., bankruptcy) • Satisfy lenders' requirements for additional security on transaction	• Reduce contingent liabilities • Distribute sale proceeds • Protect passive sellers
Strategic Uses	**Strategic Uses**
• Distinguish bid in auction • Protect key relationships	• Attract best offers by maximizing indemnification • Include R&W Insurance as the sole remedy in draft agreements in auctions

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Representations and Warranties Insurance

Two Types of R&W Insurance Policies

1. Buyer-Side Policy
   - Insurance replaces sellers' potential indemnification liabilities under acquisition agreement
   - Covers loss resulting from alleged breaches buyers discover or third parties assert during the policy term
   - Can enhance indemnification terms set out in acquisition agreement via extended survival periods and/or an increased cap
   - Covers fraud by the sellers
2. Seller-Side Policy
   - Sellers backstop their potential indemnification liabilities agreed to in acquisition agreement
   - Liability policy structure – covers claims made against sellers alleging breaches of reps and warranties (actual losses and defense costs)
   - Mirrors indemnification terms set out in acquisition agreement
   - Typically excludes fraud by the sellers
   - Knowledge between sponsors and management sellers can be severed

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Basics of R&W Insurance

- Protects against financial losses resulting from inaccuracies in the representations and warranties relating to the target company or selling shareholders
- Capacity to insure limits from $1 million to $1,000,000,000+
- Policy period typically 6 years for fundamental and tax representations, and 3 years for other representations (regardless of survival period in underlying agreement)
- Retention can drop down as escrow released (usually at 12 or 18 months)
- Materiality scrape and pre-closing tax indemnity in underlying deal typically matched
- Items not covered: forward-looking statements and projections, known or scheduled matters, known breaches (may be addressed via a separate contingency policy), deferred tax assets, underfunded benefit plans, known environmental risks, known wage and hour risks, deal-specific underwriting concerns

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R&W Insurance: Key Terms

- Premiums
  - Typically 2.75% - 3.75% of limit insured (no indemnity deals slightly more expensive than indemnity deals)
  - Rates are generally lower outside of US
  - Who pays? Negotiable. (And, if seller demands that buyer pay, buyer can consider in offered purchase price.)
- Deductibles
  - Typically 1% - 2% of transaction value (no indemnity deals may have slightly higher retention than indemnity deals)
  - Buy-side policies often use underlying agreement deductible plus escrow account as policy deductible (which may drop down as escrow is released)
  - Seller-side policies use a negotiated amount

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R&W Insurance: Key Terms

- Policies are negotiated among deal parties and insurer and specifically tailored to fit each unique transaction
  - Coverage has become more insured-friendly
  - Insurers have expanded coverage for certain known matters and have agreed to remove certain exclusions (e.g., for punitive damages insurable under law, and consequential, special, and multiplied damages [if the purchase agreement is silent re such damages])
  - Coverage for materiality scrape and pre-closing tax indemnity generally covered if scrape and indemnity are included in the underlying agreement (even in a no indemnity deal where the reps and warranties do not survive closing)
  - Expanded coverage may entail additional premium
- “Sign to Close” coverage
  - Insurers will cover breaches discovered between signing and closing arising from matters existing prior to signing (i.e., matters the insurers can diligence)
  - Insurers will not cover breaches which both first arise and are discovered between signing and closing (termed “interim breaches” in most policies)
  - To incept at signing, a 10% non-refundable down-payment of premium is required

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Reps & Warranties Insurance—Process

Step 1: Negotiate and execute NDA (counsel/broker)

Step 2: Provide submission to prospective insurers (through broker)

- Requested information includes draft agreement, financial information, offering memo

Step 3: Obtain quote within 2 - 5 days (through broker)

- No charge to obtain quote
- Quote process will inform prospective insured of the market's appetite to insure deal (and the market's concern regarding certain risk areas, which will be excluded in the quote, or subject to heightened scrutiny in the carrier's underwriting process)

Step 4: Select carrier and pay underwriting fee (client)

- Fees range from $30k-$50k depending on the nature of the risk
- Insurers will typically share own report with any excess carriers for additional $5k per carrier

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Reps & Warranties Insurance—Process

Step 5: Underwriting process for 5 - 10 days (team)

- High level review of due diligence (if buyer-side) or disclosure process (if seller-side)
- Access to legal, financial, tax, other DD reports (if buyer-side)
- Conference call(s) and follow-up email questions with deal team

Step 6: Policy wording negotiations (counsel/broker)

- Will often be concurrent with underwriting process
- Work closely with outside counsel
- Latham has extensive experience negotiating and binding R&W insurance, and has bound policies with all of the major carriers

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R&W Insurance – In Practice

RWI Policy to Reduce Purchase Price

- PE Fund contemplated purchasing manufacturer for $1 billion, with $100 million escrow / cap.
- Instead, PE Fund purchased $80 million buyer-side RWI Policy which provided broader coverage with a longer survival period.
- Because an escrow / indemnity was no longer required, PE Fund was able to negotiate a lower purchase price by $25 million (resulting in a net gain to PE Fund of $22 million, considering $3 million RWI Premium)

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R&W Insurance – In Practice

Stapled Insurance Package to Minimize Escrow and Indemnity

- PE Firm preparing to sell $400 million manufacturing company through auction process. The company was the last of 15 divestitures from a holding company, and therefore had numerous hanging indemnities from past sales, as well as tax and environmental exposures.
- Pre-auction, Seller obtains an insurance package (including RWI, tax and environmental insurance) in favor of an eventual purchaser. Bidders were directed to work with Aon, and Seller made it clear it would provide no indemnity.
- Seller was able to attract more bids by providing bidders with clear direction towards a source of recourse, and, because the prospective insurers had already vetted the risk through their engagement with Seller, the Buyer's due diligence process was generally smooth and efficient.

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R&W Insurance – In Practice

RWI Policy to Ease Collection Concerns

- Publicly-traded company in the manufacturing industry had purchased the diesel engine business of another publicly-traded manufacturing company for $150 million. The parties negotiated a $3 million escrow with a $20 million cap, but Buyer was concerned about its ability to collect from Seller, because Seller was close to insolvency at the time.
- Buyer purchased an RWI Policy, which allowed the Buyer to collect under the Policy above the $3 million escrow.
- Seller agreed to pay for fifty percent of the Policy premium and, in return, Buyer agreed to revise the Agreement such that Seller would only be liable above the escrow for Loss that was not covered under the Policy.

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Other Transactional Insurance Products

(Contingent Liability)

Contingent Liability Insurance

- What is it?
  - Covers identified potential exposures that have not yet materialized
  - Provides certainty around an unknown legal outcome that could affect deal valuation and/or effect closing of a transaction
  - Transfers risk of an adverse outcome to an insurer
- What can it cover?
  - Tax exposures
  - Successor liability
  - Fraudulent transfers
  - Litigation exposures
  - Wage and Hour exposures
  - Environmental exposures
- Coverage can be excess of existing insurance or indemnity or can serve as primary recourse

Requirements And Process

- Requirements for Underwriting
  - Primarily questions of legal interpretation
  - Comprehensive legal opinion analyzing facts and applicable law
  - Low chance of adverse outcome
- Insurer's Diligence
  - Copies of legal analysis provided by insured's advisers
  - Other relevant documentation
  - Underwriting call
  - Privilege issues
  - Insurer's independent legal analysis
- After coverage is bound
  - Policy may grants insurer rights to take over the conduct of litigation or right to fully associate with insured's legal counsel and approve all major strategic decisions
  - Insurer's right to approve settlements in advance

Tax Indemnity Insurance

- Tax Insurance coverage is intended to protect against the failure of a transaction or situation to qualify for its intended tax treatment. Insurers will consider submissions in respect of US Federal, State, local and/or foreign taxes. By providing assurance against the unanticipated or ill-timed occurrence of a tax loss, Tax Insurance is an effective means of protecting against an unpredictable or catastrophic drain on cash flow

- Tax Insurance is a tool that has been in use since the mid-1980s and has become a tried and true means to obtain certainty regarding a tax position where traditional sources of comfort are unavailable, impractical or simply would take too long. Transaction parties have often relied upon tax insurance to navigate tax exposures in M&A transactions and corporate taxpayers are now seeing it as a means to address ongoing business tax risk

Tax Indemnity Insurance

- Some situations which have lent themselves to the use of Tax Insurance include:
  - Tax-Free Reorganizations
  - Tax-Free Mergers
  - Tax-Free Spin Offs
  - Net Operating Losses
  - Partnership Issues
  - Structured Real Estate Transactions
  - Retroactive Change in Law
  - Cross-Border Transactions
  - Transfer Pricing
  - Tax Credits
  - Low Income Housing (Section 42)
  - Historic Rehabilitations (Section 47)
  - Real Estate Transfer Tax
  - Consolidated Return Issues
  - Tax-Exempt Financings
  - Transferee or Successor Liability
  - S Corporations / 338(h)(10) Elections

*Tax insurance is **NOT** available for tax shelters. Tax Insurance typically specifies the particular tax treatment which is being insured. It always has an aggregate limit (selected by the insured), can include a "gross up", and generally is available for a non-cancellable term of seven years to address the statute of limitations. Any settlement with the taxing authority must be approved in advance by the insurers.*

Successor Liability

Solutions

Successor Liability Insurance

- A successor liability insurance policy ("SLIP") can be used in any asset purchase agreement where there is concern about the asset buyer's exposure to liabilities it does not expressly assume
- A SLIP is most commonly used where there is concern about the asset seller's financial ability to meet any retained liabilities or indemnifications obligations
- The liability can either be an identified issue (claim/litigation/judgment on appeal) or unidentified/general indemnification obligation
- A SLIP has particular application for asset sales within bankruptcy matter (Section 363 sales) where there is concern that an unsecured creditor will to seek to impose successor liability for a claim against the asset buyer, despite a "free and clear" order

Fraudulent Conveyance Insurance

- A fraudulent conveyance (or fraudulent transfer) insurance policy ("FCIP") insures buyers of assets (or business units) from a (distressed) pre-bankruptcy seller, against subsequent allegations that the sale was a fraudulent conveyance or transfer under federal (Section 548 of the Bankruptcy Code) or state laws (Section 7 of the UFTA)
- FCIP will cover defense costs, plus financial loss where a successful challenge results in a clawback of assets or the requirement that additional funds be paid by the asset buyer to satisfy the "reasonably equivalent value" standard
- FCIP can also be used to insulate the original (distressed) asset buyer in a subsequent sale of those assets

Litigation Insurance

- Covers adverse outcome of potential litigation
  - Transfers litigation off insured's books
  - Can back-stop inadequate insurance limits
  - Satisfies buyer's concern of an unexpected litigation result
- Broad subject matter
  - Can cover securities and other class actions, intellectual property, antitrust, products liability and construction defect litigation
  - Insurers may consider covering risk of adverse appellate rulings
- Provides coverage for defense costs, damages, awards and settlements
- Can be structured to transfer entire financial risk
- In more advanced litigation, often acts as a cap excess of a self-insured amount – *i.e.*, worst case scenario coverage.

Wage & Hour Insurance

Specific coverage to respond to potential/unknown wage and hour claims either:

a) Where R&W insurer excludes Wage & Hour ("W&H") from R&W policy; or
b) Where buyer requires run off and ongoing coverage for W&H given nature of business

Features:

- A stand alone tailored coverage for Wage and Hour claims.
- Brings technical expertise and experience to an areas typically excluded by reps insurers.
- Can be written as run off or ongoing coverage for Target, with or without RDI (subject to underwriting)
- Limits of up to USD 5m (potentially up to USD 10m) to deploy excess existing program or leading.

Six key sectors:

Hospitality	Manufacturing
Technology	Retail
Transportation	Healthcare

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Environmental Insurance

Wide range of insurance options – historic/legacy cover on a site specific basis, operational cover to fill gaps in existing insurance programs, contractual cover where funders of projects insist on protection, on site off-site, business interruption, transportation, and contingent liability.

Loss:	Includes damages, settlements and costs arising from a claim (bodily injury, property damage, third party or regulatory requirement to clean-up, remediation compensation)
Insured sites:	Site specific coverage and unspecified sites
Period of Insurance:	Any claim made against the Insured arising 1 - 10 years (post completion), can include on-going operational coverage
Common Exclusions:	Change of Use and Voluntary Site Investigation
Policy deductible:	Typically each and every pollution event

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U.S. Style Coverage Potentially Available for Deals involving Non-U.S. Assets

Examples of Deals Involving non-U.S. Assets

- Example 1: U.S. style policy issued in connection with merger of a U.S. entity and European entity into a newly-formed UK entity. U.S. entity was beneficiary of coverage (which effectively insured European assets).
- Example 2: U.S. style R&W policy and separate tax policy issued in connection with international deal largely centered in Canada.

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- As the transactional risk markets continue to mature, we anticipate even greater flexibility and appetite from carriers for creative solutions (including availability of U.S. style coverage for non-U.S. assets).
- Note that the named insured in a U.S. style policy must provide a U.S. address for inclusion in the Policy.

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Good Faith/Bad Faith Claims Investigations: Information vs. Evidence - A Distinction with a Difference

Rick Hammond, HeplerBroom
Marialuisa Gallozzi, Covington & Burling LLP

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Key to the Good Faith/Bad Faith Dichotomy

- The insurance relationship is more than the words of the contract
- It entails certain standards of conduct
- Standards apply throughout the insuring relationship
  - application and underwriting
  - submission of claims
  - investigation of claims
  - payment of claims
  - coverage disputes
- Standards apply to first party and third party insurance

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Overview

- The Implied Covenant of Good Faith
- Origins of the Tort of Bad Faith
- First Party Bad Faith
- Third Party Bad Faith
- Practical examples and good practices

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- *This presentation is for educational purposes. It does not provide legal advice. The opinions of the speakers are not attributable to their firms or their clients.*

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Origin of bad faith

- “when an insurer “fails to deal fairly and in good faith with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of implied covenant of good faith and fair dealing.”
- *Gruenberg v Aetna Ins. Co*. 510 P.2d 1032, 1037 (CA 1973)

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Evolution of good faith/bad faith law

- Case law developed largely in first-party cases
  - Some jurisdictions say the inquiry is objective: did the insurer act unreasonably?
  - Other jurisdictions add the subjective: did the insurer know its conduct was wrong?
  - In general, bad faith is more than simple negligence but less than a specific intent to harm:
    - “there must be proof of the insurer failed or refused to discharge its contractual duties not because of an honest mistake, bad, judgment, or negligence, ‘but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that part of the benefits of the agreement’” (*Century Surety v Polisso*, Cal. App., 2006).

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Bad faith – Michigan statute

- Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies
- Refusing to pay claims without conducting a reasonable investigation based upon the available information
- Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed
- Failing to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear
- Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts due the insureds

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Mich. Comp. Laws § 500.2026(1)(c-g)

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Restatement of the Law of Liability Insurance

- §50: Liability for Insurance Bad Faith (third party context)

  "An insurer is subject to liability to the insured for insurance bad faith when it fails to perform under a liability insurance policy:

  (a) Without a reasonable basis for its conduct, and

  (b) With knowledge of its obligation to perform or in reckless disregard of whether it had an obligation to perform."
- Applies objective and subjective components

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Restatement of the Law of Liability Insurance

- §51: Damages for Liability Insurance Bad Faith

  "Damages for liability insurance bad faith include:

  (1) The reasonable attorneys' fees and other costs incurred by the insured in the legal action establishing the insurer's breach of the liability insurance policy;

  (2) Any other loss to the insured proximately caused by the insurer's bad-faith conduct; and

  (3) if the insurer's conduct meets the applicable state-law standard, punitive damages."

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Bad faith: claims investigation

- Insurer's conduct before making a coverage determination can give rise to elements of bad faith
- role of counsel in coverage determinations
  - independent analyzer vs claims adjuster
  - attempt to cloak claims adjustment function with privilege protection
  - insurer/expert communications: direct or through counsel?
- inadequate or delayed investigation
- predisposition/bias/lack of objectivity
- negligent hiring of experts
- improper information sharing
- assignment of bad faith claim to third party.

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Bad faith: claims payment

- Prompt payment is required following a determination that coverage is due
  - insured should make sure to request/demand a partial payment or payment on account
  - withholding payment of one portion while another portion is investigated or disputed
  - under CA law, insured may recover attorneys fees insured incurs to compel payments (*Brandt*, 1985); these are considered compensatory damages for purposes of applying a punitive damages multiplier (*Nickerson v Stonebridge*, CA 2016)
- Delay in payment
- Exposing the policyholder to bankruptcy risk
  - large/small business as well as individual insureds

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10

Bad faith: coverage disputes

- A bona fide coverage dispute is not bad faith
  - To assert a genuine dispute, the insurer must have conducted a proper investigation
    - *Nickerson v Stonebridge* (CA, 2016); insurer determined that a portion of insured's hospitalization (91 of 109 days) was not medically necessary but never consulted the treating physician
    - Emotional distress and punitive damages awarded
- An insurance company does not commit bad faith simply because it is unsuccessful in challenging coverage for a claim
- *However*: An insurer's good faith obligations to its insured continue even when there is a coverage dispute and even when the insurer is sued
- Conduct during litigation can support a bad faith cause of action

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PA Supreme Court: bad faith does not require malice

Facts: *Rancosky v. Washington Nationa*l (PA 2017)(unanimous opinion)
  - Insured developed ovarian cancer in February 2003, made premium payments through June 2003 (90-day waiver period)
  - Policy provided for a waiver of premium following diagnosis
  - Insurer made payments from 2003 to 2005 but denied coverage following a cancer recurrence in 2006 on the ground the insured had not applied for a premium waiver for the period between initial diagnosis and start of disability and her policy had lapsed in May 2003
  - Insured stated that disability began in February 2003
  - Physician stated that disability began in April 2003
  - Insurer did not investigate the discrepancy
- Insurer argued that bad faith requires a subjectively improper motive
- Insured argued that insurer's reckless conduct constitutes bad faith
- Pennsylvania bad faith statute permits an award of interest, punitive damages and attorneys fees/court costs against the insurer

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PA Supreme Court: bad faith does not require malice

- "[A]n ill-will level of culpability would limit recovery in any bad faith claim to the most egregious instances only where the plaintiff uncovers some sort of 'smoking gun' evidence indicating personal animus towards the insured. We do not believe that the General Assembly intended to create a standard so stringent that it would be highly unlikely that any plaintiff could prevail thereunder when it created the remedy for bad faith. Such a construction could functionally write bad faith under Section 8371 [the bad faith statute] out of the law altogether."
- "[W]e hold that, to prevail in a bad faith insurance claim pursuant to Section 3871, a plaintiff must demonstrate, *by clear and convincing evidence*,(1) that the insurer did not have a reasonable basis for denying benefits under the policy and (2) that the insurer knew or recklessly disregarded its lack of a reasonable basis in denying the claim. We further hold that proof of the insurer's subjective motive of self-interest or ill-will, while perhaps probative of the second prong of the above test, is not a necessary prerequisite to succeeding in a bad faith claim. Rather, proof of the insurer's knowledge or reckless disregard for its lack of reasonable basis in denying the claim is sufficient for demonstrating bad faith under the second prong." (italics added)

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Bad faith: refusal to settle with third-party plaintiff

- When an insurer refuses to settle an underlying law suit within policy limits:
  - the insurer may be liable for a judgment in excess of policy limits
  - the insured may enter into its own settlement
- The insured may also assert a bad faith claim against the insurer, which is not extinguished when the underlying plaintiff releases the insured from liability
- The insured may assign the bad faith cause of action to the underlying plaintiff (*Nunn v MidCentury*, CO 2010)
  - In this case, the insured stipulated to a judgment in excess of policy limits and the underlying plaintiff entered into a covenant to execute the judgment against the insurer but not against the insured
  - The insured was not required to be liable for the judgment for the bad faith claim to survive

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Bad faith: other examples from the liability context

- misappropriating an expert the policyholder used to defeat liability to defeat coverage
- negotiating with the third-party plaintiff to plead the insured out of coverage

____

Comments to the Restatement §50

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Rethinking Insurance Coverage for Autonomous Vehicles

2017 University of Michigan Law School Symposium
October 20, 2017
Ann Arbor, MI

Walter J. Andrews, Hunton & Williams LLP

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Rethinking Insurance Coverage for Autonomous Vehicles

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Autonomous Vehicles – Significant Market Growth Is Predicted

- Convenience for drivers.
- Save lives and costs by reducing frequency and severity of accidents.
  - In 2015, 35,092 fatalities resulted from vehicle accidents, with human error as the leading cause.
- Generate billions of dollars for automotive companies.
- New entrants in automobile industry.
  - Suppliers of new technologies, digital services, infrastructure development.

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Autonomous Vehicles – Significant Market Growth Is Predicted

- Tesla's "Master Plan, Part Deux."
  - Self-driving electric cars on a Tesla "shared fleet."
- GM's automated "Bolt" hatchbacks with Lyft.
- IBM's "Olli" 12-person autonomous bus.
- Ford acquired the expanding "Chariot" rideshare service and is working with Velodyne to produce laser-scanning tech used for fully autonomous cars.
- 2021–AVs approved for widespread consumer use.*
- 2031–AVs/EVs will make up 95% of passenger miles.*
- Average family will save $5,600/yr using AVs/EVs.*

*Source: RethinkX, *Rethinking Transportation 2020-2030: The Disruption of Transportation and the Collapse of the Internal-Combustion Vehicle and Oil Industries* (May 2017)

4

Autonomous Vehicles – Levels of Autonomy

July 7, 2017 5

New Legal Risk Paradigm

- Traditional ownership models, auto dealers, and insurance companies face "total disruption"
- Traditional risks decreasing:
  - Liability, injury, vehicle damage; 90% decrease in accidents.
  - Theft nearly nonexistent due to vehicle tracking tech.
- Toward Level 4 Autonomy – New risks emerging:
  - Vehicle operating systems, rideshare platforms, and computing hardware all present data security risks.
  - Liabilities of manufacturers, tech developers, infrastructure developers increase; Individual drivers decrease.
  - Electric vehicle risks posed on the energy grid.

Source: RethinkX, *Rethinking Transportation 2020-2030: The Disruption of Transportation and the Collapse of the Internal-Combustion Vehicle and Oil Industries* (May 2017)

6

Autonomous Vehicles – Insurance and Risk-spreading

- Commercial Auto Insurance Overhaul
  - Weather-related policy exclusions.
  - Audio, visual, and data electronic equipment coverage exclusions.
  - Coverages may need to cover higher maintenance and repair costs.
  - Product liability and recall exposure coverage.
  - Coverage for AV-supported and IoT road infrastructure.
  - Business interruption and cyber liability coverage to cover data loss.
  - Coverage for reputational losses stemming from accidents, hacking.

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Autonomous Vehicles – New Insurance Models

- Autonomous Vehicle Insurance
  - Tesla bundled QBE Policy
  - "Flux" Policy developed in 2016
    - First driverless car insurance policy.
    - Limited coverage for losses from hacking or attempted hacking of vehicle software.
    - Collision coverage.
    - Losses resulting from failure to install updates within certain time.
    - Satellite failures or other outages affecting navigation.
  - Policies tailored to vehicle owners, but not businesses providing or controlling the vehicles.

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Autonomous Vehicles – Additional Risks for Electric Vehicles

- Grid Stability Issues
  - EVs draw heavily from grid.
  - Owners charge overnight when transformers need to cool.
  - Transformers can "blow" and cause power outages.
  - Risk of data loss and consequential damages.
  - Risk higher in communities with older grid infrastructure, urban centers, sports arenas, concert venues.
- Business Interruption Coverages
  - Re-negotiating utility interruption exclusions.
  - Traditional "physical damage" requirement.

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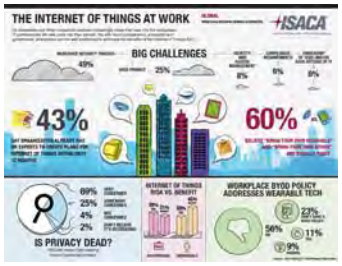
Autonomous Vehicles – Additional Risks for Internet of Things (IoT) Components

- What is it?
  - The Internet of Things (IoT) is made up of all devices connected to the internet.
- The Risks:
  - Devices that are "always on" the network pose new risks as they are a target for hacking



Graphic from the Information Systems Audit and Control Association (ISACA). https://www.isaca.org/Knowledge-Center/Research/ResearchDeliverables/Pages/internet-of-things-risk-and-value-considerations.aspx

10

Risks in the "Sharing Economy"

- "The peer-to-peer based activity of obtaining, giving, or sharing access to good and services."*
  - Individual ownership ↓, Sharing platforms ↑.
  - Pioneers: eBay, Airbnb, Lyft, Uber, Zipcar
  - Freelance Work: TaskRabbit, Upwork
  - Coworking Space: WeWork
  - Fashion: Poshmark, threadUP, Le Tote, Rent the Runway
  - Neighborhood Sharing Resources: Neighborgoods
  - Food: AirDnd ("Drink 'n Dine")
  - **Ridesharing**: Lyft, Uber, Autonomous Fleets?

*Source: Hamari, J., Sjöklint, M., & Ukkonen, A. (2015). The sharing economy: Why people participate in collaborative consumption. *Journal of the Association for Information Science and Technology*.

11

Autonomous Vehicles – Coverage Gaps in Legacy Policies

- Business Interruption Cases – "Physical Loss"
  - *American Guaranty & Liability Insurance Company v. Ingram Micro Inc.*, 2000 WL 726789 (D. Ariz. Apr. 19, 2000).
    - Policy insured against "[a]ll [r]isks of direct physical loss or damage from any cause."
    - As a result of thirty-minute power outage, Ingram's computer lost all programming information from its RAM. *Id*. at *2.
    - The insurer argued that there was no physical damage because the computer itself had not actually lost its ability to accept data and its functionality could be restored. *Id*.
    - The court disagreed, finding that the loss of use, access, and functionality of the computer system for a period of time constituted covered "physical damage." *Id*.

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Autonomous Vehicles – Coverage Gaps in Legacy Policies

- Business Interruption Cases – "Physical Loss"
  - *Vonage Holdings Corp. v. Hartford Fire Ins. Co.*, 2012 WL 1067694 (D.N.J. Mar. 29, 2012).
    - Vonage's voice and messaging servers were hacked, causing calls to be momentarily re-routed in a manner that prevented Vonage from utilizing the full capacity of its servers, resulting in a loss of over one million dollars. *Id*. at *1.
    - The insurer denied coverage for the business losses, arguing that the corruption to the servers did not constitute any physical damage to "tangible property." *Id*. at *2. The District Court denied the insurer's motion for summary judgment, holding that the loss of use of the full capacity of its servers could qualify as a "loss" of property under the policy. *Id*. at *3.

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Autonomous Vehicles – Coverage Gaps in Legacy Policies

- Business Interruption Cases – "Physical Loss"
  - *But see Ward General Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548, 550 (4th Dist. 2003).
    - Plaintiff was in the process of updating its Oracle computer database when the database system crashed, resulting in the loss of plaintiff's electronically stored data, as well as expenses incurred in restoring the data, and a loss of business income because of the disruption, all totaling over $250,000.00.
    - The court held that "the loss of the database, with its consequent economic loss, but with no loss of or damage to tangible property, was not a 'direct physical loss of or damage to' covered property under the terms of the subject insurance policy, and, therefore, the loss is not covered." *Id*. at 556-57.

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Autonomous Vehicles – Coverage Gaps in Legacy Policies

- Privacy Violation Cases – "Publication"
  - *Travelers Indem. Co. of America v. Portal Healthcare Solutions*, 644 Fed. Appx. 245 (4th Cir. 2016).
    - The underlying class action alleged that Portal Healthcare failed to protect confidential patient medical records by inadvertently posting those records on the Internet in a manner that could be publicly accessed.
    - Portal Healthcare sought coverage under a provision of its commercial general liability policy that covered "electronic publication of material" in certain circumstances.
    - The insurer argued that there had not been a "publication."
    - The district court held that the conduct fit within the definition of publication, reasoning that: (1) "'publication' does not hinge on the would-be-publisher's intent", (2) "unintentional publication is still publication" and (3) "publication does not hinge on third-party access." The Fourth Circuit affirmed.

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Autonomous Vehicles – Coverage Gaps in Legacy Policies

- Privacy Violation Cases – "Publication"
  - *Cf. Yahoo! Inc. v. National Union Fire Ins. Co.*, No. 5:17-cv-00447-NC (N.D. Cal. June 2, 2017).
    - The underlying class actions alleged that Yahoo violated consumers' privacy by transmitting unsolicited text messages in violation of the Telephone Consumer Protection Act ("TCPA").
    - Yahoo sought coverage under provision that covered "oral or written publication, in any manner, of material that violates a person's right of privacy."
    - The court concluded that "publication" requires making content of text messages known to third parties in order to trigger coverage.

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Consider Adding a Cyber-Specific Insurance Portfolio

- Information control systems are no longer isolated
- Use of smart-grid technology means that energy systems are connected to the Internet of Things (IoT), which welcome new security vulnerabilities (from webcam to turbine control to tank management)
- Increased regulatory attention (e.g., SEC, FTC, FERC)
- Vendor/business associate risk
- Insider threats
- Exclusions in standard coverages (e.g., CGL, D&O)
- Cyber-criminal ingenuity, perseverance, and greed

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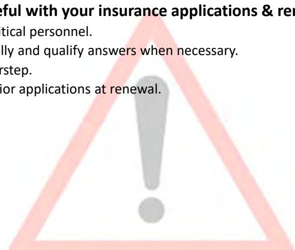
July 2017 17

Cyber-Risk Insurance Best Practices

- **1. Be careful with your insurance applications & renewals.**
  - Involve critical personnel.
  - Answer fully and qualify answers when necessary.
  - Don't overstep.
  - Review prior applications at renewal.



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July 2017 18

Cyber-Risk Insurance Best Practices

- **1. Be careful with your insurance applications & renewals.**
  - Cyber Crime Cases – Rescission.
    - *Columbia Cas. Co. v. Cottage Health Sys.*, No. 2:16-cv-03759 (C.D. Cal. filed May 31, 2016); *Cottage Health v. Columbia Cas. Co.*, Case No. 16-cv-02310 (Sta. Barbara Sup. Ct. filed May 31, 2016).
      - Cottage Health System operates a network of hospitals that suffered a data breach in 2013, resulting in unauthorized access to patient records.
      - The patients filed a class action against Cottage Health, which was settled for $4.125M.
      - Columbia seeks rescission of the cyber liability policy. It has argued that Cottage Health made misstatements in the "Risk Control Self Assessment" component of its cyber insurance application, including misstatements that it regularly maintained security patches on its systems.
      - Columbia has also argued that Cottage Health has triggered the exclusion for losses arising from an Insured's failure "to continuously implement the procedures and risk controls identified in the Insured's application."

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Cyber-Risk Insurance Best Practices

- **2. Aim for broad triggers and short waiting periods.**
  - Does first-party coverage require a wrongful act or an affirmative "failure"?
  - Does coverage trigger on "discovery" or "occurrence"?
  - Are you covered for "alleged" or "suspected" breaches?
  - Keep the waiting period SHORT!

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Cyber-Risk Insurance Best Practices

- **3. Mind the gaps.**
  - Both legacy coverages (CGL, Property, Crime) *and* cyber-specific insurance products may not provide adequate coverage for risks involving the IoT, new technologies, and the Sharing Economy.

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Cyber-Risk Insurance Best Practices

- **3. Mind the gaps.**
  - "Error, omission, or negligent act."
    - *Travelers Prop. Cas. Co. of America et al. v. Federal Recovery Services et al.*, No. 2:14-cv-170-TS (D. Utah May 11, 2015).
      - FRS provided processing, storage, and handling of electronic data for Global Fitness.
      - Global Fitness sued FRS for conversion, tortious interference, and breach of contract, alleging that FRS held for ransom billing account data for members of its fitness centers.
      - Travelers disputed coverage for the lawsuit, asserting that the withholding of data was not an "error, omission, or negligent act" for which the cyber liability policy provided coverage.
      - The Court agreed with Travelers, holding that Global Fitness had alleged knowledge, willfulness, and malice, in the withholding of data.

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Cyber-Risk Insurance Best Practices

- **4. Think outside of the box on endorsements.**
  - Potential Solutions to Coverage Gaps:
    - Cyber endorsements removing problematic language
    - Endorsements to legacy policies for damage caused by cyber event

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Cyber-Risk Insurance Best Practices

- **5. Don't stop thinking about insurance after the policies are in place. Insurance may come up again …**
  - Change in control.
  - Change in scope of services/work.
  - New risks.
  - New contracts.
    - Additional insured considerations.

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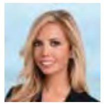

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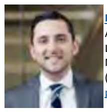

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THE FUTURE OF AUTOMATION IN THE COMMERCIAL TRUCKING INDUSTRY

Kelly A. Freeman
Senior Legal Counsel North America

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October 20, 2017

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Comments in this document may contain certain forward-looking statements, which are based on management's good faith expectations and beliefs concerning future developments. Actual results may differ materially from these expectations as a result of many factors. These factors include, but are not limited to, the risks and uncertainties described in the "Risk Factors" section and the "Forward Looking Statements" section of WABCO's Form 10-K, as well as in the "Management's Discussion and Analysis of Financial Condition and Results of Operations - Information Concerning Forward Looking Statements" section of WABCO's Form 10-K Report. WABCO does not undertake any obligation to update such forward-looking statements. All market and industry data are based on Company estimates.

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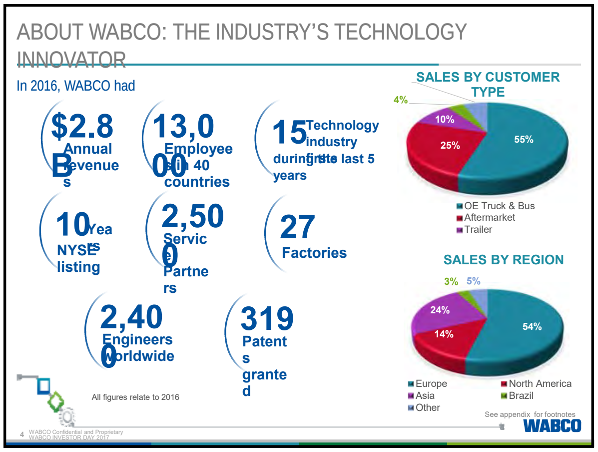
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2,400 Engineers worldwide
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All figures relate to 2016
SALES BY CUSTOMER TYPE
4%
10%
25%
55%
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Aftermarket
Trailer
SALES BY REGION
3%
5%
24%
14%
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Europe
North America
Asia
Brazil
Other
See appendix for footnotes
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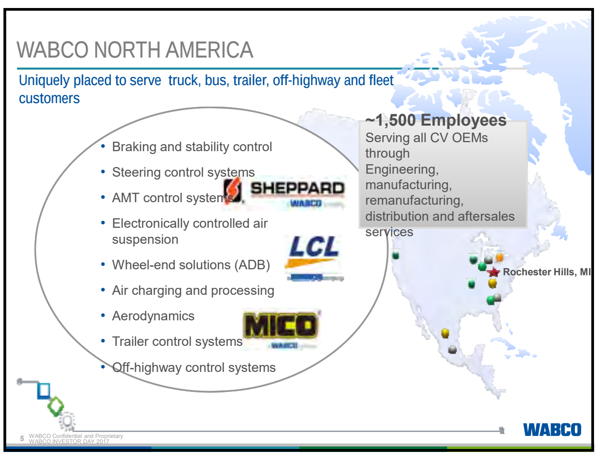
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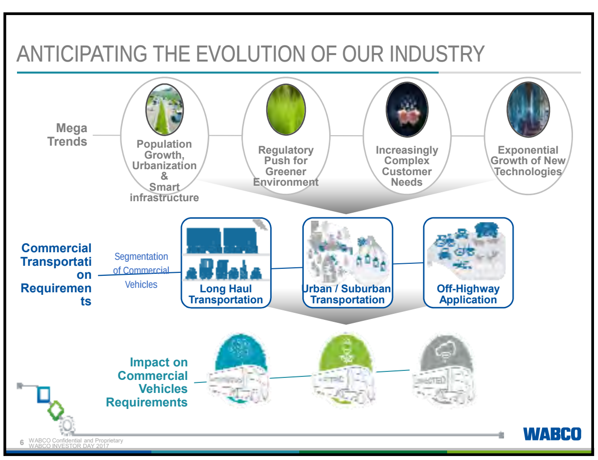
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Regulatory Push for Greener Environment
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Exponential Growth of New Technologies
Commercial Transportation Requirements
Segmentation of Commercial Vehicles
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Impact on Commercial Vehicles Requirements
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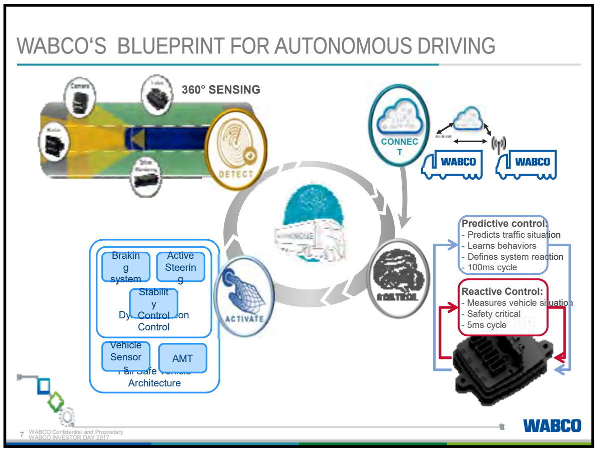
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Predictive control:
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- Learns behaviors
- Defines system reaction
- 100ms cycle
Reactive Control:
- Measures vehicle situation
- Safety critical
- 5ms cycle
AMT
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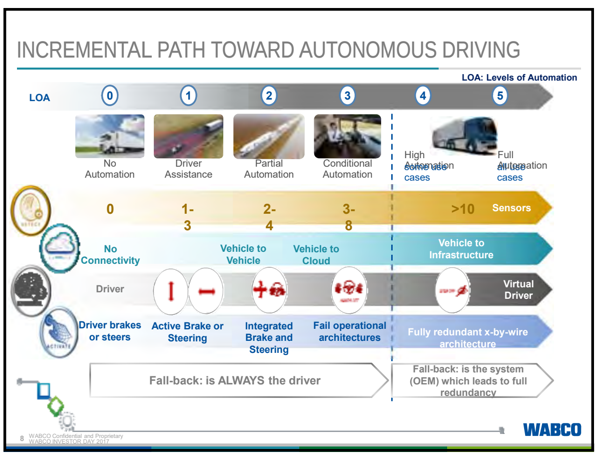
INCREMENTAL PATH TOWARD AUTONOMOUS DRIVING
LOA: Levels of Automation
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2
3
4
5
No Automation
Driver Assistance
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Conditional Automation
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2-4
3-8
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Sensors
No Connectivity
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Driver
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- Anticipating EU-regulation in 202

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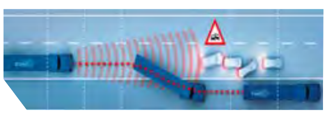
From: Braking + sensors

To: Longitudinal + lateral + sensors + stability



- Industry's first heavy duty vehicle evasive maneuver demonstration
- Required function for higher levels of automation

VIDEO

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- Actively prevents lane departure accidents
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- Enables road-train formation on highways
- Significant fuel savings
- Will pull adoption of WABCO ADAS and communications technologies

OnYard

COMING SOON

- A fully-autonomous truck for depot environments
- Leverage WABCO's leading share of market in trailer ABS/ EBS

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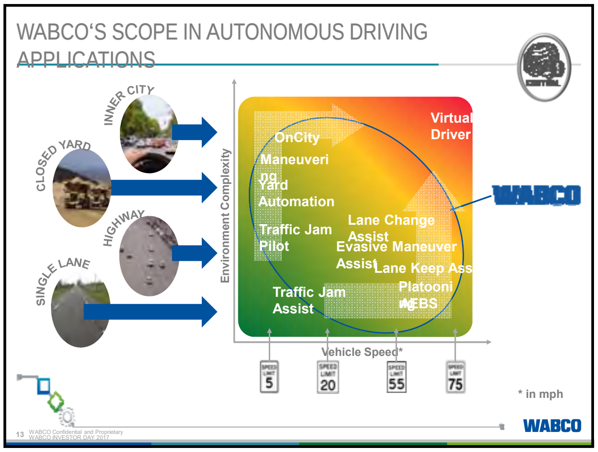
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Yard Automation
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Traffic Jam Pilot
Lane Change Assist
Evasive Maneuver Assist
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Crisis Management and Incident Response: Using Insurance as a Loss Mitigation and Business Resiliency Tool

2017 University of Michigan Law School Symposium
October 20, 2017
Ann Arbor, MI
Meghan H. Magruder
John C. Bonnie

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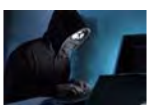
Crisis Management Planning

- Dealing with significant incidents—like a data breach or natural disaster—requires a coordinated response plan
- Companies must coordinate with their risk management leaders and insurance brokers on proper response actions
- Companies should include a protocol relating to insurance indemnification and other cost recovery as part of their incident response plans



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Insurance Programs Should Prepare for the Worst

- Consider all lines of insurance
- Mind the gaps
- Involving insurance experts during the process of purchasing insurance has duel benefits:
  1. Assists in securing strong coverage at renewal
  2. Provides insurance experts with a baseline familiarity with insurance program in event of crisis

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Content of the Notice Submissions

- Provide notice to all insurers (including excess insurers)
- Must comply with the specific requirements of each policy
- Content requirements may vary among different policies
- Facts only "what is happening and where" rather than "why or how" an incident occurred
- Causation typically speculative in first days of crisis

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Secure Pre-Approval for a Crisis Response Team

- Affected companies often need to hire a variety of vendors, such as consultants and PR firms
- Insurers are often willing to pre-approve vendors and outside legal counsel at the time policies are purchased

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Coverage for Costs of Responding to a Crisis Event

crisis response coverage,
crisis management coverage,
crisis communications coverage,
crisis management response coverage,
crisis resilience coverage,
crisis assistance coverage

CrisisResponse®

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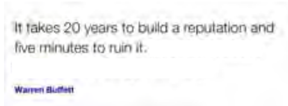
Key Features of Crisis Response Coverage

- Services of communications/public relations professionals to bolster or restore public confidence, mitigate reputational injury, effectively manage public statements and communications

- Payment of costs of medical, funeral, psychological counseling, travel, and temporary living expenses related to the crisis event.



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Origin of Crisis Response Coverage

- Risk products requiring expertise in the handling of the insured event - e.g., Kidnap, Ransom and Extortion insurance
  - Payment of ransom + expenses in obtaining release of victim: security consultants, hostage negotiation experts, other crisis response professionals

- Risk products expressly covering the economic consequences of the insured risk – e.g., product recall insurance
  - Payment of cost of recall efforts and damage/injury by the recalled product

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Origin of Crisis Response Coverage

- ***Hargrove v. Underwriters at Lloyd's, London***, 937 F. Supp. 595 (S.D. Tex. 1996)

No insurer control of ransom decision-making or strategy "[t]o avoid the appearance that the Underwriters placed their economic interest over the interests of the hostage."

Negotiation of release by third party crisis management company.

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Origin of Crisis Response Coverage

- Largely a U.S. phenomenon outside the Ransom and Product Recall context
  - Reflects litigious U.S. environment
  - A mandatory offering for purposes of competition
  - Not in Europe/elsewhere

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Coordinate Communications

- Take care to decrease risk of making early statements that could diminish coverage before the cause and scope of the incident is determined
- Attorney-client privilege communications
- Maintain consistent messaging to the various interested parties (insurers, public, regulators, etc.)

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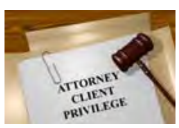

Pre-Crisis Response Coverage Landscape

- Ignorance of the PR implications on liability
- Lawyer directed PR
- In-house directed PR
- No purposeful, thoughtful PR

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Tension

- Post crisis actions
  - Can be mitigating or exacerbating
  - Best person for the job?
  - Blurring of legal and public relations roles

> Since we cannot change reality, let us change the eyes which see reality.
> Nikos Kazantzakis

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Opposing Views

- "[O]ftentimes failing to simply say 'sorry' can be more damaging to a company's reputation than potential litigation."
  – *Want to Avoid a PR Disaster? Think Like a Lawyer,* Inc. Magazine
- "[A]dmitting fault is a suicidal legal strategy."
  – *PR Crisis Management: Understanding Legal Effects of Apologies*, Crisis Management

I WAS WRONG.

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Document Communications With Insurers

- Tracking chart for course of dealings including:
  - persons involved in the communication
  - date of the communication
  - type of communication (i.e., email, letter, phone call)
  - short note describing the content of the communication
- Single person or small team to be responsible for all communications to maintain consistency

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Mitigation

- Duty to mitigate to prove best efforts were used to reduce losses
- Documenting efforts to investigate and mitigate the incident in real time creates a more accurate and defensible record

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Specialty Crisis Response Products

TOKIO MARINE KILN

Allianz

Reputation Protect

ZURICH FINANCIAL SERVICES

AIG

Munich RE

ReputationGuard®

STEEL CITY RE
Forging Reputation Resilience

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Umbrella Prime℠ and AIG Prime Express℠

- AIG Umbrella Prime℠ With CrisisResponse® (stand-alone umbrella)
- AIG Prime Express℠ (follow form excess)
- AIG CrisisResponse® coverage ("Crisis Response Coverage Extension Endorsement").

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Umbrella Prime℠ and AIG Prime Express℠

- ***Coverage Grant***: Irrespective of fault, insurer will advance **"CrisisResponse Costs"** to third parties on behalf of the named insured and will pay **"Crisis Management Loss"** on behalf of the named insured arising from a **"Crisis Management Event"** first commencing during the policy period, up to the stated sublimit of coverage.
- **"CrisisResponse Costs"** means enumerated, "reasonable and necessary" expenses incurred during and directly caused by a "Crisis Management Event" "provided that such expenses have been preapproved by us and may be associated with damages that would be covered by this policy."
  - **Enumerated expenses:**
    1. medical expenses;
    2. funeral expenses;
    3. psychological counseling;
    4. travel expenses;
    5. temporary living expenses;
    6. expenses to secure the scene of a "Crisis Management Event"; and
    7. any other expenses pre-approved by the insurer.

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Umbrella Prime℠ and AIG Prime Express℠

- **"Crisis Management Loss"** means the following, incurred during a "Crisis Management Event":
  1. amounts for the reasonable and necessary fees and expenses incurred by a Crisis Management Firm in the performance of Crisis Management Services for the Named Insured solely arisin from a covered Crisis Management Event; and
  2. amounts for reasonable and necessary printing, advertising of materials or travel by directors, officers, employees or agents of the Named Insured or a Crisis Management Firm incurred at th direction of a Crisis Management Firm, solely arising from a covered Crisis Management Event.

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Umbrella Prime℠ and AIG Prime Express℠

- **"Crisis Management Event"** means:
  - an Occurrence that in the good faith opinion of a Key Executive of the Named Insured, in the absence of Crisis Management Services, has or may result in:
    1. damages covered by this policy that are in excess of the total applicable limits of Scheduled Underlying Insurance or the Self-Insured Retention; and
    2. significant adverse regional or national media coverage.
  - Include[s], without limitation, man-made disasters such as explosions, major crashes, multiple deaths, burns, dismemberment, traumatic brain injury, permanent paralysis, or contamination of food, drink or pharmaceuticals, provided that any damages arising out of any of the aforementioned must be covered under this policy.

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Umbrella Prime℠ and AIG Prime Express℠

- **"Crisis Management Firm"** means a firm identified in a schedule attached to the policy hired by the Named Insured to perform Crisis Management Services in connection with a Crisis Management Event.

Umbrella Prime℠ and Prime Express℠ Summary

- Expenses must be "reasonable and necessary"
- Incurred "during" and "directly caused by" a "Crisis Management Event" Pre-approved by the carrier.
- Coverage so long as the costs/expenses "*may be* associated with damages that *would be* covered by this policy."
- "Crisis Management Event" definition adds limitations and restates others:
  - An event requires an "Occurrence" and "damages covered by this policy."
  - The requirement of covered damages repeated after the enumeration of particular events within the definitions ("explosions" and "contamination of food, drink or pharmaceuticals" for example)
  - **Further requirement:** "provided that any damages arising out of any of the aforementioned must be covered under this policy."
- No express provision coverage is limited to "bodily injury" and "property damage", but "Crisis Management Event" definition indicates this.

Umbrella Prime℠ and AIG Prime Express℠ Summary

- **"Crisis Management Loss"** definition also limits coverage: amounts must be "reasonable and necessary" fees and expenses or printing, advertising, mailing or travel "solely arising from a ***covered*** Crisis Management Event".
  - A "Crisis Management Loss" also requires a "Crisis Management Event" which requires an "Occurrence", and covered damage.

Crisis Response Coverage Extension Endorsement

- ***Coverage grant:*** the insurer will reimburse or pay on behalf of the named insured "reasonable and necessary" "crisis response costs" and/or "crisis management loss" arising out of either
  1. "'bodily injury' or 'property damage' for which coverage is provided under this policy" or
  2. "imminent injury" with respect to a "crisis event" to which the insurance applies.

  No self-insured retention or deductible applies.


ENDORSEMENT

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CRISIS RESPONSE COVERAGE EXTENSION ENDORSEMENT

THIS COVERAGE EXTENSION ENDORSEMENT EXTENDS COVERAGE TO PROVIDE FOR "CRISIS RESPONSE COSTS" AND "CRISIS MANAGEMENT LOSS" IN THE EVENT OF A "CRISIS EVENT" AS DEFINED HEREIN. THE LIMITS OF INSURANCE PROVIDED FOR SUCH COVERAGE ARE IN ADDITION TO THE LIMITS OF INSURANCE PROVIDED IN THE DECLARATIONS OF THIS POLICY.

Schedule

CRISIS RESPONSE NOTIFICATION TELEPHONE NUMBER: 877 244-3100

Crisis Response Coverage Extension	Limits of Insurance	
Crisis Response Aggregate Limit	$ 250,000	
Crisis Response Costs Limit	$ 250,000	Each "Crisis Event"
Crisis Management Loss Limit	$ 50,000	Each "Crisis Event"

SECTION I – CRISIS RESPONSE COVERAGE EXTENSION

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Crisis Response Coverage Extension Endorsement

- **"Crisis response costs"** and/or **"crisis management loss"** must arise out of a **"crisis event"** and the "bodily injury", "property damage" or "imminent injury" must take place in the coverage territory and "commence[ ] to occur during the policy period."
- "Crisis response costs" and/or "crisis management loss" cannot arise out of any fact, circumstanced, pre-existing condition, situation, "bodily injury", "property damage", or "imminent injury" "that you, prior to the inception date of the policy, knew, or reasonably should have known, could lead to, cause or result in such "crisis response costs" and/or "crisis management loss".
- "Crisis response costs" and/or "crisis management loss" must be incurred within 30 days after the commencement date of the "crisis event".

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Crisis Response Coverage Extension Endorsement

- **"Crisis Response Costs"** means
  1. reasonable and necessary "emergency transport expenses", "emergency psychology expenses", funeral expenses, travel expenses, and temporary living expenses incurred by you to provide relief and/or support to "affected persons", and
  2. expenses incurred by you to secure the scene of a "crisis event".
- Does not include **"defense costs"** or **"crisis management loss"**.
- "Emergency transport expenses" and "Emergency psychology expenses are defined terms

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Crisis Response Coverage Extension Endorsement

- **"Crisis Management Loss"** means:
  - Reasonable and necessary fees and expenses charged by a "crisis management firm" or your employees in providing public relations and media management services for the purpose of maintain and restoring public confidence in you. These expenses may include printing, advertising, or mailing of materials to manage reputational risk. This does not include the salaries of your employees.

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Crisis Response Coverage Extension Endorsement

- **"Imminent injury"** means "the actual and immediate threat of 'bodily injury' or 'property damage'".
- **"Crisis event"** means:
  1. An emergency situation including, but not limited to, a manmade disaster, such as arson, a bombing, the taking of hostages, a mass shooting, terrorism (if covered under the policy only), intentional contamination of food, drink or pharmaceuticals or the actual or alleged mishandling of a natural disaster, that results in covered "bodily injury", "property damage" or "imminent injury" to any person; and
  2. Such emergency situation as has been associated with or may reasonably be associated with significant adverse regional or national news media coverage.
- **"Crisis management firm"** means "a public relations firm or crisis management firm, assigned or approved by us in writing, that is hired by you to perform services of the type covered under 'crisis management loss' in connection with a 'crisis event'".

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Crisis Response Coverage Extension Endorsement

- All exclusions of the form policy apply.
- Two added exclusions:
  - no coverage for "crisis response costs" or "crisis management loss" resulting from "bodily injury", "property damage" or "imminent injury" that occurred prior to the date of any acquisition of or merger with another entity;
  - no coverage for "crisis response costs or "crisis management loss" arising out of infectious diseases or illnesses caused by any bacterium, virus, or fungus, with an exception for food-borne illnesses and defective vaccines.

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Crisis Response Coverage Extension Endorsement Summary

- "Crisis response costs" an/or "crisis management loss" must be "reasonable and necessary" and must arise out of a "crisis event".
- Expressly limited to "bodily injury" and "property damage" covered by the policy,.
- Must "commence[ ] to occur during the policy period."
- "Crisis event[s]" "not limited to" particular identified events (e.g., bombing, shooting, intentional contamination of food/drink/pharmaceuticals).
- Restrictions and limitations:
  - known loss
  - "crisis response costs" and/or "crisis management loss" must be incurred within 30 days after the commencement of the "crisis event".
  - Exclusion for "crisis response costs" and "crisis management loss" occurring prior to the date of acquisition of or merger with another entity, and those arising out of infectious diseases or illnesses caused by an bacterium, virus or fungus (with an exception for food-borne illnesses and defective vaccines).

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Crisis Response Related Insurance Case Law

- ***Hot Stuff Foods, LLC v. Houston Cas. Co.***, 2014 WL 28994 (D.S.D. Jan. 2, 2014), *aff'd in part and rev'd in part*, 771 F.3d 1071 (8th Cir. 2014)(Recall claim under Malicious Product Tampering/Accidental Product Contamination Policy; award for recall expense and crisis response/consultant expenses and for lost profits.)

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Crisis Response Related Insurance Case Law

- ***Caudill Seed & Warehouse Co., Inc. v. Houston Cas. Co.***, 835 F. Supp.2d 329 (W.D. Ky. 2011)(Accidental Product Contamination Policy; public relations services obtained from firm other than as identified in policy and without carrier's consent; coverage absent.)

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Crisis Response Related Insurance Case Law

- ***Fresh Express Inc. v. Beazley Syndicate 2623/623 at Lloyd's***, 199 Cal.App.4th 1038 (2011)("TotalRecall+-Brand Protection" with "Malicious Contamination, Accidental Contamination and Products Extortion Insurance"; *e. coli* outbreak outside policy's coverage for "Accidental Contamination"; no coverage).

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Crisis Response Related Insurance Case Law

- ***Cytosol Laboratories, Inc. v. Federal Ins. Co.***, 536 F. Supp.2d 80 (D. Mass. 2008)("Products Withdrawal and Crisis Management Insurance" Endorsement among bases for conclusion that Products/Completed Operations-General Liability policy to which it was endorsed afforded no coverage).

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Crisis Response Related Insurance Case Law

- ***Catholic Medical Center v. Fireman's Fund Ins. Co.***, 2015 WL 3463417 (D.N.H. Jun. 1, 2015) (first party Crisis Management Extension Endorsement and Health Care Extension Endorsement with Communicable Disease Coverage for a "communicable disease event"; need to quarantine and destroy surgical instruments from occurrence of mad cow disease not a "communicable disease event" as defined).

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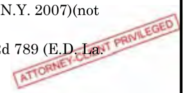
Potential Pitfalls

- Inconsistency of application of privilege for work of PR professionals
  - *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001)(protected).
  - *In re Grand Jury Subpoenas*, 265 F.Supp .2d 321 (S.D.N.Y. 2003)(protected).
  - *Behunin v. Superior Court Los Angeles County,* 9 Cal. App. 5th 833 (2017)(protected).
  - *de Espanza v. American Bureau of Shipping*, 2005 WL 3455782 (S.D.N.Y. Dec. 14, 2005)(not protected).
  - *NXIVM Corp. v. O'Hara,* 241 F.R.D. 109 (S.D.N.Y. 2007)(not protected).
  - *In re Vioxx Prods. Liab. Litig.*, 501 F.Supp. 2d 789 (E.D. La. 2007)(not protected).



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Potential Pitfalls

- Statements of remorse as admissions and breach of cooperation provision

Admission Of Liability?

Remorse

Fauxpology

APOLOGY

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Identification All Potential Sources of Recovery

- Contracts with vendors, suppliers, and manufacturers could contain indemnification or additional insured status requirements
- Consider noting these cost recovery opportunities and notice requirements in a contract summary relating to each significant vendor agreement

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Good Planning Leads to Effective Incident Response

- Proper planning enhances the likelihood of maximizing recoveries
- Thoughtful crisis management planning is an essential business resilience tool

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Getting to Know You —An Introduction To Representations & Warranties Insurance

American College of Coverage and Extracontractual Counsel
2017 University of Michigan Law School Symposium

Ann Arbor, MI
October 20, 2017

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Getting to Know You—An Introduction To Representations & Warranties Insurance

I. PURPOSE

"Critical to a buyer's and seller's evaluation of the acquisition and sale of a company is the allocation of exposure between them with respect to *unknown risks and liabilities* of the business." H. Meshki and B. Vongsawad, *Why You Need M&A Reps and Warranties Insurance,* (https://www.kirkland.com/.../Law360%20(M&A%20Insurance_%20Meshki,%20Vongsa...)("Meshki"). As one commentator notes:

> A form of coverage designed to guarantee the contractual representations made by sellers associated with corporate mergers and acquisitions. For example, the seller of a company may represent that the company's underground storage tanks are in good repair. If a serious leak is discovered following the purchase, the buyer can seek recovery for repair and clean-up costs from the seller's representations and warranties insurance policy. The key benefit of the policies is that they provide a *viable alternative to escrow funds*, which have traditionally used to satisfy claims associated with representations and warranties contained in merger and acquisition documents.

(https://www.irmi.com/online/insurance-glossary/terms/r/representations-and-warranties-insurance.aspx)("IRMI").

This form of coverage has been around for over a decade, but it is in the last few years that the market has really taken off and the policies have been in demand. All of the major carriers appear to be offering various forms of this coverage. It now represents billions in premium dollars being spent by American companies. Joseph Verdesca

Paul Ferrillo, *Representations and Warranties Insurance: What Every Buyer and Seller Needs to Know,* 1(LexisNexis Corporate Law Advisory January 2016).

II. TYPES

A. Picking A Side

The perspective insured varies. Most are familiar with a "buy-side" policy, which of course covers buyers. "Sell-side" policies are also available. In some circumstances, the Seller may choose to purchase a "buy-side" policy for the benefit of the Buyer. Most policies written today are "buy-side" policies. Meshki, *supra*, at 1. In addition to the Buyer and the Seller, the policies involve to some degree the conduct of the Target Group. That is the company or companies being acquired. Finally, the typical policy differentiates as to "Deal Team Members," which shall include the principal persons who (i) supervised, reviewed or conducted any due diligence, analysis or evaluation in connection with the Purchase Agreement, and/or (ii) supervised, reviewed, prepared or negotiated the Purchase Agreement.

B. Blending With Indemnity—Excess of Retention Arrangements

Many insurers require a self-insured retention to be paid by the Insured before the carrier has to pay indemnity dollars. The retention is only eroded by payments for amounts that would otherwise involve covered claims under the policy. Retentions of a million dollars or slightly less are not unusual on policies providing an aggregate limit of $25 million.

III. BASIC COVER

A. The Unknown

Most obviously, R&W policies cover the unknown risks and liabilities of the company being acquired. M&A transactions also involve indemnity obligations, which may not be covered per se under many R&W policies.

B. Indemnity

Some R&W policies provide specific coverage for "general indemnities beyond the representations and warranties."

IV. BASIC BENEFITS

A. The Problem

One commentator explains the basic problems solved by R&W coverage as follows:

Issue

Merger and acquisition transactions generally require the seller to indemnify the buyer for breaches of the representations and warranties that are made in the purchase and sale agreement. Depending on the parties involved and the nature of the representations and warranties, the seller may be required to escrow a material percentage of the indemnification requirement. This requires the seller to maintain substantial illiquid capital following an exit. If the seller is a private equity investor, it may limit their ability to wind down partnerships, formed for investment purposes, and may further limit their ability to return funds to investors.

From the buyer's perspective, an uninsured indemnity provides only limited comfort, as there is no guarantee that they will be able to collect losses if a breach occurs. In many acquisitions, the representations and warranties do not survive after closing because there is no one left to provide indemnity.

Marsh, *Representation and Warranty Insurance—Private Equity,* (https://www.marsh.com/ca/en/services/private-equity-mergers-acquisitions/representation-and-warranty-insurance.html

B. To The Seller

- Takes the pressure off of indemnity obligations, depending on policy language.
- No need for escrows or hold-backs
- Frees more funds for distribution
- Replaces indemnity, thus lessening impact of partners who are not likely to help with contractual indemnity obligations in the purchase agreement.
- Remove tax contingencies

See Verdesca, *supra*, at 3.

C. To The Buyer

Direct path to recovery

- No conflict per se with Seller
- No disruption of operation from pre-occupation with litigation or with litigation costs
- Limit indemnity and escrow exposures
- Solvent source of funds
- Protection from successor liability
- Greater limits than might be available by using a percentage of the purchase price
- Longer survival period than parties will typically agree to.

    - Avoids issue regarding availability or not of indemnity (e.g., publicly traded companies).

    - Solvency

- Better than a “Sell-side” policy because knowledge of the buyer is all that is excluded under the “buy-side” policy.

D. Carrier Pitch

One carrier has summarized the respective benefits as follows:

Representations and Warranties Insurance provides buyers with:

- Competitive advantage in bid/auction processes
- Added protection above any negotiated indemnity cap
- Longer survival period for indemnification resulting from breaches
- Protection against collectability or solvency risk of an unsecured indemnitor
- Representations and Warranties Insurance provides sellers with:
- Cleaner exits by reducing escrows or purchase price holdbacks and enhancing returns on sellers’ capital
- Alternative recourse to shareholders in take-private transactions

- Protection from financial loss resulting from representation and warranty indemnity claims

(http://xlcatlin.com/insurance/insurance-coverage/professional-insurance/representations-and-warranties-insurance.)

V. NAVIGATING THE TERMS—EXAMINING THE TERMS OF A BUY-SIDE POLICY

A. Hybrid Policy Terms—*Incorporation*

Most forms of R&W coverage expressly incorporate the underlying Purchase Agreement facilitating the sale or acquisition.[1] In Texas, as in many jurisdictions, "a separate contract [from the insurance contract] can be incorporated into an insurance policy by an explicit reference clearly indicating the parties' intention to include that contract as part of their agreement." *Urrutia v. Decker,* 992 S.W.2d 440 (Tex.1999); *see also In re Deepwater Horizon,* --- S.W.3d ---- (Tex. 2015)(holding that additional insured provision in policy referencing a requirement in a collateral contract requiring someone to be made an additional insured resulted in incorporation of the collateral contract into the policy). "[I]nsurance policies can incorporate limitations on coverage encompassed in extrinsic documents by reference to those documents." *In re Deepwater, supra.* As the Supreme Court noted in *In re Deepwater Horizon, supra,* "[W]hile our inquiry must begin with the language in an insurance policy, it does not necessarily end there. In other words, we determine the scope of coverage from the language employed in the insurance policy, and if the policy directs us elsewhere, we will refer to an incorporated document to the extent required by the policy. *Unless obligated to do so by the terms of the policy, however, we do not consider coverage limitations in underlying transactional documents." Id.* (emphasis added).

Some policy forms define "policy" to consist of the declarations, terms and conditions and attached Appendices. The Purchase Agreement and its schedules, exhibits or other attachments are often made a part of the Appendices and thus part of the policy.

[1] "The contents of a high percentage of asset purchase, stock purchase and merger agreements are likely to be very similar. Each of the agreements will likely (1) set forth the financial terms of the transaction; (2) have representations and warranties regarding the target's business and its legal and financial condition; (3) have affirmative and negative promises, called covenants; (4) have conditions that must be satisfied in order for the parties to be obligated to close; and (5) in the case of private company acquisitions, have indemnification provisions setting forth the rights of each party to recover damages resulting from the other's misrepresentations or breaches." (https://www.law360.com/articles/268750/defining-definitive-acquisition-agreements.)

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B. **Claims-Made**

The typical policy requires notice of a breach or third-party claim as soon as practicable. It must be made within the policy period or within a defined period of extension. Prejudice is required so long as the notice is at least received in the policy period or extension.

C. **Policy Limits**

1. **Limits Based On A Pecking Order**

The policy is likely to have a general aggregate limit. This will likely have sub-limits tied to particular types of covered events, breach of (a) any insured representation (likely set at the lowest amount in the policy, i.e. $5 million; (b) loss from breach of a Fundamental or Tax Representation, which will have a higher limit reflecting the remainder amount of the aggregate over the Insured Representation sub-limit.

2. **Self-Insured Retentions**

Most carriers will require a self-insured retention. In some instances, the Buyer may demand that the Seller pay for any SIR. This requires separate and additional terms for the policy and the purchase agreement. Many Sellers justifiably will not front the SIR unless there is a waiver of subrogation as to the amount of the SIR, which again requires the consent and agreement of the carrier.

D. **Duty to Defend?**

Some policy forms include defense costs in the limit of liability. With such so-called declining limits policies, the insurer does not undertake any duty to defend. But, the carrier does have the right to associate counsel in the defense, much like an excess or umbrella carrier.

E. **Types of Representations**

1. General Representations

2. Fundamental Representations

3. Tax Representations and Tax Indemnity

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F. Breach

A breach is required to invoke the insuring agreement. This can be shown by "any" breach of or inaccuracy in any of the insured representations, which are specifically set forth in the policy declarations. A breach can also be shown by establishing the failure the "Seller Indemnitors" (as defined by the collateral Purchase Agreement) to satisfy their indemnification obligations relating to tax indemnity as set forth in the Purchase Agreement. Any attempts to address materiality, substantial compliance, etc. in the Purchase Agreement shall be disregarded. But, qualifications set forth in schedules in the Purchase Agreement shall not be disregarded and may be considered in determining if a breach or inaccuracy has occurred.

G. Policy Period

In my experience, the policy period is in multiple parts, tying different periods to claims involving different types of representations. For example, the policy period would be (1) three years from the date of closing for "General Representations"; (2) six years from closing for "fundamental representations"; and six years from closing for

H. Exclusions

1. Actual Knowledge/No Claims Declaration

"Reps and warranties policies do not cover known issues, such as issues discovered during due diligence, described in disclosure schedules, or so-called "new new" matters both occurring and discovered by the insured in the interim period between signing and closing." Verdesca, *supra*, at 4.

The policies always include some sort of "actual knowledge" exclusion Below is an example:

> The Insurer has no obligation to pay Loss to the extent arising out of, relating to, or to the extent it is increased by (and then only in relation to such increase):
>
> A. any Claim
>
> (i) of which any **Deal Team Member** had **Actual Knowledge** prior to the **Inception Date**;

(ii) to the extent such **Claim,** or the facts, matters or circumstances which would reasonably be expected to give rise to such **Claim**, has been disclosed in the **Purchase Agreement**; or

(iii) for which the amount of **Loss** is less than the **De Minimis**.

B. fraud by the **Insured** or any **Deal Team Member**, as determined pursuant to a *final judgment* by a court or arbitrational panel of competent jurisdiction . . . .

"Deal Team Members" is broader than simply noting actual knowledge of the insured. The Appendix to the policy states: "**Deal Team Members** shall include the principal persons who (i) supervised, reviewed or conducted any due diligence, analysis or evaluation in connection with the Purchase Agreement, and/or (ii) supervised, reviewed, prepared or negotiated the Purchase Agreement.

The policy definition of "actual knowledge" accompanying this particular policy defined it as follows:

Actual Knowledge

- with respect to a particular fact, event or circumstance means *actual conscious awareness* of such fact, event or circumstance, and
- with respect to a Breach, means *actual conscious awareness that such fact, event or circumstance constitutes a Breach*.
- Actual Knowledge *does not include* imputed or constructive knowledge.
- The Insurer shall have the burden of proof that any Deal Team Member had Actual Knowledge of any underlying fact, event or circumstance and any Breach.

Many of these policies have other related provisions. For example, some policies require a "No Claim Declaration" at closing from the Deal Team or anyone reviewing the due diligence and/or the Purchase Agreement has knowledge of a breach. Verdesca, *supra,* at 5. The policy makes this a condition precedent to coverage. Similarly, one would expect applications to potentially address this issues as well. Common law in most jurisdictions imposes the rule that one may not insure a known risk.

2. Indemnity

Some policies exclude some or a substantial part of the indemnity obligations in the Purchase Agreement:

> C. any covenant or specific indemnity set forth in the Purchase Agreement or breach of such covenant or specific indemnity (not including the tax indemnity set forth in Section _____ of the Purchase Agreement) . . . .

Note that tax indemnity is excepted.

3. Payments and Obligations Under Purchase Agreement

The policies will include multiple exclusions dealing with obligations set forth in the Purchase Agreement itself. For example, amounts paid or to be paid pursuant to adjustment provisions in the Purchase Agreement are excluded. Similarly, estimated tax benefits or relief to the Target Group and secondary tax liability of an entity other than the target group are also excluded.

4. Environmental

R&W policies often exclude specified environmental claims. For example, some specifically exclude claims relating to asbestos and polychlorinated biphenyls. Where the reps and warranties themselves specifically deal with environmental subjects, negotiations with the carrier are necessary to eliminate a dangerous gap.

5. Deal Specific Exclusions

While standard exclusions are few, underwriters will add manuscript exclusions to fit aspects of the deal they consider too dangerous. This most frequently comes up in the context of environmental or manufacturer/products exposures. Perkins Coie, *Representation and Warranty Insurance,* (https://www.perkinscoie.com/en/insurance-recovery-resource-library-1/representation-and-warranty-insurance.html.)

I. Subrogation

Sellers are subject to subrogation for acts or omissions that amount to fraud. No other subrogation appears to be reserved under standard policy terms. Subrogation is not permitted against the Target Group itself. This variation is a buy-side policy with seller protection. Again, the protection to the seller is in terms of barring the carrier from subrogating against the seller. This protects and assures payment to the buyer, but allows the seller to walk away without worrying about escrows and hold-backs.

The Insured/Seller may not waive its rights of subrogation or assignment. Thus, if a Seller fronts the retention, the policy and the Purchase Agreement must both be modified to reflect that no subrogation, even for fraud, is permitted as to amounts paid under a retention by the Seller.

VI. SOPHISTICATED INSURED DEFENSE BUILT-IN

Some policies call for an agreement that the rule of strict construction does not apply to the policy. Some recite that the policy is a fully negotiated agreement among commercially sophisticated parties.

VII. IMPACT OF POLICY ON PURCHASE AGREEMENT

A. Amendment or Assignment

The Purchase Agreement may not be amended or assigned without the consent of the carrier. Consent is not required unless the carrier's rights will be adversely affected. No term of the policy may be amended or waived without a prior written endorsement or other instrument executed between the insurer and the insured. Typically, the insured may assign rights to (i) an affiliate of the insured, (ii) a subsequent purchaser by merger or stock acquisition or sale of all or substantially all of the assets of the Insured or any of its affiliates, or (iii) to a finance party by way of granting of security or providing collateral provided that the Insured notified the Insurer of such assignment within 30 Business Days of such assignment.

B. Indemnity

An example of an indemnity clause used in a Purchase Agreement including R&W coverage is set out below:

Indemnification by the Seller Indemnitors.

From and after the Closing, and in addition to the indemnification provided in Section _____ hereof, each of the Seller Indemnitors, jointly and severally (except as set forth in Section _______), will indemnify, defend and hold the Purchaser, each Target Company and each of their respective Representatives, successors and permitted assigns (collectively, the "***Purchaser Indemnitees***") harmless from any and all Losses asserted against, relating to, imposed upon, suffered by, or incurred by a Purchaser Indemnitee as a result of, arising from or relating to:

(i) any inaccuracy in, or breach of, any (A) Fundamental Representation, (B) the representations and warranties of Seller or the other Seller Indemnitors made in any Schedule to any Fundamental Representation or (C) to the extent required by and subject to Section ____) and _____, any inaccuracy in, or breach of, any representations or warranties as identified, in any notice delivered under Section ____, and in the case of (A) or (B), any allegation by a third party that, if true, would constitute such an inaccuracy or breach; and

(ii) the breach of any covenant or agreement made by or on behalf of Seller, any other Seller Indemnitor or any Target Company in this Agreement or pursuant hereto, or any allegation by a third party that, if true, would constitute such a breach.

WITH RESPECT SOLELY TO CLAIMS ARISING UNDER ENVIRONMENTAL LAWS, INCLUDING CERCLA, THIS INDEMNITY IS INTENDED TO ALLOCATE, WITHOUT LIMITATION, STATUTORY AND COMMON LAW NEGLIGENCE AND STRICT LIABILITY CLAIMS AS WELL AS NEGLIGENCE, STRICT LIABILITY, AND ALL OTHER CLAIMS ARISING UNDER ENVIRONMENTAL LAWS, INCLUDING CERCLA.

ACCEC
American College of Coverage and Extracontractual Counsel

Trends and Features of Transactional Liability Insurance and its Effects on the M&A Marketplace

American College of Coverage and Extracontractual Counsel
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I. What is Transactional Liability Insurance?

A. Representation and Warranties Insurance Policies

Transactional liability insurance has arisen in recent years as a solution for many types of transactions in the mergers and acquisitions marketplace. Historically, after performing its due diligence and assessing relevant risks, a buyer in an M&A transaction might push for broader indemnification or a larger escrow (e.g., 10% of purchase price) as collateral against potential breaches of seller's or the target's representations and warranties. In certain circumstances, a buyer might even push for other post-closing mechanisms, such as holdbacks or earn-outs, effectively further reducing the purchase price. More recently, however, with the popularization and use of the representation and warranty insurance product, buyers can achieve a sense of comfort that, upon completion of a reasonable diligence process, recourse with respect to representations and warranties can be assured. This ultimately can result in greater certainty for the buyer and a better economic deal for the seller, which is permitted to exit the sale leaving behind less in escrow. In this way, representation and warranty insurance ("RWI") can be beneficial for both a buyer and a seller in an M&A transaction in that it can provide greater post-closing certainty for each party by providing an alternative path for risk assumption with respect to a transaction agreement's representations and warranties.

At a basic level, representation and warranty insurance protects a buyer against loss from unknown breaches of the representations and warranties of either a target company or its selling equity holders that are discovered post-closing (or even post-signing, if structured accordingly). Policies can also be obtained by sellers as a backstop against a seller's indemnification obligations post-closing (although these "seller-side" policies are far less common). Representation and warranty insurance policies can expedite the progress of a deal, create additional bid certainty in auction contexts, minimize escrow obligations or indemnification caps, extend the survival of buyer's right to indemnification, facilitate a clean exit and earlier distribution for sellers, and minimize buyer's risk with respect to seller's creditworthiness.

Insurers offering RWI will perform their own underwriting which will include a review of the data room, review of diligence reports prepared by a buyer and its representatives (shared on a non-reliance basis), and a diligence call and other discussions with buyer and its representatives. Insurers in the market today have the capacity to insure limits ranging from $1 million to over $1 billion. Typical policies, like contractual indemnity caps, have limits of liability set at 10% or 20% of enterprise value. In some cases, parties may insure a larger percentage of the enterprise value of the transaction or buy additional limits to protect specific representations, such as certain fundamental representations involving title, corporate formalities or intellectual property in the context of the sale of a technology company.

Policies typically extend six years from closing for breaches of fundamental and tax representations, with a three-year term for other representations. These term lengths are typical regardless of the length of survival of the representations and warranties in the underlying transaction documents. This means that a typical RWI policy can potentially provide an extension of coverage for a buyer under the seller's and target's representations. Most policies are subject to a retention (i.e. deductible) that typically ranges from 1% to 2% of total transaction value, which tends to be shared equally between the buyer and seller. However, when the underlying transaction is structured as a public style or no seller indemnity transaction, the retention will be borne entirely by the buyer, and the premium may be slightly increased. Policies can be structured such that the retention (or deductible), if there is one, is reduced as an escrow fund is released (typically at 12 or 18 months), and a policy will generally match the structure of the underlying deal with respect to both the materiality scrape and pre-closing tax indemnity.

Certain items, however, that may receive coverage by the representations and warranties of an underlying deal, may not be covered by a RWI policy, including: (i) known or scheduled matters, (ii) known breaches (which may be addressed via a separate contingency policy), (iii) deferred tax assets, and (iv) certain tax issues, such as net operating loss carryforwards and transfer pricing, and (v) underfunded benefit plans. Likewise, after performing diligence, an insurer may propose additional, deal-specific exclusions based on concerns arising from its own underwriting.

B. Tax Indemnification Policies

Separate tax indemnity policies may also be available to protect the insured against an adverse ruling by the Internal Revenue Service ("IRS") or other relevant taxing authority with respect to certain manifest tax risks, including the anticipated tax treatment of the underlying transaction or a given diligence issue relating thereto. Such policies can cover tax, interest, penalties, contest costs and gross-up for tax on the insurance proceeds.

A tax indemnity policy can be used to improve the odds of execution by bridging the gap between a buyer's evaluation of a particular tax issue and the seller's evaluation of the same issue. These policies do not necessarily require that a formal tax opinion be obtained, though providing insurers with some work product to underwrite can make for a more efficient underwriting process. Such policies can cover potential issues relating to S Corp. qualification and section 338(h)(10) elections, reorganizations (either that they are tax free or not more taxable than intended by the parties), tax-free spinoffs, net operating losses, section 335(e), transfer pricing, the sale of REIT shares, real estate issues or cross-border issues.

II. **History of Transactional Liability Insurance**

Transactional liability insurance has existed as a potential transaction solution since the early 1980's, when Lloyd's of London first provided tax insurance for leasing transactions. The RWI product emerged on the scene in the late 1990's. Like many products, the earliest versions were too limited in coverage and the process was too costly and time intensive to be of much use in the marketplace.[1] Today, however, the product has matured and the process has been dramatically streamlined, and the result has been the use of transactional liability insurance truly burgeoning, with over 1,000 policies underwritten in the U.S. in 2016 and approximately 2,250 worldwide. From total policy limits of under $5 billion in the U.S. in 2012, current estimates show a total of over $25 billion in limits in the U.S. for such policies in 2016 – more than a five-fold increase.

[1] https://irmka.scic.com/2015/06/04/transactional-liability-insurance/

A key catalyst for the change has been a shift in insurers' views on the diligence process. Originally, insurers would typically undertake a lengthy and independent diligence review of the target company with respect to the representations and warranties to be covered by a given policy. This process could take months in total and the engagement of multiple insurers (to see which would ultimately provide acceptable terms) and was typically intrusive to the in-process transaction. In recent years, however, insurers have become more comfortable relying upon the diligence performed by a buyer – such that the insurer's process focuses on conducting secondary diligence of the buyer's primary diligence. This approach greatly reduces both the intrusiveness of and time required by the underwriting process, making it a much more attractive solution for both buyers and sellers.[2] Additionally, insurers now staff their underwriting teams with former M&A attorneys who are familiar with applicable deal mechanics and timeframes, which enables greater customization of policies and streamlining of the underwriting process for a given transaction. Insurer initial indications of interest are typically available within days. New insurers are continuing to enter the field, increasing competitiveness and overall capacity; five new insurers entered the market in 2016 and an additional five are expected to enter by the end of this year.

III. **Current Statistics and Trends**

As discussed above, the volume of deals utilizing transactional liability insurance has been steadily on the rise in recent years. In North America, Aon Transaction Solutions alone has seen its total policy limits rise from approximately \$2.1 billion in 2013, comprising 54 total policies, to \$12.6 billion in 2016, comprising 350 policies. Over 80% of the 2016 policy limits were under RWI policies, with most of the remaining 20% under tax insurance policies. Certain features of these RWI policies, and trends relating thereto, are described below.

A. Analysis of Cost Considerations

Which party pays for a RWI policy is negotiable and, where a seller demands that buyer cover the cost, can be considered in connection with the total purchase price being offered. A typical RWI policy would carry a total cost of around 3-4% of the total insured limit under the policy, although this rate will be somewhat dependent upon the specific details of the transaction; for instance, deals without any seller indemnification provision would typically lead to a slightly higher premium for any applicable RWI policy. Rates are also dependent on the scope of coverage being secured, with significantly lower rates (for more limited coverage) generally available for non-U.S.-style transactions.

In terms of retentions (which are also referred to as deductibles) under the policy, 1-2% of total transaction value is typical. Recent competition among insurers is driving this figure down; similarly, for certain simple operations, such as a privately held REIT, insurers may only require even lower retentions. Retentions may be slightly higher (or, on the higher end of the 1-2% range) in a no-seller-indemnity structure. For practical purposes, the retention under a buyer-side RWI policy will often match the sum of the deductible and escrow in the underlying

[2] *Id*.

agreement. Relatedly, as noted above, the policy retention may drop down upon the release of the escrow funds.

B. Key Coverage Differentiators and Advantages of Utilizing RWI Policies

Key differentiators of RWI policies, as compared with standard indemnification and related provisions of a transaction agreement, include:

- *Increased policy duration* – RWI policy terms will typically exceed those for the survival of the representations and warranties of an underlying deal;
- *Coverage limits* – Insureds may purchase coverage of up to 100% of the purchase price, as opposed to a typical seller indemnity coverage of 5-10% of the purchase price;
- *Definition of Loss* – Carriers will generally only exclude categories of loss where they are excluded by an underlying agreement (i.e., "follow silence with silence"), which leaves the door open for potential recovery of consequential and multiplied damages;
- *Materiality Scrape* – Carriers will generally recognize the materiality scrape of an underlying agreement, and disregard applicable materiality qualifiers in a seller's or target's representations and warranties when determining the existence of a breach and/or calculating damages, as applicable.

Buyers and sellers may each have strong motivations for introducing RWI as an element of a transaction. In addition to the factors outlined above, buyers can use RWI in an auction process in order to distinguish their bid from other prospective purchasers, to protect key relationships in the context of a proposed management rollover, ease collection concerns (particularly from a distressed or otherwise uncreditworthy seller), or provide recourse where no seller indemnity would otherwise be possible. Sellers, on the other hand, can look to an RWI policy to reduce or eliminate post-closing indemnity obligations for unknown breaches (thus adding deal certainty), thereby reducing contingent liability, protecting passive sellers, aiding in the timely distribution of sale proceeds, expediting a sale process, and, during the sale process, attracting the best offers from prospective buyers by enhancing recourse options for those buyers.

IV. **How Transactional Liability Insurance Shapes M&A Transactions**

In the current marketplace, the availability and use of transactional insurance can often shape the form and process of the underlying transaction. Some examples from our experience, showing the operation of this influence, follow below.

A. Example A – RWI Policy to Reduce Purchase Price

A U.S. private equity fund was purchasing a manufacturer for approximately $1 billion, with a $100 million escrow/indemnity cap. The fund was approached with a proposal to replace a portion of the escrow/indemnity cap with a buyer-side RWI policy, in the hope that the fund would then be able to obtain a purchase price adjustment in the fund's favor.

A buyer-side RWI policy for $80 million excess of a $20 million deductible was negotiated and placed, which provided coverage broader than the seller indemnity. Additionally, the policy period extended for the standard six years for all fundamental and tax representations and warranties, and the retention would be reduced to $4 million after 18 months in conjunction with the release of the escrow. In connection therewith, the fund was able to negotiate an ultimate purchase price of $975 million – about $22 million less than initially contemplated (after taking into account the insurance cost).

B. Example B – "Stapled Insurance Package" to Minimize Escrow and Indemnity

A U.S. private equity firm was preparing to sell a $400 million manufacturing company through an auction process. The target company was the last of 15 divestitures from a holding company, and therefor had numerous hanging indemnities from past sales, plus potential tax and environmental issues. The seller hoped to effect the sale on an "as is" basis, in order to have no surviving indemnities or escrow post-closing.

Before commencing the auction, quotes were structured and obtained for a package of representations and warranties, tax and environmental insurance in favor of an eventual purchaser. Prospective purchasers were directed to work with Aon, and the private equity firm made it known that it would provide no indemnities. Ultimately, the RWI policy was able to cover the hanging liabilities from the holding company's prior transactions in addition to the representations relating to the target transaction, and the transaction agreement had no survival period and provided a credit against the purchase price for the insurance cost (which amounted to 1% of transaction value). Through this approach, the seller was able to encourage more bids and a better ultimate sale price than it had anticipated. Additionally, because the prospective insurers had already vetted the applicable risks, buyer's due diligence process was generally smooth and straightforward, which helped contribute to a successful auction process.

C. Example C – RWI Policy to Ease Collection Concerns

A publicly-traded company in the manufacturing industry had purchased the diesel engine business of another publicly-traded manufacturing company for approximately $150 million. The parties negotiated a $3 million escrow and a $20 million cap on indemnification for breaches of representations and warranties, but the buyer was concerned about its ability to collect under the indemnification provisions of the agreement because the seller was in danger of becoming insolvent at the time of the sale.

To resolve these issues, an RWI policy for the buyers was structured and negotiated that provided a primary recourse to the buyer above the amount of the escrow. The policy had a $20 million limit and a $3 million retention (which was equal to the escrow). The parties further were able to amend the purchase agreement in order to provide that the seller would only have liability in the amount above the escrow in the event that the policy did not provide coverage, and in return the seller agreed to pay 50% of the policy's premium.

D. Example D – Cross Border Tax Insurance

A non-U.S. company sought to purchase the shares of a U.S. manufacturing corporation from a private equity seller. The buyer's due diligence revealed that a prior restructuring transaction might be taxable under complex consolidated return regulations. This was unexpected, because the private equity firm had received a legal opinion that the transaction should be tax-free. This opinion, however, was based on several assumptions about events that did not ultimately occur. The private equity firm refused to provide the buyer with full tax indemnity. The buyer had 10 days remaining in its period of exclusivity with the target (which included the Christmas holiday), and the private equity firm was unwilling to extend the exclusivity period.

A tax insurance policy was put in place to insure the buyer against the tax liability risk as a result of the restructuring not being treated as a tax-free transaction. The tax insurance policy had a $50 million limit and a seven-year term, and was bound within the remaining 10 days of the exclusivity period, which allowed the sale and purchase agreement to be executed within the remaining window. The deal closed several weeks later.

E. Example F – Tax Free Spinoff

A public company client, which was a leading foreign multinational in the manufacturing industry, spun off a U.S. business unit. Less than a year later, the client sold that unit to a private equity firm. IRS policy limited the ability of the taxpayers to obtain "comfort" rulings on wither the spin-off transaction qualified for tax-free treatment under Section 355 of the Tax Code. For example, the IRS will not rule on certain key technical aspects such as the "business purpose," "device" and Section 355(e) "plan requirements." The potential tax liability was approximately $270 million.

Due to the magnitude of the risk, the client sought a tax insurance policy to protect against a successful IRS challenge of the tax-free nature of the spin-off. Aon Transaction Solutions structured and secured the largest tax insurance policy placed in the previous decade for a $350 million limit, with a $5 million retention and a seven year term. The tax opinion policy covered (1) the full amount (less the retention) of potential U.S. federal and state income taxes, plus interest and penalties, following a successful challenge by the IRS, and (2) a "gross-up" (up to the $350 million limit) for the tax on any proceeds received by the client under the tax opinion policy.

V. **Claims**

Because the use of RWI has become widespread, substantial data is now available regarding the types of claims most likely to arise in connection with these policies. The following are brief summaries of Aon's and AIG's respective experience from claims under RWI policies.

A. Aon's Experience

Aon's transactional liability insurance clients in North America seem to be experiencing claims with frequency that matches the increased use of the insurance solution in M&A

transactions. Claims under RWI policies result most frequently from breaches of representations relating to financial statements (31% of all claims known to date), followed by claims relating to intellectual property (19%), tax matters (19%) and employment matters (15%), and with the remainder of claims stemming from breaches of environmental (8%) or product liability and recall (8%) representations. When considered on an annual basis, approximately 14.6% of deals in 2013 with RWI policies gave rise to claims, and the figures were similar for other years, at 17.6% for 2014 policies and 13% for 2015 policies. Thus far, 4.7% of 2016 policies have given rise to claims notices.

In total, since 2014, there have been 82 claims under Aon R&W policies – 70 total claims arose in 14.7% of all buy-side policies and 12 total claims arose in 35% of all sell-side policies. Of 145 claims since 1999, 73 remain open and are early in the claims process, 25 were resolved within the applicable retention, 17 have been inactive/dormant, 16 resulted in loss payment and just 4 were ultimately denied by the insurer.

B. AIG's Analysis

AIG's data[3] was similar to Aon's in several respects, but broke claims down into different categories. AIG's analysis conformed to that of Aon with respect to breaches of reps relating to financial statements being the most likely category of rep likely to give rise to a claim (at 20% of all such claims under AIG RWI policies). This was followed by claims relating to compliance with laws (15%), breaches of representations relating to contracts (14%) and tax matters (14%), intellectual property (8%) and employment matters (8%), breaches of fundamental representations (7%), and finally environmental issues (5%), litigation (5%) and operations related matters (5%). In AIG's analysis, approximately one in five policies issued globally (21%) had claims presented thereunder. When 2015 is included in the relevant period, the ratio falls to 18%.

VI. Conclusion

RWI is now an accepted means for buyers and sellers in M&A transactions to "bridge the gap" in negotiations relating to representations and warranties and related mechanisms for recovery. More broadly, transactional insurance has developed to address and solve for an increasingly broad slate of M&A risk-allocation issues. Given the continued robust interest from insurers and buyers and sellers alike, forecasts project continued growth in the years to come.

[3] AIG Mergers & Acquisitions 2017 Claims Report, available at https://www.aig.com/business/insurance/mergers-and-acquisitions/mergers-acquisitions-claims-reports

A Primer on the Ethics and Potential of Social Media in Insurance Practice

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Introduction

Nearly a decade after the launch of Twitter and Facebook, the reach and power of social media is undeniable. As defined by the National Association of Insurance Commissioners (NAIC), social media, in its many forms, is a novel method of communication through use of a "group of Internet-based applications that allow for the creation and exchange of user-generated content."[1] Approximately 69% of the American public now uses some form of social media, compared to 5% in 2005.[2] This technology has fundamentally changed how people and businesses share information, develop relationships, and exert influence.

Notwithstanding the rise of social media nationally, its potential as a tool for litigators has yet to be fully realized. Guidance on ethical issues arising from use of social media is similarly undeveloped, and remains largely jurisdiction- and case-dependent. Although courts have traditionally looked to the American Bar Association's Model Rules of Professional Conduct for ethics guidance, the ABA and Model Rules have just begun to develop guidance on the ethical implications of social media. In contrast, state courts and bar associations — the New York State Bar Association in particular[3]— have been on the forefront of addressing and synthesizing approaches to the ethical quandaries raised by social media.

This article discusses the emerging guidance concerning the use of social media by legal professionals and how these principles apply in the context of insurance coverage practice. There are both established rules that apply to lawyer conduct and newly developed rules specifically focused on social media use. Under the Model Rules, lawyers have a duty of competence and are encouraged to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology,"[4] such as social media. Lawyers in many jurisdictions are also subject to an ancillary duty to anticipate and "to assess at the outset of each case what electronic discovery issues might arise during the litigation, including the likelihood that e-discovery will or should be sought by either side."[5] A baseline understanding of how social media works is necessary for ethical practice.

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[1] *The Use of Social Media in Insurance*, National Association of Insurance Commissioners, www.naic.org/store/free/USM-OP.pdf (2012).

[2] Pew Research Center, *Social Media Fact Sheet*, www.pewinternet.org/fact-sheet/social-media/ (Jan. 12, 2017).

[3] *Social Media Ethics Guidelines*, N.Y. State Bar Ass'n, Commercial & Fed. Litig. Sec., www.nysba.org/socialmediaguidelines17 (updated May 11, 2017).

[4] ABA Model Rules of Professional Conduct R. 1.1, cmt. 8, *available at* www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html.

[5] E.g., State Bar Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. No. 2015-193 (2015), *available at* www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL%202015-193%20%5B11-0004%5D%20(06-30-15)%20-%20FINAL.pdf.

Primary Consequences: Relationships and Investigation

Broadly speaking, there are two ways in which social media affects the practice of insurance lawyers. The first is by offering a new medium to engage with clients and the general public. The second is by providing a new tool for fact investigation —unmatched in low cost and the type of information that can be gleaned — which can be employed outside formal discovery, even before litigation.

Social Media to Build Relationships

A primary consideration among state bars and even insurance regulators[6] is how professionals use social media to advertise to or communicate with members of the general public. The New York State Bar Association's Social Media Ethics Guidelines, for example, explain what content on an attorney's LinkedIn page transforms the page into attorney advertising that requires disclaimers.[7] A page might be rendered attorney advertising based on representations that an attorney is an expert[8] or even by a list of various insurance-related "skills"[9] on his or her LinkedIn profile. Similarly, a professional who answers insurance-related questions posed by another social-media user should ensure that an attorney–client relationship is not inadvertently created. This can happen if the lawyer discusses pending cases and provides legal advice.[10]

Although ethical issues arising from use of social media are often inadvertent and subtle, there are more blatant incidents that raise the possibility of severe sanctions. In 2015, for example, an attorney practicing in Louisiana was disbarred for making multiple posts that encouraged others to call two judges involved in separate custody hearings in order to "ask why they won't follow the law" or protect children.[11]

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[6] *See The Use of Social Media in Insurance*, National Association of Insurance Commissioners, www.naic.org/store/free/USM-OP.pdf (2012).
[7] *Social Media Ethics Guidelines*, N.Y. State Bar Ass'n, Commercial & Fed. Litig. Sec., www.nysba.org/socialmediaguidelines17 (updated May 11, 2017) (describing what "information posted on a lawyer's LinkedIn profile may require that the profile be deemed 'attorney advertising'").
[8] Christina Vassiliou Harvey et al., *10 Tips for Avoiding Ethical Lapses When Using Social Media*, Bus. L. Today (Jan. 3, 2014) (discussing S.C. Ethics Op. 12-03 and N.Y. State Ethics Op. 972), *available at* www.americanbar.org/content/dam/aba/publications/blt/2014/01/avoiding-ethical-lapses-201401.authcheckdam.pdf.
[9] LinkedIn "skills" related to insurance include Insurance, HIPAA, Commercial Insurance, Health Insurance, Property & Casualty Insurance, General Insurance, Life Insurance, Casualty Insurance, Disability Insurance, Insurance Planning, Term Life Insurance, Umbrella Insurance, Insurance Law, Directors and Officers Liability Insurance, Insurance Brokerage, Whole Life Insurance, Marine Insurance, Long Term Care Insurance, Insurance Claims, and Travel Insurance.
[10] Elizabeth S. Fitch & Theodore M. Schaer, *Defining Attorney-Client Relationships in the Electronic Age*, Law360, www.law360.com/articles/831576/defining-attorney-client-relationships-in-the-electronic-age (Aug. 26, 2016).
[11] Debra Cassens Weiss, *Lawyer is Disbarred for 'Social Media Blitz' Intended to Influence Custody Case and Top State Court*, ABA Journal Daily News, www.abajournal.com/news/article/lawyer_is_disbarred_for_social_media_blitz_intended_to_influence_custody (July 8, 2015).

Social Media to Build a Case

Perhaps more significant to insurance practice, social media has been often referred to as a "gold mine" of information.[12] By simply accessing a person's Twitter page, for example, it is possible to "create a map of the history of the date and times where a person was."[13] Indeed, for years, social media has been used by insurers and claims handlers to uncover evidence of fraudulent auto, fire, burglary, life, and workers' compensation claims. *See, e.g.*, *Nationwide Mut. Fire Ins. Co. v. Almco, Ltd.*, 179 F. Supp. 3d 97, 104 (D.D.C. 2016) (citing evidence from a business's Facebook account that it operated as a nightclub and not just as a deli); *State Farm Fire & Cas. Co. v. Rollins*, 187 F. Supp. 3d 638, 642–44 (E.D. Va. 2016) (citing evidence from Facebook account of an insured under a homeowner's policy that she provided child care services).[14]

More broadly, however, social media can be used to research stakeholders throughout the litigation process. With approximately 79% of online Americans (or 68% of U.S. adults) using Facebook in 2016,[15] troves of personal information can be extracted with the click of a mouse. The information — from a user's network of connections, to what they "follow" and "like" — might be critical in showing biases that otherwise would be impossible or impractical to uncover. In addition, the availability of this information outside formal discovery means that it can be researched and collected by anyone at any time, even before a lawsuit.

Notwithstanding the substantial opportunities available with social media, there are risks to using it as an investigatory technique. In particular, investigators should differentiate between publicly available information (which can be seen by anyone with an Internet connection and social-media account) and restricted information (which is protected by a user's privacy settings). Even though it is generally proper to collect publicly available information, a lawyer should refrain from seeking to access restricted information through deceptive means, such as by creating a "fake" social-media profile and "friending" the target user. Similarly, lawyers should refrain from communicating with or attempting to collect restricted information about individuals represented by counsel.[16] As to judges or jurors, there tends to be more diversity of opinion on the propriety of using social media as a research tool; but at minimum, lawyers should refrain

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[12] Saleel V. Sabnis, *Attorney Ethics in the Age of Social Media*, ABA Sec. of Litig. on Prof'l Servs. Liab., apps.americanbar.org/litigation/committees/professional/articles/spring2016-0616-attorney-ethics-age-social-media.html (June 8, 2016).

[13] Ian Lopez, *Is Social Media a Goldmine for Collection?*, Legaltech News, www.legaltechnews.com/id=1202755594239/Is-Social-Media-a-Goldmine-for-Collection?slreturn=20170725183510 (Apr. 21, 2016).

[14] *See also Archived Key Issue: Social Media*, NAIC & Center for Insurance Policy & Research, www.naic.org/cipr_topics/topic_social_media.htm (June 3, 2015) ("Insurance companies use social media not just to market insurance products; they are also using social media to discover insurance fraud.").

[15] Pew Research Center, *Social Media Update 2016*, www.pewinternet.org/2016/11/11/social-media-update-2016/#fn-17239-1 (Nov. 11, 2016).

[16] N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. No. 843 (Sept. 10, 2010), *available at* www.nysba.org/CustomTemplates/Content.aspx?id=5162; Robert Keeling, *Social Media is a Powerful Tool, But Be Wary of Ethical Pitfalls*, Corp. Counsel, www.corpcounsel.com/id=1202746988835/Social-Media-Is-a-Powerful-Tool-But-Be-Wary-of-Ethical-Pitfalls (Aug. 27, 2017).

from doing anything that might be deemed an ex parte contact or otherwise give the appearance of impropriety.[17]

Attorneys also should be mindful that social media can present spoliation issues. In particular, all parties subject to hold notices should ensure that any potentially relevant social-media content is properly preserved. Before litigation, however, a lawyer may advise a client to restrict information on social media, as long as information that would be relevant to a “reasonably foreseeable proceeding” is preserved in some form.[18] Indeed, the consequences of conspiring to improperly alter a client’s or witness’s social media can be steep. A Virginia lawyer was sanctioned $542,000 for instructing a paralegal to “clean up” a client’s Facebook page that contained photos of the client drinking a beer and wearing a T-shirt emblazoned with “I ♥ hot moms.”[19]

In the context of insurance practice, there are likewise benefits and downsides to using social media. Insurers can use social media to aid the underwriting process, such as by identifying loss exposures or lucrative niche markets. But they could also abuse social media by uncovering embarrassing information to pressure an insured to accept a lower settlement of an insured claim. Insureds also might use social media to demonstrate that an insurer is acting in bad faith in connection with a specific claim or types of claims — in other words, to demonstrate a pattern or practice of improper claims handling. For example, social media provides a public forum for insureds to air grievances and warn others of abusive claims handling. If those grievances suggest a pattern or practice of an insurer unfairly denying claims — or if information was improperly collected and used by an insurer — social media could support claims for bad faith, based on an insurer’s unfounded refusal to pay proceeds due under a policy.[20] *See, e.g., Schultz v. Sentinel Ins. Co.*, Ltd., 2016 WL 3149686, at *13 (D.S.D. June 3, 2016) (recognizing relevance of discovery request that “may tend to show a pattern or practice of business conduct by [an insurer] that shows it denied claims it knew were covered, or that it acted with reckless disregard in denying such claims”); *Stephens v. State Farm Fire & Cas. Co.*, 2015 WL 1638516, at *5 (M.D. Pa. Apr. 13, 2015) (“[I]t is clear that in some instances examples of similar, wrongful conduct in the processing other insurance claims may permit an inference that there is a pattern or practice of misconduct on a defendant’s part.”).

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[17] *E.g.*, ABA Formal Op. No. 466 (Apr. 24, 2014), *available at* www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf; ABA Formal Op. No. 462 (Feb. 21, 2013), *available at* www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf; *see also* Carolina Bolado, *Judge’s Facebook Friendship Isn’t Disqualifying: Fla. Court*, www.law360.com/articles/957029/judge-s-facebook-friendship-isn-t-disqualifying-fla-court (Aug. 23, 2017) (noting split in Florida courts on whether friending of judges on social media is suggestive of impropriety).

[18] E.g., Fla. Bar Prof’l Ethics Op. 14-1 (June 25, 2015), *available at* www4.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+14-1!OpenDocument&Click=.

[19] *Allied Concrete Co. v. Lester*, 736 S.E.2d 699, 702–03 (Va. 2013).

[20] *See, e.g.*, Gerald Albrecht, Rick Hammond & Matthew Smith, *Good Faith, Bad Faith: A Legal View*, Insurance Committee for Arson Control, www.butler.legal/files/22660_2016_GoodFaithBadFaithFINAL.pdf (2016) (synthesizing various frameworks for bad-faith claims).

Conclusion

Although ethical guidance pertaining specifically to social media is still being developed, attorneys practicing in the insurance area should be familiar with existing law and guidelines in the meantime, and also consider how general rules of professional conduct apply in the use of social media in both their professional and personal lives.

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Gaining Entry Into a Social Networking Account: Is There a Right of Privacy to Information Posted on Facebook and MySpace?

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Background

It should come as no surprise that many insurers are examining social networking websites in tandem with their investigation of insurance claims. In fact, several cases of insurance fraud have been uncovered, surprisingly, because people posted information to their Facebook or MySpace profiles that *supplied* proof of fraud and, apparently, because they never expected that their social media accounts would be targeted as a possible source for information. In other cases, people were of the mistaken belief that the security settings on their social media account would bar anyone from being able to view its content without their permission.

The question becomes, under what circumstances will a court permit someone to gain entry into a person's social networking account without their permission? While many courts are playing "catch up" on this techno-legal question, a few states have addressed this issue. And, a recent case out of New York helps to offer some guidance.

Kathleen Romano v. Steelcase Inc., Supreme Court of New York, Suffolk County – 2010 NY Slip Op 20388; 30 Misc. 3d 426; 907 N.Y.S.2d 650

Kathleen Romano claimed that she incurred permanent injuries when she fell off a chair that had allegedly been manufactured and distributed by the defendants. As a result of the fall, she claimed to have suffered restricted movement in her neck and back, pain and progressive deterioration, injuries that affected her enjoyment of life and claimed to be confined to her home.

At the same time, however, Romano's Facebook profile page showed her smiling happily in a photograph outside the confines of her home. In addition, both her Facebook and MySpace pages suggested that she had an active lifestyle, and had traveled to Florida and Pennsylvania during the same period that her injuries supposedly precluded such activity.

In light of these discrepancies, Steelcase deposed Romano and attempted to question her about the content of her social media accounts, but to no avail. Following her deposition, Steelcase served her with discovery that requested, among other things, authorization to obtain full access to her Facebook and MySpace accounts. Steelcase also issued subpoenas to both providers, but Facebook objected on the basis that it couldn't release a person's profile information without his or her consent.

Allegedly, Romano refused consent to the release of any content contained in her social media accounts, and she filed a motion to quash the subpoenas on several privacy related grounds. Therefore, Steelcase filed a motion seeking access to her current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information on the grounds that the *public* portions of these sites reflected material that was contrary to her alleged injuries and deposition testimony, and on the grounds that the *private* portions of these sites likely contained evidence that was material and relevant to their defense of her claims. Steelcase argued that preventing their access to her private postings would be in direct conflict with New York law, which states that "there shall be full disclosure of all non-privileged matter which is material and necessary to the defense or prosecution of an action."

Romano responded by asserting her Constitutional right to privacy. However, the court noted that the Fourth Amendment's right to privacy protects *people not places*. Thus, *what* a person knowingly exposes to the public is not a subject of Fourth Amendment protection. Notwithstanding, the court further noted that in order to determine whether a right to privacy exists, a reasonableness standard must generally be applied.

Neither Facebook nor MySpace Guarantee Complete Privacy

It is interesting to note at this point that neither Facebook nor MySpace guarantee complete privacy. For example, MySpace warns users that their profiles are public places; and Facebook's privacy policy has stated that:

> When you use Facebook, certain information you post or share with third parties (e.g., a friend or someone in your network), such as personal information, comments, messages, photo, videos … may be shared with others in accordance with the privacy settings you select. All such sharing of information is done at your own risk. Please keep in mind that if you disclose personal information in your profile or when posting comments, messages, photos, videos, marketplace listing or other items, this information may become publicly available.
>
> Although we allow you to set privacy options that limit access to your pages, please be aware that no security measures are perfect or impenetrable.

On that basis, the court held that when Romano created her Facebook and MySpace accounts, she arguably consented to the fact that her personal information would possibly be shared with others, notwithstanding her privacy settings; and that this is the very nature and purpose of these social networking sites; else they would cease to exist. The court further held that Steelcase's need for access to the information outweighed any privacy concerns that may be voiced by Romano.

To permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial.

"Fishing Expeditions" into a Person's Social Network Account is not Allowed

Although no previous New York case addressed the issue of whether a person has a right to privacy regarding information they post on social media such as Facebook and MySpace, other jurisdictions have examined these issues. For example, the court in this case cited a Canadian court's ruling in *Bishop v. Minichiello*, 2009 BCSC 358, CanLII, 2009, which held that the hard drive of a plaintiff's computer should be produced to the defendant in order to determine how much time the plaintiff spent on Facebook.

The court also cited to another case (*Ledbetter v. Wal-Mart Stores, Inc.*, 2009 WL 1067018, 2009 LEXIS 126859, D. Colo. 2009), wherein the plaintiff moved for a protective order seeking to bar the production of his social media content. However, the court denied the plaintiff's motion and held that the information was reasonably calculated to lead to the discovery of admissible evidence, and was relevant to the issues in the case. It's also interesting to note that other courts have required plaintiffs to produce in discovery their passwords and login information to their social networking accounts.

Not surprisingly, some courts have reached opposite conclusions. For example, in *McCann v. Harleysville Insurance Company of New York*, 2010 N.Y. App. Div LEXIS 8396, 2010, the court held that before a defendant will be granted access to the contents of the plaintiff's social media account, they must provide a specific reason to seek such information, and that a "fishing expedition" will not be tolerated. In other words, courts generally appear to be in favor of allowing the examination of content within a person's social networking account, so long as, the request is relevant in scope, and evidence that reflects that the account will likely contain non-privileged matter which is material and necessary to the defense or prosecution of the case.

Accordingly, when interviewing an insured or claimant as part of a claims investigation, or when deposing a witness or issuing discovery, consideration should be given to asking questions concerning whether a social media account exists and concerning the type of information contained therein.

That said, in this case, after hearing all of the arguments and evidence presented, the court granted Steelcase's motion for an order granting access to Romano's current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information.

Conclusion

It is important to note that information gained by viewing a person's social networking account should not be considered as conclusive evidence. Thus, many people embellish their profiles and activities on the internet. Also, it can be difficult to draw evidentiary conclusions from internet photos or postings that lack a basis to establish their authenticity or the time and date of their creation.

Insurance investigators should also be cautioned against "friending" someone through the use of impersonation or false information in order to gain access to that person's social networking account. Such conduct would likely be viewed as deceptive, a form of misrepresentation and lacking in good faith by a court. In addition, communication with individuals that are represented by legal counsel, via the use of social media, should also be avoided. Finally, it is also important to note that many insurers have strict procedural guidelines concerning the proper use of their company computer equipment by employees. Accordingly, claims investigators should strive to remain in full compliance with their company's procedural guidelines in regard to these issues.

Beyond Champerty:
The Rise of Third Party Litigation Funding

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I. Third Party Litigation Funding

From its humble beginnings in the United States twenty years ago, third party litigation funding is clearly on the rise. A 2017 survey found that nearly 30 percent of attorneys in private practice had used alternative litigation funding compared to a mere 7 percent a few years earlier. Interest in third party litigation funding has also been spurred by the increased cost of commercial litigation, notably intellectual property disputes, and the interest of corporations in removing litigation exposures from their balance sheets. Finally, there has been a significant uptick in publicity and press reporting concerning third party litigation funding in the wake of the disclosure that Silicon Valley billionaire Peter Thiel secretly underwrote the cost of Hulk Hogan's suit against the Gawker web site for distributing a private sex tape.

In 2016, the Wall Street Journal reported[1] that Los Angeles trial lawyer Raymond Boucher, architect of a $660 million settlement for California clergy-abuse victims, has taken out several million dollars in funding from publicly-traded litigation financer IMF Bentham. The Journal has separately reported that pension funds, university endowments, and private offices "have collectively pumped more than a billion dollars" into litigation finance vehicles.

The rise of third party litigation funding has not come without obstacles, however. As discussed below, many jurisdictions and corporate interests have sought to block or limit this practice on the basis of old common law doctrines, such as barratry, champerty and maintenance. In recent years, however, many of these obstacles have fallen away. Indeed, there is a substantial body of academic literature that proclaims the virtues of third party litigation funding and questions why involving third parties in funding litigation should be more dangerous or ethically problematic than allowing insurers to control and pay for the defense of civil law suits.

In this paper we will explore the current contours of the third party litigation funding debate and its potential implications for the future rights of insureds and insurers.

II. Common Law Antecedents: Barratry, Champerty and Maintenance

"Barratry" is the practice of filing vexatious litigation. During the Middle Ages, the authorities could prosecute individuals who "stirred up" litigation by encouraging plaintiffs to bring suit. "Maintenance" is "an officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend [the suit]." Thus, *any* third-party support for a lawsuit theoretically constitutes maintenance. "Champerty" is a form of maintenance that involves "maintaining a suit in return for a financial interest in the outcome." "Because money is solicited from disinterested parties to fund litigation," usually in return for a share of the proceeds, "syndicated lawsuits, by

[1] https://www.wsj.com/articles/litigation-financing-attracts-new-set-of-investors-1463348262

definition, constitute champerty." As the U.S. Supreme Court succinctly declared in ***In re** Primus,* 436 U.S. 412, 424 n. 15 (1978):

> Put simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty.

Champerty and maintenance began in antiquity with the Greek view that even a party's advocate should have a personal interest in the litigation, such as family ties. Max Radin, *Maintenance by Champerty,* 24 Cal. L. Rev. 48, 49 (1935). During the Middle Ages, the antipathy of the English clergy and royals to lawsuits, particularly in secular courts, combined with fear that English barons would purchase land with clouded title to increase their estates and otherwise abuse the legal process by purchasing meritorious claims for insignificant amounts from plaintiffs too poor to prosecute their own actions resulted in royal regulation of champerty and maintenance. *Id*. at 64-66. These "champertors" had paid retainers – known as "maintainers" – prosecuted the suits ruthlessly on their behalf, taking "all necessary steps to win." Because kings soon found themselves the target of this vexatious litigation, and because of a general distaste for litigation in general, laws against champerty and maintenance were born.

III. Relaxation of Traditional Restraints on Third Party Litigation Funding

As medieval suspicion of litigation gave way to the age of commerce, most of these old-fashioned limitations on champerty and maintenance have been relaxed or abandoned. Traditional bars to champerty were set aside by the Australian High Court and courts in the United Kingdom in the earlier years of this century. With the removal of common law bars to litigation finance, markets were free to develop. The fact that Australia and the United Kingdom are so far ahead of the United States with respect to the evolution of alternative litigation financing may well reflect the fact that both have "loser pays" judicial systems, whereas in the United States, both parties typically are responsible for their own costs and attorney's fees. Additionally, Australia did not permit contingency fee arrangements of the sort that have commonly permitted injured individuals with limited assets to seek recovery against well-funded corporations in the U.S. and elsewhere.

In recent years, U.S. courts have largely relaxed earlier restrictions with respect to the ability of a plaintiff to assign a chose in action. Such suits may be assigned as a matter of right or contract pursuant to insurance policies, for instance, thus allowing insurers to pursue subrogation actions arising out of losses that they have paid on behalf of their policyholders. Beyond the insurance context, however, courts have frequently permitted plaintiffs to assign a chose in action even for claims that are personal to the plaintiff such as malpractice or invasion of privacy.

South Carolina, Massachusetts, New York and West Virginia, have significant limitations on champerty, while others – Arizona, California, Louisiana, New Jersey and Texas – either never adopted it or have since abandoned it. See Bond *Comment Making Champerty Work: An Invitation to State Action*, 150 U. Pa. L. Rev. 1297 (2002) (fifty state survey).

In *Saladini v. Righellis*, 687 N.E.2d 1224, 1226 (Mass. 1987), Righellis obtained a loan from Saladini to help him pursue legal claims arising from his interest in certain real estate. Saladini made the loan in return for a contingent interest in the recovery: his loan principal would be repaid from the first proceeds, plus he would receive 50% of any net recovery after attorney's fees. When Saladini attempted to enforce this agreement, Righellis defended by invoking champerty and maintenance.

The Supreme Judicial Court of Massachusetts rejected this defense, declaring that it was "no longer persuaded that the champerty doctrine is needed to protect against the evils once feared: speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining position. . . ." The court noted that the view of litigation as "social ill" is long outdated. It also recognized that application of the champerty doctrine would provide the litigant with a windfall: Righellis would get to keep the litigation proceeds, while Saladini, whose financial contribution made the recovery possible, would end up with nothing. According to the court, fee regulations, sanctions rules, and the doctrines of unconscionability, duress and good faith are more than sufficient to prevent the "evils" that champerty was originally designed to address. Financing arrangements, the Court continued, should be analyzed on a case-by-case basis, with a focus on "whether the fees charged [are] excessive or whether any recovery by a prevailing party is vitiated because of some impermissible overreaching by the financier."

Likewise, in South Carolina, the state Supreme Court ruled in *Osprey, Inc. v. Cabana Limited Partnership,* 532 S.E.2d 269, 279 (S.C. 2003) that, "We abolish champerty as a defense because we believe it no longer is required to prevent the evils traditionally associated with the doctrine as it developed in medieval times." Restrictions on champerty were also set aside by the Kentucky Supreme Court in *McCullar v. Credit Bureau Systems*, 832 S.W.2d 887 (Ky. 1992).

Nevertheless, a significant number of states continue to maintain traditional restrictions on champerty and maintenance. For instance, in Minnesota, courts have declared that, "An agreement in which a party had had no interest otherwise, and when he is in no way related to the party he aids, is champertous and void as against public policy." *Johnson v. Wright,* 682 N.W.2d 671, 678 (Minn. Ct. App. 2004). Similarly, in Delaware, courts have declared that, "It is the duty of court to dismiss a case in which the evidence discloses that the assignment of the cause of action sued upon was tainted with champerty." *Hall v. State,* 655 A.2d 827, 829-30 (Del. Super. Ct. 1994).

In June 2003, however, the Supreme Court of Ohio dealt a severe blow to the litigation funding industry. In *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 213 (Ohio 2003), the court ruled that a funding company's advance to a litigant in return for a percentage of the recovery was void under principles of champerty and maintenance.

Rancman had been seriously injured in a car crash, and had sued an insurance company for damages. Apparently in need of funds while the case was pending, she contacted Interim Settlement Funding Corporation ("Interim") to obtain a cash advance secured by her pending claim. Interim agreed to advance her $6,000 in exchange for the first $16,800 she would recover if the case resolved within 12 months, with higher payments due if the case took longer to resolve. If she did not obtain a recovery, she would pay nothing.

Rancman settled the case for $100,000 within 12 months, but refused to pay Interim the amount due under the contract. She eventually sued for rescission, and prevailed in the lower court on the ground that Interim's advance constituted a usurious loan.

On appeal, Interim argued that the advances were not loans at all, but investments (since there was no absolute obligation to repay). The Supreme Court of Ohio ruled that "[t]he advances here are void as champerty and maintenance regardless of whether they are loans or investments." The advances constituted champerty because "Interim sought to profit from Rancman's case," and constituted maintenance because Interim "purchased a share of a suit to which [it] did not have an independent interest" through an arrangement that "provided Rancman with a disincentive to settle her case."

Specifically, the Court noted that Rancman, in return for her $6,000 advance, had to pay Interim the first $16,800 she received in settlement and also had to pay her lawyer a 30% contingency payment. Thus, she would pocket nothing for herself unless the settlement exceeded $24,000. According to the Court, this created "an absolute disincentive" to settle for a lower amount, and resulted in prolonging the litigation. Meanwhile, the court concluded, Interim earned a "handsome profit by speculating in a lawsuit."[2]

Champerty also remains viable in many states pursuant to common law. In a recent Nevada case, for instance, the District Court observed that:

> Although champerty has not been a tort in England since 1967, *see* Criminal Law Act, 1967, c. 58, § 13(1)(a) (Eng.), unless superseded by state or federal law, the common law of Nevada is the statutory and common law of England as it existed at the signing of the Declaration of Independence. . . . Notably, although the Criminal Law Act of 1967 eliminated champerty as a crime and tort, it remains a valid contractual defense within the United Kingdom. . . . And even if the United Kingdom had eliminated champerty as a contractual defense, by statute the fork in the road between the common law of England and that of Nevada was the signing of the Declaration of Independence, and the Nevada Supreme Court explicitly reaffirmed the contractual defense of champerty less than fifteen years ago. *See Schwartz v. Eliades,* 939 P.2d 1034, 1036–37 (Nev. 1997) ("Although we concluded above that the district court erred by finding champerty, had there actually been a champertous agreement, Eliades would not have been entitled to restitution of the money he paid under the void agreement."). In

[2] Ohio has since enacted a statute regulating champerty practices.

> fact, this language indicates that in Nevada a champertous agreement is not only voidable, but void.

Incline Energy, LLC v. Penna Group. LLC, 2011 WL 1304710 (D. Nev. Apr. 1, 2011).

Legislative efforts to reinstate limitations on champerty failed in Texas in 2007 when the Texas Senate failed to approve House Bill 2987. In 2013, the Texas Legislature proposed a statute that would significantly limit the ability of third-party financiers to fund litigation by characterizing such agreements as a form of consumer legal funding subjecting it to interest rate limitations.

Efforts at reform also failed in Illinois several years ago when the state House voted 87-28 to kill the so-called "Law Suit Loan Shark Act." Senate Bill 3322, the Non-Recourse Civil Litigation Funding would have:

> Provides that all contracts for non-recourse civil litigation funding must meet specified criteria. Provides that the contract shall provide that the consumer may cancel the contract within 5 business days following the consumer's receipt of funds, without penalty or further obligation. Specifies the notice requirements for contracts. Contains provisions concerning the dispute of contracts. Provides that each non-recourse civil litigation funding company shall adhere to specified best practices. Contains provisions concerning (1) the sale and assignment of proceeds of legal claims and (2) the requirements for non-recourse civil litigation funding companies by the Department of Financial and Professional Regulation. Provides that the Department shall maintain a list of all non-recourse civil litigation funding companies. Contains provisions concerning the power of the Department to issue cease and desist orders. Specifies penalties for violation of the Act. Contains provisions concerning judicial review and application of the Act. Amends the Consumer Installment Loan Act to exclude non-recourse civil litigation funding

It has been reported[3] that Florida, Ohio, New York and Texas are the states that are most accommodating to third party financing of litigation. Conversely, Alabama, Colorado, Kentucky, and Pennsylvania are among the states that are most hostile to it.

Fifteen states still enforce common law prohibitions against maintenance in champerty. See *Johnson v. Wright*, 682 N.W.2d 671 (Minn. App. 2004) and *Fleetwood Area School District v. Berks County Board of Assessment Appeals*, 821 A.2d 568 (Pa. Super. 2003). Conversely, 28 states and the District of Columbia permit litigation funding with certain limitations including Delaware, New York and California.

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[3] "The Best and Worst States for Litigation Finance" (Above the Law 2017). http://abovethelaw.com/2017/07/the-best-and-worst-states-for-litigation-finance-part-ii/

Other states continue to maintain restrictions on champerty but do so in a sense that appears more geared towards preventing barratry as by focusing on whether the third party was instrumental in the decision to bring the lawsuit as opposed to merely facilitating its prosecution. *See Bluebird Partners, L.P. v. First Fidelity Bank, N.A.,* 94 N.Y.2d 726, 731 N.E.2d 581 (2000). Such claims are still barred by Judiciary Law §489, which provides in pertinent part:

> **Purchase of claims by corporations or collection agencies**
>
> No person or co-partnership, engaged directly or indirectly in the business of collection and adjustment of claims, and no corporation or association, directly or indirectly, itself or by or through its officers, agents or employees, shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon.

In 2017, Vermont became one of the first states to specifically regulate third-party litigation funding. House Bill 84 requires litigation funders to be licensed in Vermont and to post a letter of credit or a surety bond to protect consumers. On the other hand, neither the licensing requirements or the amount of the bond are particularly onerous.

In 2016, the Delaware Superior Court rejected efforts to dismiss an intellectual property suit as violating the rules against champerty. In *Charge Injection Technology Inc. v. E.I. DuPont*, (Del. Super. 2016), Charge Injection Technologies ("CIT") had alleged DuPont wrongfully used and disclosed CIT's technology. After years of expensive IP litigation, CIT turned to Burford Capital for financial assistance in return for a percentage of any eventual recovery. Burford also received a security interest in CIT's claims as collateral.

Upon learning of Burford's suit, DuPont moved to dismiss CIT's on the grounds of maintenance and champerty. The Superior Court declined to grant DuPont's motion to dismiss but did allow it to obtain discovery with respect to CIT's funding arrangements. Following this discovery, DuPont again moved to dismiss. In early 2016, Judge Jurden refusing to grant the motion to dismiss, declaring that, "[t]he court is not persuaded by DuPont's argument that the [claim] is champertous because of Burford's alleged de facto control. …The record before the court demonstrates that CIT is the bona fide owner of the claims in this litigation, and Burford has no right to maintain this action." Crucially, the Superior Court found that CIT was still the real party in interest as it had not assigned its claims to Burford and that, apart from having certain rights with respect to decisions concerning selection of counsel, Burford the express or *de facto* right to direct, control or settle the claims. Further, the court observed that CIT had pursued this litigation for five years before Burford's involvement and that there was no evidence had incited the litigation or otherwise encouraged CIT to pursue frivolous claims.

IV. The Rise of Modern Third Party Litigation Funding

The renaissance of third-party litigation funding began in Australia several decades ago during a period of time when Australia prohibited contingent fee arrangements in Australia. In the decades since, it has spread to the United Kingdom and, to a significantly lesser but growing extent, Europe and North America.

At its simplest level, ALF is little different from a private mortgage that a consumer may obtain to purchase a home where bank financing is unavailable due to the consumer's poor credit history. In its more sophisticated forms, however, ALF investors may securitize such risks or invest in them through devices such as hedge funds. In the future, some of these loans may even be financed through public companies financed through stock offerings.

Modern third party litigation funding may take one of three forms:

> *Loans*: In the first type, the financier simply loans a certain amount of money to the plaintiff in consideration of the repayment of that loan and interest. In such instances, the financier exerts little or no control over the handling of the litigation.
>
> *Litigation Financing*: In large intellectual property cases or other types of commercial litigation lawsuits, the financier agrees to fund some or all of the costs of the litigation in consideration of a significant percentage recovery from the eventual outcome of the lawsuit. Thus, a financier may loan 50 percent of the cost of litigation in consideration of 20 percent of any recovery. In these cases, the financier requires far more information with respect to the ongoing handling of the case and may or may not take a direct role in strategic or settlement decisions.
>
> *Portfolio Loans:* Finally, there are so-called pool or portfolio arrangements where a financier may loan money to a law firm or a party involved in a large group of cases. Pool investing allows the financier to distribute its capital among numerous different cases that a law firm might be handling, thus diversifying the risk to the funder. In such instances, the financier balances its risk across the entire portfolio of law suits being handled by the firm, much in the way that an investor in the stock market may face less risk by placing money into a mutual fund and buying individual stocks.

In portfolio funding cases, the financier will provide a law firm with funds for a group of cases and will take its fee from the collective result rather than the individual disposition of each case. As an investment prospectus from Jersey-based Burford Capital proclaimed:

> Burford Capital's strategy is to create and manage a portfolio of commercial dispute financing investments diversified by duration, claim type, geography and a number of other variables, with the aim of providing shareholders with attractive levels of dividends

> and capital growth. The Company expects returns to be uncorrelated to general equity market performance.

The U.S. litigation financing market is dominated by two companies: Juridica Capital Management and Burford. In addition to Burford, other prominent litigation financiers include Juridica Capital, Calunius Capital, Juris Capital, Arca Capital, and IMF. Additionally, a few banks, notably Credit Suisse and Deutsche Bank have units that specialize in litigation financing

These financiers rarely invest in personal injury cases and tend to focus on large commercial cases where the amount in dispute exceeds $25,000,000. Some funders also provide support to defendants against various types of negative results, including the obligation to pay attorney's fees in "loser pays" jurisdictions.

Apart from funders such as Burford and Juridica, there have been reports of instances where private individuals funded litigation, as in Hulk Hogan's notorious suit against Gawker for publishing his sex tape. Additionally, some private citizens are raising money for their lawsuits through crowd-funding events. At the end of 2016, for instance, the Green Party nominee for president, Jill Stein, raised several million dollars to fund recount challenges in Wisconsin and other battleground states.

Finally, several startup companies in the United States have become involved in crowd-funding litigation, including LexShares, Trial Funder and Invest4Justice. These companies list various law suits on their web sites that they have already vetted and offer opportunities for individual investors to fund at a significant lower cost that the major law suit funds. Invest4Justice has received several million dollars since it was founded in early 2014. At the time of its founding in April 2015, Trial Funder's CEO declared that its mission was to assist plaintiffs in civil lawsuits involving police brutality, sexual harassment, wrongful death and other personal injuries "Trial Funder promises to democratize the legal system, while bringing a new level of transparency to the entire process." Mighty Group has reportedly helped to fund over 1000 suits already.

V. How Are ALF Loans Different From Contingent Fee Agreements?

Notwithstanding these concerns, the original idea that a party should be solely responsible for its own litigation costs has already been substantially eroded. In America, contingent fee agreements that entitle a plaintiff's lawyer to recover as much as 40% of his plaintiff's ultimate recovery are quite common in personal injury litigation. Likewise, in large class action suits and mass tort litigation, it is not at all uncommon for well-known plaintiffs' firms to merge their assets, intellectual and otherwise, to finance and prosecute class action claims. If the lawyer prosecuting a case is entitled to invest in it, what then is the danger of allowing disinterested third parties to do so?

Traditional restrictions on client funding have largely been relaxed over the years on the basis that they facilitate access to justice particularly on the part of individual citizens or plaintiffs who might not otherwise be able to afford competent counsel through their own resources. As a result, plaintiffs' law firms are allowed to enter into contingent fee agreements with their clients where the client is still obligated to pay the cost of the litigation but the lawyer agrees to only accept a fee based upon a percentage of the ultimate recovery.

The key difference between contingent fee agreements and alternative litigation financing is that a lawyer agrees to provide a service for a fee in a contingent fee agreement whereas litigation financing involves an investment in an asset by a third party.

Litigation finance entities are also not subject to the Rules of Professional Responsibility that govern the conduct of law firms in the individual jurisdictions making up the United States. Accordingly, they may be guided by profit and business strategy decisions without necessarily being concerned about conflicts of interest that would otherwise prohibit a law firm from becoming involved.

In the past, mass tort litigation in the United States has often been financed through consortia of well-established law firms specializing in such work, who shared their resources to pioneer such claims. Even these fee sharing arrangements have proved problematic in some cases. For instance, in *In Re: Agent Orange Products Liability Litigation,* 818 F.2d 216, 217 (2nd Cir. 1987), certain of the lead law firms pursuing the Agent Orange case agreed to fund the cost of the litigation in return for a 300% return on their investment before funds were distributed to the remaining firms. Although a federal district court in New York agreed to the arrangement, finding that there was no evidence that it had affected the willingness of the parties to settle, it was set aside by the U.S. Court of Appeals for the Second Circuit. The Court of Appeals held that fee sharing arrangements "that include a return on investment present the clear potential for a conflict of interest between class counsel and those whom they have undertaken to represent."

VI. How Is Third Party Funding Different From Liability Insurance?

For more than a century, defendants in civil suits have had their legal fees financed by liability insurers. Why then, should there be concerns about third parties funding the prosecution of civil suits?

There are several key differences between liability insurance and third-party litigation funding, however. First and foremost, insurance contracts are designed to minimize liability costs whereas funding arrangements are intended to maximize liability recoveries. Second, insurance policies are issued prior to any loss occurring whereas third-party litigation funding is negotiated after a loss has already incurred in anticipation of a lawsuit and eventual recovery on account of that loss. Third, whereas insurers are required to defend all covered claims, financiers may pick and choose among those that they seek to support. Finally, a consumer who enters into a contract with a third party financier has some degree of certainty of assistance, whereas a policyholder cannot always know that a liability insurer will agree to defend or whether the insurer will either deny coverage or reserve its rights with respect to certain aspects of the claims.

Professor Charles Silver of the University of Texas made an aggressive argument in favor of the similarities between liability insurance and third-party litigation funding in his 2014 article in the DePaul Law Review. In his article, Silver pointed to the example of how insurers minutely manage litigation and argued that the involvement of third parties in litigation or settlement decisions will not necessarily skew the judicial process or result in inequity to any party.

Silver also argued that both funding mechanisms have much in common. Liability insurance and third-party litigation funding are both subject to adverse selection as insurers seek to avoid poor risks whereas financiers are careful to only loan money for worthwhile lawsuits. Silver observes that third party funders will only invest in large commercial litigation after an investigation period that could last up to 90 days and cost $75,000 to $100,000.00 for each screening.

There is, in fact, something resembling a parallel tripartite relationship in context of third-party litigation funding involving the financier, the client and a law firm. Unlike the traditional tripartite relationship among insurers, policyholders and defense counsel, however, it is typically not the financier that hires counsel or specifically controls the litigation.

Silver's 2014 article was written in response to a 2012 article by Professor Michelle Boardman in the Journal of Law Economics and Policy in which she identified five key differences between liability insurance and lawsuit funding: 1) contractual relationship between the policyholder and the liability insurer precedes the litigation; 2) the insurer's involvement in the litigation is automatic, not an investment choice; and 3) the litigation funding is the primary purpose of the contract; 4) the policyholder has a duty to cooperate with the insurer; and 5) the policyholder and the insurer are co-clients of defense counsel.

Boardman's critique was echoed in a white paper[4] released by the National Association of Mutual Insurance Companies in 2011 in which NAMIC argued that there are fundamental differences between the involvement of liability insurers in defending lawsuits and the involvement of third-party financiers in funding litigation. "Whereas the primary objective of funding companies is to promote and profit from litigation, insurers seek to avoid litigation and minimize its costs."

VII. Criticisms of Third Party Litigation Funding

Third-party litigation funding arrangements have come under harsh criticism from the U.S. Chamber of Commerce and insurer advocates in recent years.

In 2012, the Institute for Legal Reform arm of the U.S. Chamber of Commerce issued a White Paper[5] recommending that the federal government adopts rules (1) prohibiting investor control of cases; (2) forbidding direct contracts between investors and lawyers that do not also include the client; (3) banning law firm ownership of third party financing firms; (4) prohibiting the use of financing in class actions; and (5) requiring disclosure of funding contracts in litigation.

[4] National Association of Mutual Insurance Companies: *Third Party Litigation Funding: Skipping The Scales of Justice for Profit* (NAMIC Issue Analysis: May 2011).

[5] U.S. Chamber Institute for Legal Reform, *Stopping the Sale on Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation* (Oct. 2012)

In its 2011 White Paper, NAMIC criticized such funding arrangements as "tipping the scales of justice for profits" and expressed concern that "litigation funders will naturally seek to exert control of those strategic decisions that affect their litigation portfolios." NAMIC also expressed concern that the growing involvement of third-party litigation funding would result in more lawsuits being filed and making it more difficult to settle such claims, thus increasing the overall cost of the litigation system. NAMIC noted that placing greater financial resources in the hands of plaintiffs would allow them to undertake to hire litigation communications consultants who specialize in "orchestrating negative media campaigns aimed at defendants" that would result in unfair reputational damage to defendants and place greater pressure on them to settle otherwise unmeritorious cases. NAMIC darkly predicted that third-party litigation funding would encourage more frivolous lawsuits and over time would skew the evolution of tort law by enabling plaintiffs' law firms to litigate strategically.

The NAMIC White Paper concluded with the following recommendations:

1. Third-party funding should not be allowed in class action settings or to finance mass tort litigation.

2. Interest rates on funds advanced under third-party financing arrangements must be limited to "a reasonable" amount.

3. Third-party funding must be restricted to actions by individual plaintiffs for torts involving personal injury.

4. The amount that can be taken as loan repayment from the net recovery should be limited to a percentage of the net recovery.

5. Litigation funding companies should not be allowed to make referrals to attorneys on behalf of a potential plaintiff, nor accept advertising from attorneys on their web sites or in their marketing materials.

6. Attorneys should not be allowed to have a financial interest in the litigation funding company.

7. Litigation funding companies should not be allowed to exert influence over the plaintiff's decision to settle or to otherwise direct the court of litigation.

8. The existence of any third-party funding arrangement should be disclosed to all parties to the lawsuit and to the court.

Other groups have expressed concern that third party litigation funding creates ethical quandaries for lawyers and may distort the future course of litigation.

A. Ethical Concerns

A White Paper released by the ABA Commission on Ethics 20-20[6] last year expressed concern with respect to the potential impact on third-party litigation funding arrangements for lawyers involved in such cases. The White Paper suggested that such arrangements might implicate the following rules of professional responsibility:

- Model Rules 1.7(a)(2) (representation material be limit by lawyer's responsibility to a third party or the lawyer's own interests).
- Model Rule 1.8(e) (lawyers may not provide financial assistance to client).
- Model Rule 1.8(f) (lawyer must not accept compensation for representation from third party without informed consent of client and unless it will not interfere with independent professional judgment).
- Model Rule 1.8(i) lawyer may not acquire propriety interest in subject matter representation)
- Model Rule 5.4(c) (the lawyer may not permit fee pay or direct or regulate lawyer's professional judgment).

The White Paper suggested that lawyers might be put in an ethical bind if they were prosecuting a claim where the third-party litigation funding gave the financier the right to cut off further funding in the event of certain strategic decisions contrary to the financier's interests. In such circumstances, counsel "may reasonably believe that the funder's second guessing of decisions made in the representation of the client is an unreasonable interference with the lawyer's professional judgment." The ABA White Paper also expressed concern that such arrangements might endanger the confidentiality of attorney-client communications and otherwise violate Model Rule 1.6(a).

B. Do ALF Arrangements Generate More Lawsuits?

As third party litigation funding is only in its infancy in the United States, there is little empirical to support or refute concerns that it is generating increased law suits, encouraging frivolous litigation or otherwise changing the arc of litigation in this country.

[6] American Bar Association Commission on Ethics 20/20: *White Paper on Alternative Litigation Financing* (2016).

Some guidance may be derived from the experience of Australia, which has had a much longer experience with these funding arrangements than Europe or the United States. In a landmark study[7] published by the University of Pennsylvania Institute for Law Economics, David Abrams and Daniel Chen found that jurisdictions with a larger number of financed law suits tended to have a bigger back log as such suits were less likely to settle and dragged on longer. The authors suggested that this backlog might be temporary, however. They pointed out, moreover, that financed cases also tended to be more important and were more likely to generate results of precedential value.

Abrams and Chen's paper also tends to undercut claims that litigation financiers are likely to spawn more frivolous litigation. Their review of the records of IMF Bentham, which has a 50% market share of ALF in Australia, indicate that between 1999 and 2007, the financier received 763 proposals but only agreed to fund 91 cases. To similar effect was a 2016 story in the Wall Street Journal that reported that one financier rejected 95% of the cases presented to it for funding.[8] Proponents of third party litigation funding point to these figures as evidence that funding is not promoting frivolous litigation and these funding companies are only investing their money in worthwhile cases for which there is a good chance of a favorable result.

VIII. Criticisms of Third Party Litigation Funding

A. Legal Challenges

A. Client Claims of Champerty

As detailed above, ALF borrowers may have good grounds for disputing ALF arrangements in states that continue to maintain common law or statutory rules against champerty and maintenance.

B. Defendants' Challenges To Champerty

U.S. courts remain divided with respect to whether champerty is a defense that only a party to an unconscionable agreement may raise or whether third parties may seek to set aside champertous agreements that affect them. In short, may a defendant who is being sued as the result of litigation being financed through champertous means seek to void that agreement?

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[7] David S. Abrams and Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. Pa. J. Bus. L. 1075 (2013)

[8] Sara Randazzo, *Litigation Funding Moves into Mainstream*, WALL STREET JOURNAL (Aug. 4, 2016)

In *CSX Transportation, Inc. v. Gilkison,* 406 Fed. Appx. 723 (4th Cir. 2010), a U.S. railroad sued certain plaintiffs' law firms claiming that they had engaged in common law fraud and civil conspiracy and had violated the Racketeer Influenced and Corrupt Organizations Act (RICO) by fabricating and prosecuting objectively unreasonable, false and fraudulent asbestosis claims against it. Although these claims were largely vacated by the U.S. District Court, they were reinstated late last year by the U.S. Court of Appeals for the Fourth Circuit. The suit alleged that the plaintiffs' firms had engaged in an illegal conspiracy with physicians who fabricated x-ray screenings to support allegations of asbestosis.

In *Dell Webb Communities, Inc. v. Partington,* 2011 WL 2854086 (9th Cir. July 20, 2011), a U.S. District Court in Nevada enjoined a building inspection company that sought to detect construction defect problems which it referred to various local law firms in return for a finder's fee that varied depending on whether the homeowner merely signed an engagement letter or prevailed in its suit. The District Court held that these agreements violated Nevada's common law prohibition against champerty and maintenance as the building inspection company was, in effect, using its own funds and resources to instigate and prosecute actions in which it had no interest. On further review, the U.S. Court of Appeals for the Ninth Circuit ruled that the defendant had no standing to dispute the efficacy of the financing arrangement, as it was not a party to this contract. The Ninth Circuit found that there was no basis for predicting that the Nevada Supreme Court would recognize a common law tort cause of action for damages or equitable relief asserted by a stranger to an allegedly champertous agreement.

B. ALF v. Syndication

Even the *Saladini and Osprey* courts made clear that their decisions "should not be interpreted to indicate our authorization of the syndication of lawsuits." While neither court gave any reason for limiting its holding in this way, it appears that even these pro-financing courts view multi-investor arrangements, which may involve huge sums of money and the public solicitation of lay investors, very differently from private, one-on-one arrangements designed to help one impoverished litigant.

C. Ethical Issues

1. Prohibition Against Fee Splitting With Lawyers

The growing popularity of alternative litigation finance arrangements has resurrected issues with respect to the impropriety of non-lawyer professionals being affiliated with lawyers. While the barriers to law firm affiliations with non-lawyers eroded throughout the 1990s, any momentum in this regard largely dissipated in the wake of Enron and other scandals in the past decade involving the big eight accounting firms.

Rule 5.4 of the American Bar Association's Model Rules of Professional Responsibility states that, "A lawyer or law firm shall not share legal fees with a non-lawyer." The intent of the rule is to protect lawyers from having others infringe upon the exercise of their professional judgment. As a consequence of this rule, American law firms have been constrained with respect to the extent to which they can be directly affiliated with accountants or other professionals. Such constraints seemed to be on the wane in the 1990s but gained fresh currency following the collapse of Enron and the ensuing scandals that tainted the reputation of the former big eight accounting firms in the years that followed.

It has been argued that ALF financing arrangements avoid Model Rule 5.4 because the lawyer is not sharing his fee with a third party. Rather, such arrangements are undertaken directly between the client and the financing entity and are generally exclusive of the fee owed to the lawyer.

2. Exchanging Confidential Information

If the litigation financiers are not clients, to what extent are they entitled to information concerning the status of the litigation or reports from defense counsel without waiving the otherwise privileged content of such communications? May litigation financiers claim a common interest in the litigation such that they are entitled to receive such reports much like excess insurers have been permitted to in the United States even though they are not the entity represented by counsel or even paying for counsel's services?

Different financiers have different requirements with respect to the amount of information that they may require from a prospective client and their attorneys before deciding to grant funding for a law suit. Likewise, others may also require periodic conference with counsel or access to reports that clearly implicate the attorney-client privilege. This does not, however, preclude the use of the work-product doctrine or some form of the common interest doctrine to shield certain materials from discovery. *See Mondis Tech., Ltd. v. LG Elecs., Inc.*, 2011 WL 1714304 (E.D. Tex. May 4, 2011) (documents created for potential investors were protected by work-product) and *In re Int'l Oil Trading Co.*, 548 B.R. 825, 832 (S.D. Fla. Bankr. Apr. 28, 2016) (the attorney-client privilege is not waived if the "third party and the privilege holder are engaged in some type of common enterprise and [] the legal advice relates to the goal of that enterprise").

3. Conflicts of Interest-Public Disclosure

Among the unanswered questions is the extent to which such litigation financing arrangements must be disclosed to all parties in the case or to the judge supervising the case. Relatively few of these arrangements see the light of day. A rare example is the involvement of Burford Capital in the lawsuit that Indian tribes in Ecuador filed against Chevron. In that case, Burford invested $4 million in the suit against Chevron in November 2010 in exchange for a 1.5% share in any recovery. Even if plaintiffs ultimately recover less than $1 billion, however, Burford is still entitled to recover its full $55 million promised payout unless the plaintiff's ultimate recovery is less than $69.5 million. In short, for an investment of a mere $15 million, Burford is entitled to a potential recovery of up to 80% of the plaintiffs' actual award or settlement.

Courts around the country are divided with respect to whether disclosure is required and on what basis. A few courts have permitted discovery. *See, e.g. Leader Tech., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373 (D. Del. 2010) (common interest privilege does not apply to protect disclosures made to a litigation funder) and *Gharabe v. Chevron Corporation* (N.D. Cal. August 10, 2016) ordering plaintiff to produce funding agreement). Others have refused to require disclosure. *See Kaplan v. S. A. C. Capital Advisors,* 2015 WL 5730101 (S.D.N.Y. Sept. 10, 2015) holding that third-party litigation documents were not relevant to any claim or defense and thus not required for disclosure); *Miller UK Ltd. v. Caterpillar, Inc*., 17 F. Supp. 3d 711 (N.D. Ill. 2014) (financing documents are not discoverable because the funder was not the real party in interest);; *Devon IT, Inc. v. IBM Corp.*, No. 10-2899, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012) (common interest privilege applied to protect disclosures to a third-party litigation funder because the plaintiff and the funder shared a "common interest in the successful outcome of the litigation which otherwise [plaintiff] may not have been able to pursue without the financial assistance" of the funder).

Automatic disclosure of third-party litigation funding has also been considered by the Advisory Committee on Civil Rules since 2014 but, as yet, has not been adopted. Additionally, the amendments to the Class Action Fairness Act that were passed by the U.S. House of Representatives in March 2017 as the Fairness in Class Action Litigation Act of 2017 (HR 985) would have required prompt disclosure to U.S. district courts of third-party litigation funding in all class actions by any entity "with a contingent right to receive compensation from any settlement, judgment or other relief obtained in the action."

Pending amendments to the federal rules, lower courts are left to their own devices with respect to whether the fact and details of third-party funding must be disclosed. Only the U.S. District Court for the Northern District of California has promulgated a rule mandating automatic disclosure of third-party funding in certain cases. In June 2016, the Northern District proposed a change to Local Rule 3-15 that would have required automatic disclosure at the outset of litigation of any person or interest "with a financial interest (of any kind) in a subject matter in controversy or in a party to the proceeding." After vehement opposition by financiers, the court ultimately scaled down the scope of these revisions to Local Rule 3-15. In its final form promulgated in January 2017, disclosure of third-party litigation funding will only be required for class actions.

IX. The Future of Champerty and Maintenance in the United States

The control of champerty and maintenance in the United States has largely shifted from common law prohibitions against litigation financing towards treating these arrangements as another sort of consumer transaction requiring regulation and protection against predatory or usurious lenders akin to rules against usury.

As the scope of ALF funding becomes more sophisticated and widespread in this country, it is expected that new challenges will emerge, particularly from non-clients, focusing on ethical and confidentiality problems presented by ALF lenders who are more than mere lenders and who are taking an active role in litigation and settlement decisions.

Bibliography

David S. Abrams and Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. Pa. J. Bus. L. 1075 (2013)

American Bar Association Commission on Ethics 20/20: *White Paper on Alternative Litigation Financing* (2016).

Michelle Boardman: *Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation,* 8 Journal of Law, Economics and Policy 673 (2012).

Bond *Comment Making Champerty Work: An Invitation to State Action*, 150 U. Pa. L. Rev. 1297 (2002)

Daniel Brook, *Litigation by Loan Shark*, *Legal Affairs* (2004).

Comment*, The South's Amended Barratry Laws: An Attempt to End Group Pressure through the Court*, Yale L. J. 613 (1963).

Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, Vt. L. Rev. Vol. 31, 615.

Isaac Marcushamer, *Note, Selling Your Torts: Creating a Market for Tort Claims and Liability*, 33 Hofstra L. Rev. 1543 (2005).

Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should be Tamed Not Outlawed*, 10 Fordham J. Corp. and Fin. L. 55 (2004).

Susan Lorde Martin, *Financing Litigation Online: Usury and Other Obstacles*, DePaul Bus. & Com. L.J. 85 (2002).

National Association of Mutual Insurance Companies: *Third Party Litigation Funding: Skipping The Scales of Justice for Profit* (NAMIC Issue Analysis: May 2011).

Max Radin, *Maintenance by Champerty*, 24 Cal. L. Rev. 48, 49 (1935).

Rand Institute for Civil Justice: *Conference Proceedings—Third Party Litigation Funding And Risk Transfer: Trends and Implications For The Civil Justice System* (2010).

Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 Mercer L. Rev. 649 (2005).

Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding*, 36 Cardozo L.R. 861 (2015).

Charles Silver: *Litigation Funding v. Liability Insurance: What's the Difference?* 63 DePaul L. Rev. 617 (2014).

Maya Steinitz, *Whose Claim Is It Anyway? Third Party Litigation Funding*, 95 Minn. L.R. 1269 (2011).

U.S. Chamber of Commerce Institute for Legal Reform: White Paper: *Third Party Litigation Funding* (2016).

U.S. Chamber Institute for Legal Reform, *Stopping the Sale of Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation* (2012).

Winfield, *The History of Maintenance and Champerty*, 35 L.Q. Rev. 50 (1919).

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Rethinking Insurance Coverage for Autonomous Vehicles

The autonomous vehicle industry is pressing forward, full speed ahead. In addition to providing convenience, safety and cost-efficiency for passengers, these vehicles stand to completely transform the economic dynamics of the automotive industry. But while autonomous vehicles can lessen the costs of human error, they can also introduce new, potentially crippling technological risks. In turn, the rollout of these new vehicles – along with their concomitant risks – will require a significant revamp of the traditional functions of auto insurance and increase the role of other forms of insurance, such as product liability coverage, business interruption policies and cyber insurance options.

Many predict that vehicle automation will generate billions of dollars for automotive companies and spur a diversity of new entrants into the industry, including suppliers of new technologies, digital services and infrastructure developers. Car manufacturing heavyweights have hopped on the automated bandwagon in a race to develop their networks of self-driving vehicles. For example, Tesla founder Elon Musk unveiled his 'Master Plan, Part Deux', which involves the development of self-driving electric cars that can be added to the 'Tesla shared fleet' to be used by other passengers while owners are at work or on vacation. Non-traditional players in the automotive manufacturing industry have also entered the fray. IBM, for example, recently introduced 'Olli', a 12-person autonomous bus, with plans to test an urban transportation network in Miami, Florida.

Other companies are moving full-throttle to find their niche in the autonomous vehicle space. For example, Lyft recently announced that it is developing a new several-hundred-employee "Level Five" unit focused on developing an open network for autonomous vehicles that can be used by automakers and technology companies. Others are jumping at opportunities to partner with Lyft's open network, and consumers may soon find Google's Waymo vehicles or General Motors' Bolt model operating on the network. This illustrates how some businesses focus their energies on building and selling autonomous cars, while others are taking the lead in developing the computer software, sensor technologies and user interface that autonomous vehicles need to navigate.

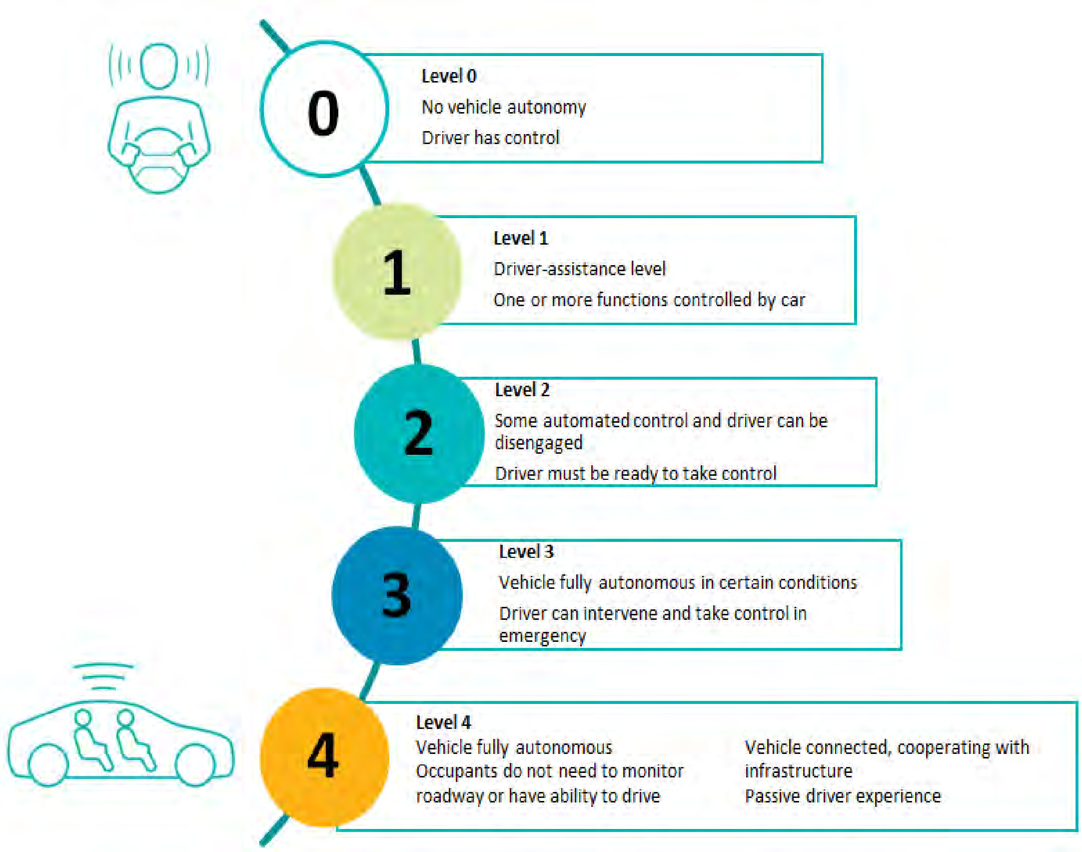
The diverse industry investment signals that automation is expected to create numerous benefits for businesses and consumers: better safety, greater mobility, energy efficiency and cost savings. In an attempt to keep up with this growth, many states are grappling with how to regulate these vehicles and industry players. In fact, some states have opted to reduce regulatory barriers in order to lure investment and innovation into their borders. The result, however, is a patchwork quilt of regulations and varying forms of liability.

While the risks associated with driving have, traditionally, been addressed through auto insurance, the potential liabilities that arise from deploying autonomous vehicles raise questions about whether these traditional policies will be enough and to whom the policies should be issued. As vehicles become more ‘connected’ to outside forces and controls, autonomous vehicle operators will need to focus on new areas of liability that previously may have had little place in the automotive industry – issues such as privacy, cyber security and the Internet of Things (IoT). Going forward, auto insurance as we know it may lose its importance, and the ‘connected’ nature of these vehicles will require greater consideration of other forms of insurance to address new liabilities.

New and Uncertain Risks

Autonomous vehicles can also introduce new, potentially catastrophic risks, as well as new questions about who is responsible for them. For example, the first known fatality in an autonomous vehicle occurred recently on a divided highway in central Florida. While on autopilot mode, the vehicle collided with a tractor-trailer—reportedly due to a combination of flaws in the vehicle radar system settings, the weather, and the atypical height of the trailer. As this unfortunate event demonstrates, companies and consumers in the coming years will need to rethink their use of auto insurance when a human driver is not in control, and instead increase the role of other forms of insurance, such as product liability coverage, business interruption policies and cyber insurance options.

In many instances, the ability of the driver to exert some degree of control over the vehicle may have the greatest impact on determining liability. The National Highway Transportation Safety Administration’s (NHTSA’s) five levels of vehicle autonomy illustrate the spectrum of autonomous vehicle types, ranging from full driver control to total automation.



At Level Zero, the driver is in complete and sole control of the vehicle controls at all times, and is solely responsible for monitoring the roadway. **At Level One**, automation involves one or more specific control functions, such as electronic stability control or pre-charged brakes. **At Level Two**, automation involves at least two primary control functions designed to work in unison to relieve the driver of control of those functions, such as adaptive cruise control in combination with lane centring. **At Level Three**, there is limited self-driving automation. Automation at this level allows the driver to refrain from monitoring the roadway and cede full control of all safety-critical functions, but returns control to the driver in certain conditions. **At Level Four**, the vehicle is fully autonomous. The vehicle can perform all operation and safety-critical driving functions for an entire trip.

For vehicles on the market that utilize only partial autonomy (Levels One through Three), the driver is still expected to monitor the roadway and have at least some control over the vehicle. In those situations, the driver should remain generally responsible for accidents because the driver still has ultimate control of the vehicle. Hence, the driver's own insurance should apply. Traditional bodily injury and property damage liability coverage, uninsured or underinsured motorist coverages, and no-fault coverages may not change significantly for these vehicles, though premium costs may decrease with a reduction in accidents.

But as vehicles on the market become truly autonomous (Level Four), the role of the individual driver disappears. Driving decisions will instead be based on artificial intelligence and through communication with other connected vehicles and surrounding infrastructure. In these circumstances, the potential liability of the manufacturers and technology developers will likely increase, while the liability of individual drivers will likely decrease. The allocation of liability among these various actors can be difficult to determine when different technologies are meant to interoperate with each other to collectively create an autonomous experience. For example, if an accident occurs in an auto manufacturer's self-driving vehicle that drives on a rideshare app's network and accepts data through a "SMART" City's connected road infrastructure, then liability will likely hinge on identifying which elements contributed to the accident amid this technological chain. Thus, automation will require introducing insurance to cover the potential liabilities faced by ***all*** these new players in the industry, including suppliers of new technologies, digital services and infrastructure developers.

Importantly, the risks posed by autonomous vehicles are not limited to traffic accidents. Autonomous vehicles utilize sensors that constantly collect and maintain identifying information about passengers and owners. Not only do the vehicles track the individuals' driver safety habits and entertainment settings, but also their movements and whereabouts. Voice recognition technologies used to operate the vehicle may also enable the vehicles to capture private communications by passengers. In addition, some vehicles will be capable of interoperating with its owner's contact lists and social media accounts. Businesses and advertisers will surely capitalize on the ability to track this detailed information about a passenger's personal interests and daily routine. Exposure of this sensitive information poses a number of risks for passengers – from embarrassment, to identity theft, to potential bodily injury if location data becomes accessible to stalkers or other wrongdoers. And, if private user data is exposed on a large scale, then companies may face the risk of data breach response costs and regulatory sanctions.

Minimizing Liability Before It Occurs

Auto manufacturers, service providers, technology platform developers, transit authorities and other businesses using self-driving cars have a number of options to help minimize the potentially crippling costs caused by autonomous vehicle mishaps. These players will need to look to broader commercial auto and liability insurance options and should reconsider common policy exclusions. For example, traditional weather-related policy exclusions may need to be altered to account for the effects weather may have on sensors or cellular signals.

Cf. Small v. King, 915 P.2d 1192, 1193 (Wyo. 1996) (no coverage under CGL policy due to exclusion for weather-related damage).

Relatedly, traditional auto policies also contain audio, visual and data electronic equipment coverage exclusions, which were originally devised to limit coverage for sound systems and communications devices. *Cf. Maryland Cas. Co. v. Integration Concepts, Inc.*, 119 F. Supp. 3d 1322, 1328 (S.D. Fla. 2015) (electronic data exclusions barred coverage for bodily injuries sustained due to defects in software designed to conduct flow measurements); *Clark v. Clarendon Ins. Co.*, 841 So. 2d 1039, 1044 (excluding coverage for losses to CDs and cassettes under audio, visual or data electronic devices exclusion). Since visual and data signals are critical components of autonomous vehicles, businesses will want to negotiate exceptions to this exclusion.

Cyber liability and crime insurance coverages will also be essential, given the increased risk of hacking or other exposure of private data transmitted using autonomous vehicle technologies. Relying only on traditional commercial liability insurance will likely leave significant coverage gaps for autonomous vehicle businesses that rely heavily on data transmission and processing. *See, e.g., Travelers Prop. Cas. Co. of America et al. v. Federal Recovery Services et al.*, No. 2:14-cv-170-TS (D. Utah May 11, 2015) (unauthorized withholding of data was not an "error, omission, or negligent act" for which the cyber liability policy provided coverage.). Separate cyber liability and crime coverages can cover dishonest third-party acts, such as employee theft, forgery or alteration, computer fraud and funds transfer fraud, and cyber extortion.

Distinct business interruption coverages can also protect against cyber events that cause an outage or interruption in autonomous vehicles' delivery and transportation schedules when there has not been actual physical damage to the vehicles. *Cf. American Guaranty & Liability Insurance Company v. Ingram Micro Inc.*, 2000 WL 726789 (D. Ariz. Apr. 19, 2000) (no coverage under general liability policy for interruption in functionality of computer system because there was no physical damage); *Vonage Holdings Corp. v. Hartford Fire Ins. Co.*, 2012 WL 1067694 (D.N.J. Mar. 29, 2012) (no coverage for business losses resulting from corruption to servers where there was no physical damage to "tangible property"). Additionally, products liability and recall exposure coverage can be used to cover liabilities associated with the technical components of autonomous vehicles, such as faulty sensors and communications devices.

Finally, given the significant media attention placed on the autonomous vehicle industry, companies will want to consider coverages for reputational or business income losses that stem from accidents, recalls or hacking events. Such consequential losses may not be covered under basic cyber policies. *Cf. P.F. Chang's China Bistro, Inc. v. Federal Ins. Co.*, No. 2:15-cv-1322 (SMM), 2016 WL 3055111 (D. Ariz. May 31, 2016) (consequential damages from hacking event not covered under cyber risk policy).

New Insurance Products

Several insurance carriers are already offering new specialized policies for autonomous vehicles. In 2016, U.K. insurer Adrian Flux introduced the first driverless car insurance policy. The Flux policy provides limited coverage for losses arising from hacking or attempted hacking of the vehicle's software, as well as losses arising from collisions caused by a failure to install updates to the car's operating systems within a certain period of time. The Flux policy also provides coverage for losses stemming from satellite failures or other outages that affect the navigation systems. Other companies are also bundling driverless car insurance with their vehicles. Tesla, for example, has bundled QBE-provided insurance along with the driverless cars it sells in Asia and Australia.

These driverless car insurance policies are tailored toward the individuals who own driverless cars, and thus may not be the right product for businesses operating on autonomous vehicles, third-parties that develop technologies or services that provide information or commands to the vehicles, or developers of connected road infrastructure. These organizations will still want to consider broader commercial auto and liability insurance options to cover the cyber, product liability, business interruption, and reputational risks described above. Although there are existing insurance options to help cover these risks, we can expect insurance carriers to begin offering more specialized products aimed at the companies that provide technologies and services that interoperate with autonomous vehicles.

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Autonomous technologies will dramatically change driving as we know it. Many businesses are sure to thrive on the efficiencies that driverless vehicles bring. Nevertheless, embracing autonomous technologies can also create new cracks and potholes in traditional risk management frameworks. Experienced coverage counsel can advise on how to fill those gaps—including by analyzing policy language in light of new risks, and partnering with brokers to negotiate endorsements to fit a company's unique needs.

Crisis Management and Incident Response:
Using Insurance as a Loss Mitigation and Business Resiliency Tool

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I. **Crisis Management Planning**

Corporations from time to time will face significant incidents—from data breaches to natural disasters—that require coordinated crisis response plans. Even detailed plans can fall short, however, when companies fail to coordinate with their risk management leaders and insurance brokers on proper response actions in the event of a crisis. This can cause problems in incident response, particularly in catastrophic situations because the financial stakes can be high so that insurance companies may look for opportunities to reduce coverage. Moreover, cost recovery against other responsible parties can be harder to obtain if it is considered too late in the process and does not give other potentially responsible parties the opportunity to be involved in critical decisions if they will be expected to contribute to the response costs. Companies should include a protocol relating to insurance indemnification and other cost recovery as part of their incident response plans so they are ready to quickly and effectively react to any crisis situation.

II. **Insurance Programs Should Prepare for the Worst For Effective Crisis Planning**

When building an insurance program, it is important for policyholders to consider all lines of insurance which could respond to incidents they are most likely to face. A technology company, financial institution, or company that maintains customer personal or financial information will focus on protecting against a cyber-security event, whereas a company located near a coast will pay particular attention to coverage for hurricanes losses. But beyond the obvious policies (i.e., cyber insurance for a data breach or commercial property insurance for a hurricane), companies should build insurance programs that offer coverage under a variety of different policies. For example, a sub-limit providing investigations coverage under a D&O policy may offset certain expenses on a first-dollar basis after a data breach —like attorneys' fees for defending against subpoenas to directors or officers or a derivative demand investigation on the entity—even if the company's cyber insurance is the primary coverage for most other costs incurred due to the breach. There are often costs associated with a significant crisis where applicable insurance is contained in a number of different policies.

It is also helpful to involve insurance experts during the process of purchasing insurance to ensure that the broadest coverage is secured and the strongest policy language possible is negotiated. Brokers will be familiar with what policy enhancements are available in the marketplace, whereas coverage counsel can provide policy language and gap analysis based on case law developments. Just as importantly, by involving coverage counsel and the brokers in the process early, they will already have a baseline familiarity with the insurance program when called on for response to a crisis, allowing them to get up-to-speed more quickly during the emergency.

III. Secure Pre-Approval for a Crisis Response Team

In the event of a significant incident, particularly one that is accompanied by heavy media coverage, the affected company will need to hire a variety of consultants, PR firms, and other vendors. Depending on the terms and conditions of the applicable insurance policy, some or all of these costs may be reimbursable, but such reimbursement is typically predicated on the prior written consent or approval of the insurer. Insurers are often willing to pre-approve vendors, as well as outside legal counsel. Seeking these pre-approvals at the time policies are purchased is time well spent. Care should be taken at renewal each year to review the outside consultant list to make sure that preferred vendors are approved for particular types of incidents. Not only is it one less thing to do when emergency arises, many insurers refuse to pay costs incurred prior to approving vendors, and there may not be time to secure insurance approval before incurring vendor costs immediately in the aftermath of an emergency. It streamlines the process—and potentially increases recoverable expenses—to let the insurers know that pre-approved vendors will be retained.

IV. <u>Identify All Potential Sources of Recovery</u>

Clearly a cyber-insurance policy will respond to a data breach, as a commercial property policy responds after a property loss, but there are often other potential sources of recovery. As part of incident response, other contracts should be identified such as contracts with vendors, suppliers, and manufacturers that could contain indemnification or additional insured status requirements. Time is of the essence in reviewing these documents, as with traditional insurance because additional insureds must also comply with prompt notice requirements. It is helpful to consider noting these cost recovery opportunities and notice requirements in a contract summary relating to each significant vendor agreement.

V. <u>Take Care with the Content of the Notice Submissions</u>

In the event of a crisis, the requirements in the notice provisions of the insurance policies must be complied with. These provisions contain time limitations in which a claim must be submitted and detailed instructions regarding where to send the notice and what to include with any notice submission. Beyond simply complying with the time limitations on notice specified in the policies, it is important to provide notice as quickly as possible to ensure that monies spent prior to notice being provided are reimbursed. In addition, to preserve the right to seek coverage under more than one line of insurance, notice must be provided to each insurer consistent with that insurer's notice provisions. It is also helpful to provide notice to all of the excess insurers that you expect may be needed, even if those coverages will not be triggered until the primary coverage is exhausted.

While most attention regarding notice provisions focuses on the timing, the content of the notice is also important. The notice must provide all information required by the policy and the depth of detail required varies widely among different policies. Beyond simply complying with the policy requirements it is useful to have coverage counsel review notices going to the insurers to make sure the language of the notice is not inadvertently limiting the potential recovery. Coverage can be jeopardized by addressing "why or how" an incident occurred too early in the investigation, whether in the notice submission or other early communications with an insurer. Trying to answer the "why and how" questions can lead to inaccurate speculation, which sometimes inaccurately suggests that the loss was due to an excluded cause. Instead it is better to focus on reporting facts like "what is happening and where" (i.e., flames in certain area, computer system non-responsive, etc.). Very often, people think that they know what triggered an event, but after more time passes it appears less clear. Companies should avoid speculation about causes or parroting talking points from the media. In some of the worst hurricanes causing significant damage it became very important as to whether water or wind caused the damage (water is often an excluded cause, whereas wind damage is often covered). Some companies had to back-track once they took a position that was not ultimately accurate and instead negatively impacted insurance available by being too quick to suggest a cause of loss. Even something as seemingly innocuous as calling a "tropical storm" a "hurricane", just because the weather centers do, may create unnecessary issues for some companies who have limitations on insurance for damage due to "hurricanes." For these reasons, keeping notice submissions and early communications purely factual is prudent.

Because forensic consultants often are required to immediately work on determining the cause of the incident, the legal team should be involved to ensure that the consultants do not use unnecessary coverage-defeating or indemnity defeating language to describe the incident without regard for the consequences.

VI. Communications to the Insurers Must be Coordinated

Insurance adjusters and representatives will arrive on site shortly after an incident occurs, informally asking questions and gathering as much information as they can. Formal information requests and interviews typically will follow. As insurers may be looking to limit their exposure to the losses the incident causes, lawyers with cost recovery experience can meet with the adjusters and insurance representatives that arrive at the site early (or start asking for information right away in the event of an event like a cyber-attack without physical loss). These individuals know how to handle the extensive information requests that will be received from the insurers and can coordinate responses with the rest of the team. Appointing a knowledgeable individual decreases the risk of making early statements that could diminish coverage before the cause and scope of the incident is determined. Consistent messaging is also critical. Responses will be required for the public, regulators, sometimes congressional committees, and others. Insurance requires policyholders to comply with a "duty to cooperate" with the insurance companies. Keeping your insurers up-to-date on communications, damages and costs can lead to reimbursements more quickly.

Another benefit of involving coverage counsel from the start in insurance-related communications is that it provides more of the company's communications with the attorney-client privilege. Strategic discussions with brokers, vendors, or others hired to respond to a crisis may remain privileged if the discussions involve counsel. No privilege will attach if these discussions are led by a broker or other non-lawyer in the absence of any lawyers. Even though communications with the insurer are not protected by privilege, make sure the legal team provides guidance prior to communications with the insurer, even if the broker or claims team handles the actual conversations with the insurer.

VII. Document Communications with the Insurers

It is critical to track what communications have or have not been sent to or received from the insurers. Having a single person or small team responsible for all communications can help reduce confusion. Regardless of whether communications go through one point person, a simple communications "tracking chart" is an effective way to document the communications history. It is useful to maintain a list of persons involved in the communication, the date of the communication, the type of communication (i.e., email, letter, phone call), and a short note describing the content of the communication. If there are later coverage or cost-recovery disputes, records of communications will help prove the claim and may form the basis of later bad faith claims.

VIII. Mitigate Losses as a Prudent Uninsured

Mitigating costs is vital for several reasons. First, even if there is a well-developed insurance program in place, some costs may be not covered for any number of reasons. Because insurance or an indemnifying party will often not reimburse all of the losses, cost recovery must be conducted as if you were a prudent uninsured. Second, even if a third-party (insurer or indemnifying party) is ultimately liable for some of the losses, there is a duty to mitigate to prove to insurers and indemnifying parties that best efforts were used to reduce losses. This protects against an argument that indemnifying parties should not be liable for the entire loss. Document efforts to investigate and mitigate the incident, and record efforts in real time to create a more accurate and defensible record, rather than trying to re-create your investigation and mitigation efforts months later.

IX. Good Planning Leads to Effective Incident Response

Proper planning for incident response and incorporating cost recovery measures into incident response plans enhances the likelihood of maximizing recoveries. Thoughtful crisis management planning is much more than good risk management and loss prevention strategy. It is an essential business resilience tool.

X. Crisis Event Coverage: Summary and Nature of the Coverage

The scope of crisis response coverage varies widely by the particular risk being insured, the issuing company, and the policy form utilized. The term "crisis response" is not uniformly used in the insurance market to describe functionally equivalent coverage[1], which is also referred to as "crisis management" coverage, "crisis communications" coverage, and "crisis management response" coverage, "crisis resilience" coverage and "crisis assistance" coverage, among others. By whatever name, a nearly universal feature of the coverage is the payment or reimbursement of expenses incurred after a liability event for the services of communications, public relations or other media-savvy professionals to bolster or restore public confidence, mitigate reputational injury, and effectively manage public statements and communications to avoid or minimize adverse media coverage in the aftermath of the crisis. The coverage also typically extends to medical, funeral, psychological counseling, travel, and temporary living expenses related to the crisis event.

Crisis response coverage has been referred to as a "liability mitigation tool," and a unique feature of the cover is that both the carrier and policyholder benefit

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[1] American International Group, Inc. possesses a trademark for CrisisResponse®, an insurance product first introduced in 1999, discussed more fully below. (*See* U.S. Patent and Trademark Registration No. 2633559, http://tmsearch.uspto.gov/bin/showfield?f=doc&state=4806:drnqkn.2.3).

significantly when it is invoked. This is due to the fact that company liability for an insured event can either be mitigated or exacerbated by public perception of the crisis event, and this is affected by how it is responded to and managed by the insured. The insured has a significant interest in mitigating damage to its business reputation and not jeopardizing future business prospects; the insurer has a keen interest in seeing that the insured's post-crisis actions are helpful rather than harmful, and that its response is cast in the most favorable light possible. This is so because the same sound-bite absorbing public judging the company in the immediate aftermath of the event will feed the jury pool ultimately deciding questions of liability and damages. There are other typical features of the coverage, which are addressed more fully below.

Depending on the form, and whether it is add-on coverage to a policy or is an integrated component of a policy, the coverage is often subject to sub-limits in amounts significantly less than the limit of the liability coverage.

XI. <u>The Origin of Crisis Event Coverage</u>

The element of crisis response coverage insuring the cost and expense of retaining professionals with particular and necessary expertise in the management and handling of the potentially insured event has its origin in policies insuring risk that effectively mandate the use of such professional services. For example, Kidnap, Ransom and Extortion coverage typically includes not just the payment of ransom, but the expenses incurred in obtaining the release of kidnapping or hijacking victims, such as the services of security consultants, hostage negotiation experts, and other crisis response professionals[2].

For example, in *Hargrove v. Underwriters at Lloyd's, London*[3], 937 F. Supp. 595 (S.D. Tex. 1996), the court described an employee kidnap and ransom policy insuring a World Bank/United Nations-founded organization operating in Columbia which was invoked by the insured organization when an employee was kidnapped by the Columbian guerrilla group FARC in 1994. The policy expressly provided that the insurer would not be involved in the day-to-day handling of any kidnapping or in substantive decision-making regarding strategy or the payment of ransom so as "[t]o avoid the appearance that the Underwriters placed their economic interest over the interests of the hostage." *Id.* at 597. "Instead, the Policy provides that in the event of a kidnapping, Corporate Risk International (CRI), a crisis management company, will advise and assist [the insured] in the negotiations for the release of the hostage." *Id.* A material - if not the key - component of the coverage is access to expert services necessary to effectively respond to the ransom/extortion demand.

No later than 1999[4], American International Group (AIG) launched a crisis response product that transported the concept of coverage for the expense of crisis response expertise into its commercial excess and commercial umbrella offering.

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[2] *See* ISO form CR 00 40 08 13.

[3] For an interesting summary of the history of Lloyd's kidnap risk business, see Clendenin, Meadow, *"No Concessions" With No Teeth: How Kidnap and Ransom Insurers and Insureds are Undermining U.S. Counterterrorism Policy,* 56 Emory L.J. 741, 750-751 (2006).

[4] See n. 1, and reference to first use in commerce of CrisisResponse® in 1999.

This is generally understood to be the genesis of what is now the nearly-universal inclusion of crisis response coverage in some form or fashion in U.S.-issued commercial excess and umbrella policies. As already noted, the coverage is offered in the amount of sub-limits only, not in the full amount of the liability limits of the policy[5]. The AIG coverage was ultimately offered in the form of CrisisResponse® directly integrated with AIG's Umbrella Prime℠ (stand-alone umbrella) and Prime Express℠ (follow form excess) policies, and via similar crisis response coverage that was added by certain AIG member companies as an endorsement to umbrella and follow form excess forms that did not integrated CrisisResponse® coverage ("Crisis Response Coverage Extension Endorsement").

XII. Crisis Response Coverage on Other Risks and Issuing Companies

Over time, crisis response coverage has made its way far beyond the standard commercial umbrella and excess forms of a multitude of carriers, and has a presence in nearly every insurance line, including primary coverage forms. It is in fact difficult to find a space that does not include crisis response as at least an optional coverage offering. Aviation, healthcare, environmental, professional liability, transportation and logistics, D&O, E&O, real estate management, hospitality and education related policies (by way of limited example only) now offer crisis response coverage. In 2011, AIG introduced the stand-alone product ReputationGuard® not subject to the typical sub-limits, and covering the cost of

[5] However, in the same 1999 time frame, AIG launched a CrisisFund product with significantly higher limits (up to $1 million) for crises related to 1) the price of stock or securities; 2) hostile take over; and 3) employment practices. (*See* http://ir.aigcorporate.com/phoenix.zhtml?c=76115&p=irol-newsArticle&ID=232541).

access to "world-class communications experts" to protect a company's reputation and brand value by managing reputation threats and mitigating the impact of negative publicity[6]. Since that time, numerous other companies have launched reputation protection products, including but not limited to Allianz (Reputation Protect), Zurich (BrandAssurance), MunichRe (Reputation Risk Insuarnce), as well as reputation products geared toward particular service industry segments.

XIII. Typical Crisis Coverage

The features of the crisis response coverage included in AIG's Umbrella Prime℠ and Prime Express℠ forms; in AIG's Crisis Response Coverage Extension Endorsement; and in the comparable forms of other carriers, vary by form and company. There are typical components, however. AIG's forms are utilized below to outline the scope and limitations of the typical crisis response coverage.

A. AIG Umbrella Prime℠ and Prime Express℠ Coverage

Under the Umbrella Prime℠ and Prime Express℠ forms, the insurer will advance "CrisisResponse Costs to third parties on behalf of the named insured[7] and will pay "Crisis Management Loss" on behalf of the named insured arising from a "Crisis Management Event" first commencing during the policy period, up to the stated sublimit of coverage.

The term "CrisisResponse Costs" is defined to mean enumerated, "reasonable and necessary" expenses incurred during and directly caused by a "Crisis

[6] *See* Erik Holm, *Got a Crisis? Tap AIG (Really)*, Wall St. J., Oct. 12, 2011, (https://www.wsj.com/articles/SB10001424052970203499704576624703997791390);

[7] This coverage is provided "regardless of fault".

Management Event" "provided that such expenses have been preapproved by us and may be associated with damages that would be covered by this policy." The enumerated expenses are:

1. medical expenses;
2. funeral expenses;
3. psychological counseling;
4. travel expenses;
5. temporary living expenses;
6. expenses to secure the scene of a "Crisis Management Event"; and
7. any other expenses pre-approved by the insurer.

The term "Crisis Management Loss" is defined to mean identified amounts incurred during a "Crisis Management Event". The identified amounts are:

1. amounts for the reasonable and necessary fees and expenses incurred by a Crisis Management Firm in the performance of Crisis Management Services for the Named Insured solely arising from a covered Crisis Management Event; and

2. amounts for reasonable and necessary printing, advertising of materials or travel by directors, officers, employees or agents of the Named Insured or a Crisis Management Firm incurred at the direction of a Crisis Management Firm, solely arising from a covered Crisis Management Event.

The term "Crisis Management Event" is defined to mean:

an Occurrence that in the good faith opinion of a Key Executive of the Named Insured, in the absence of Crisis Management Services, has or may result in:

1. damages covered by this policy that are in excess of the total applicable limits of Scheduled Underlying Insurance or the Self-Insured Retention; and

2. significant adverse regional or national media coverage.

Crisis Management Event will include, without limitation, man-made disasters such as explosions, major crashes, multiple deaths, burns, dismemberment, traumatic brain injury, permanent paralysis, or contamination of food, drink or pharmaceuticals, provided that any damages arising out of any of the aforementioned must be covered under this policy.

The term "Crisis Management Firm" is defined to mean firms identified in a schedule attached to the policy hired by the Named Insured to perform Crisis Management Services in connection with a Crisis Management Event.

Under the Umbrella Prime℠ and Prime Express℠ forms then, the definition of "CrisisResponse Costs" effects a limitation on the coverage to "reasonable and necessary" expenses incurred "during" and "directly caused by" a "Crisis Management Event" that are preapproved by the carrier. If these conditions are met, the coverage is triggered so long as the costs/expenses "*may be* associated with damages that *would be* covered by this policy." (Emphasis supplied). The definition of "Crisis Management Event" effects additional limitations and restates others: for there to be such an event, there must be an "Occurrence" and "damages covered by this policy." The requirement of covered damages is repeated for a second time in the definition of "Crisis Management Event" after the enumeration of particular events within the definitions ("explosions" and "contamination of food, drink or pharmaceuticals" for example) with the qualification "provided that any damages arising out of any of the aforementioned must be covered under this policy." The forms do not expressly state that the coverage is limited to "bodily injury" and "property damage" coverage, although the definition of "Crisis Management Event" arguably suggests this expectation on the part of the insurer.

The definition of "Crisis Management Loss" creates similar limitations on that coverage. As with coverage for "CrisisResponse Costs", the amounts must be "reasonable and necessary" fees and expenses or printing, advertising, mailing or travel "solely arising from a *covered* Crisis Management Event" (emphasis supplied). A "Crisis Management Loss" in turn requires a "Crisis Management Event" which as already noted requires an "Occurrence", and twice notes the requirement of damages covered under the policy.

With these conditions met, the typical policy affords coverage for "CrisisResponse Costs in the amount of $250,000 and "Crisis Management Loss" in the amount of $50,000. As noted, the coverage is not subject to a Retained Limit, and so the coverage applies first dollar, regardless of the exhaustion of underlying coverage, so long as the requirements of an "Occurrence", covered damages, and "reasonable and necessary" expenses incurred "during" and "directly caused by" a "Crisis Management Event" are met.

B. <u>AIG Crisis Response Coverage Extension Endorsement</u>

As noted, crisis response coverage is also effected by certain AIG member companies via a Crisis Response Coverage Extension Endorsement which may be attached to a policy without integrated CrisisResponse® coverage.

Under this form, the insurer will reimburse or pay on behalf of the named insured "reasonable and necessary" "crisis response costs" and/or "crisis management loss" arising out of either 1) "'bodily injury' or 'property damage' for which coverage is provided under this policy" or 2) "imminent injury" with respect to a "crisis event" to which the insurance applies. The coverage is limited to the stated sub-limits, but no self-insured retention or deductible applies. A separate provision provides that for the coverage to apply, the "crisis response costs" and/or "crisis management loss" must arise out of a "crisis event" and that the "bodily injury", "property damage" or "imminent injury" take place in the coverage territory and "commence[ ] to occur during the policy period." Furthermore, for the coverage to apply the "crisis response costs" and/or "crisis management loss" cannot arise out of any fact, circumstanced, pre-existing condition, situation, "bodily injury", "property damage", or "imminent injury" that you, prior to the inception date of the policy, knew, or reasonably should have known, could lead to, cause or result in such "crisis response costs" and/or "crisis management loss".

Also, the "crisis response costs" and/or "crisis management loss" must be incurred within 30 days after the commencement date of the "crisis event".

The term "crisis response costs" is defined to mean

1. reasonable and necessary "emergency transport expenses"8, "emergency psychology expenses"9, funeral expenses, travel expenses, and temporary living expenses incurred by you to provide relief and/or support to "affected persons", and

2. expenses incurred by you to secure the scene of a "crisis event".

"Crisis response costs" shall not include "defense costs" or "crisis management loss".

The term "crisis management loss" is defined to mean:

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8 Defined to mean "reasonable and necessary emergency transport expenses, occurring with 24-hours after a "crisis event", to transport an "affected person" sustaining "bodily injury" in a "crisis event" to a medical treatment facility.

9 Defined to mean "reasonable and necessary expenses for psychology or counseling services provided to 'affected persons' and incurred within the first fourteen (14) days after a 'crisis event'. This does not include the costs or expenses of any mediations or hospitalizations. Such psychology or counseling services must be approved by the 'crisis management firm'."

> Reasonable and necessary fees and expenses charged by a "crisis management firm" or your employees in providing public relations and media management services for the purpose of maintain and restoring public confidence in you. These expenses may include printing, advertising, or mailing of materials to manage reputational risk. This does not include the salaries of your employees.

"Imminent injury" is defined to mean "the actual and immediate threat of 'bodily injury' or 'property damage'".

"Crisis event" is defined to mean:

> 1. An emergency situation including, but not limited to, a manmade disaster, such as arson, a bombing, the taking of hostages, a mass shooting, terrorism (if covered under the policy only), intentional contamination of food, drink or pharmaceuticals or the actual or alleged mishandling of a natural disaster, that results in covered "bodily injury", "property damage" or "imminent injury" to any person; and
>
> 2. Such emergency situation as has been associated with or may reasonably be associated with significant adverse regional or national news media coverage.

The term "crisis management firm" is defined to mean "a public relations firm or crisis management firm, assigned or approved by us in writing, that is hired by you to perform services of the type covered under 'crisis management loss' in connection with a 'crisis event'".

In addition to being subject to all exclusions in the form to which the Endorsement is attached, two other exclusions are expressly added: there is no coverage for "crisis response costs" or "crisis management loss" resulting from "bodily injury", "property damage" or "imminent injury" that occurred prior to the date of any acquisition of or merger with another entity, and there is no coverage for "crisis response costs or "crisis management loss" arising out of infectious diseases or illnesses caused by any bacterium, virus, or fungus. However, this exclusion does not include, food-borne illnesses or defective vaccines.

Under the Crisis Response Coverage Extension Endorsement then, the "crisis response costs" an/or "crisis management loss" must be "reasonable and necessary". The coverage is expressly limited to "bodily injury" and "property damage" covered by the policy, either actual or imminent, and must "commence[ ] to occur during the policy period." The coverage therefore expressly does not apply to "personal and advertising injury". The "crisis response costs" and/or "crisis management loss" must arise out of a "crisis event". While the Endorsement undertakes to identify particular "crisis event[s]" expressly within the coverage (bombing, shooting, intentional contamination of food/drink/pharmaceuticals for example), the definition specifically states that the covered events are "not limited to" those enumerated.

There are other restrictions and limitations included in the Endorsement. As noted for example, there is a known loss limitation pursuant to which there is no coverage for any "fact, circumstance, pre-existing condition, situation, 'bodily injury', 'property damage' or 'imminent injury' known or which should reasonably have been known to the named insured prior to policy inception would result in "crisis response costs" and/or "crisis management loss". As also noted, "crisis response costs" and/or "crisis management loss" must be incurred within 30 days after the commencement of the "crisis event". Finally, and as also previously noted, there is an exclusion for "crisis response costs" and "crisis management loss" occurring prior to the date of acquisition of or merger with another entity, and those arising out of infectious diseases or illnesses caused by an bacterium, virus or fungus (with an exception for food-borne illnesses and defective vaccines).

As with the CrisisResponse® forms, where the conditions of coverage are met, "crisis response costs" are typically covered in the amount of $250,000 and "crisis management loss" in the amount of $50,000. As noted, the coverage is not subject to any self-insured retention or deductible.

XIV. Insurance Case Law Relating to Crisis Response

There is little case law involving disputes between carrier and policyholder over the application or scope of coverage intended to respond to a crisis event, by whatever named called. This is likely the result of two factors: the coverage at issue is relatively low – at least for those policies where the crisis response coverage is subject to a sub-limit. Consequently, any dispute over the application of the coverage is unlikely to be more than $300,000 based upon typical maximum sub-limits. Second, and perhaps a greater consideration, is the mutually beneficial nature of the coverage. As noted, in the instance of a potentially covered crisis event, the carrier has just as great an interest in the good management of post-crisis activities, whether it is thoughtful and effective public communication about the event and how it is being addressed, or whether it is the way post-crisis response efforts are organized, provided and funded. Either way, it is difficult to find reported or electronically published decisions involving disputes over crisis response coverage included or endorsed to an umbrella or excess liability policy. Rather, the cases tend to involve other forms in which crisis response is a central component of the risk being covered.

An exception is *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62 (Del. 2010) involving a CrisisResponse® policy issued by an AIG member company. But there, the dispute involved the application of the liability coverage to the insured's manufacture of contaminated peanut butter products resulting in a voluntary, nationwide recall. The crisis response coverage was not at issue in the litigation.

The same was true in *Hot Stuff Foods, LLC v. Houston Cas. Co.*, 2014 WL 28994 (D.S.D. Jan. 2, 2014), *aff'd in part and rev'd in part*, 771 F.3d 1071 (8th Cir. 2014), involving coverage under a Malicious Product Tampering/Accidental Product Contamination Policy for the recall of mislabeled breakfast sandwiches by the insured Hot Stuff. The court found coverage as a matter of law with issues of fact on the issue of damages. A jury awarded amounts for "recall expense and crisis response/consultant expenses" and for lost profits. Only the award for lost profits was the subject of a post trial motion by the carrier, however, not the award for crisis response expenses. 2014 WL 28994 at *2; 771 F.3d at 1081, n.3). The scope of the crisis response coverage was consequently not disclosed or discussed.

The same or a similar Accidental Product Contamination Policy issued by the same carrier was in dispute in *Caudill Seed & Warehouse Co., Inc. v. Houston Cas. Co.*, 835 F. Supp.2d 329 (W.D. Ky. 2011). There, the coverage for Crisis Response/Consultant Expenses was revealed to arise from a component of the policy's definition of "Loss":

> All reasonable and necessary fees and expenses of Corporate Risk International; or, provided the Company has given prior written consent, fees and expenses of any other persons (including public relations consultants and recall consultants) retained by the Named Insured to assist in the

> investigation of (and/or response to) an ACCIDENTAL PRODUCT CONTAMINATION.

Id. at 338. The insured faced liability for its sale of contaminated peanut products and alfalfa seed, and a dispute arose respecting coverage for damages it sustained as a result of product recalls, as well as for the fees of a public relations consulting firm and consulting group based upon "media attention" over one or more recalls. The facts revealed that the public relations services were not obtained from Corporate Risk International, and that the insured did not obtain the insurer's consent to retain the public relations firm it utilized. The court agreed with Houston Casualty that coverage was absent under the circumstances:

> While it may be reasonable to hire a public relations firm and a consulting group to deal with the recall, the Policy expressly requires the insured to obtain prior written consent before it will pay the fees and expenses of a public relations or recall consultant other than Corporate Risk International. Plaintiff did not obtain the necessary consent. Accordingly, the Court will grant Defendant's motion for summary judgment as a matter of law in regards to fees for the public relations firm and the consulting group.

Id. at 338.

Fresh Express Inc. v. Beazley Syndicate 2623/623 at Lloyd's, 199 Cal.App.4th 1038 (2011) involved a "TotalRecall+-Brand Protection" policy identified as "Malicious Contamination, Accidental Contamination and Products Extortion Insurance". The policy covered "losses" defined in part to mean "Crisis Response fees". At issue was $12 million in coverage for the cost of recalling *e. coli* contaminated spinach, including $125,000 for "consultant costs". Although not clear from decision, these fees may have been within the coverage for Crisis Response fees. Reversing the trial court, the California Court of Appeal determined that the *e. coli* outbreak was not within the policy's coverage for "Accidental Contamination" and that coverage was absent. There was no identification or discussion of the policy language addressing "Crisis Response fees" or consultant fees.

In *Cytosol Laboratories, Inc. v. Federal Ins. Co.*, 536 F. Supp.2d 80 (D. Mass. 2008), the existence of a "Products Withdrawal and Crisis Management Insurance" Endorsement added to a Federal policy affording claims-made Products/Completed Operations Liability and Commercial General Liability, and pursuant to which Federal paid costs associated with a product recall was identified as one basis on which the other, form coverage of the Products/Completed Operations-General Liability policy to which it was endorsed, did not afford coverage. *Id.* at 83.

Catholic Medical Center v. Fireman's Fund Ins. Co., 2015 WL 3463417 (D.N.H. Jun. 1, 2015) involved a first party property policy issued to a hospital which contained a Crisis Management Extension Endorsement affording coverage for losses due to a "covered crisis event". There, the hospital was the site of a neurosurgery procedure on a patient later diagnosed with Creutzefeld-Jakob Disease[10], described as "communicable, incurable and fatal". The hospital was required to quarantine and ultimately destroy surgical instruments as a result, and had to suspend its neurosurgery program for approximately six months while new instruments were purchased. The Fireman's Fund property policy contained a

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10 Sometimes called "mad cow disease". *See* https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Fact-Sheets/Creutzfeldt-Jakob-Disease-Fact-Sheet.

Health Care Extension Endorsement which in turn contained Communicable Disease Coverage and the referenced Crisis Management Coverage Extension Endorsement. The Communicable Disease Coverage defined "communicable disease" in relevant part as "any disease caused by a biological agent that may be transmitted directly or indirectly from one human or animal to another' and a "communicable disease event" as an

> Event in which a public health authority has ordered that the premises described in the Declarations be evacuated, decontaminated, or disinfected due to the outbreak of a communicable disease at such premises.

The Crisis Management Coverage Extension Endorsement applied to a "covered crisis event" defined as:

> Necessary closure of your covered premises due to any sudden, accidental and unintentional contamination or impairment of the covered premises or other property on the covered premises which results in clear, identifiable, internal or external visible symptoms of bodily injury, illness, or death of any person(s). This includes covered premises contaminated, by communicable disease, Legionnaires' disease, but does not include premises contaminated by other pollutants or fungi.

Id. at *2. The incident was reported to the state health regulator which met with hospital personnel to formulate a response, including the quarantine and destruction of the surgical instruments. The hospital made a claim under the Communicable Disease Coverage and Crisis Management Coverage Extension Endorsement, which was denied. Fireman's Fund contended that there was no "communicable disease event" because there was no "evacuation, decontamination or disinfection of 'the premises'", with "premises" defined as "that part of the location you occupy." The court agreed: "the only action taken was with respect to the possibly contaminated surgical instruments and . . . there was no evacuation, decontamination or disinfection of any other part of the hospital." *Id.* at *4. Since the surgical equipment was not "premises", this "important gateway to coverage" was not present. Since the Crisis Management Coverage required a "covered crisis event", in turn requiring "closure of the covered premises", this coverage was not triggered. *Id.* at *5.

XV. Conclusion

At least with respect to coverage forms containing integrated crisis response coverage (by whatever name called) and subject to the stated sub-limit, the coverage is automatically included in the policy premium: there is no additional premium charge[11]. Even with typical sub-limits of just $50,000 for the cost of public relations-related services and $250,000 for costs incurred in responding to the crisis, the coverage is a significant resource to an insured faced with a crisis event. It furthermore reflects a rare coverage the carrier is as motivated to provide, as the insured is benefitted by invoking.

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11 Some carriers may offer higher sub-limits for an additional premium charge.

ACCEC

American College of Coverage and Extracontractual Counsel

ACCEC Insurance Law Symposium

University of Michigan Law School

Ann Arbor, MI | Friday, October 20, 2017

Why Insurance Matters:

Insurance As A Driving Force for Our Economy

Speakers

Bruce D. Celebrezze
Sedgwick LLP

Bruce D. Celebrezze is a partner in the San Francisco office of Sedgwick LLP. He has been practicing in the field of insurance law for virtually his entire legal career spanning 38 years (so far). As one of the country's leading insurance industry litigators, he has represented a wide variety of international, national and regional insurers. In addition, Mr. Celebrezze frequently lectures and is widely published as a legal expert in the field.

Mr. Celebrezze is exceptionally well regarded by his peers and the wider market, with a national and international practice that focuses on complex general liability, including personal and advertising injury, property, and specialty lines. He also spends a substantial portion of his practice handling commercial disputes for insurers.

Mr. Celebrezze is President and a member of the Board of Regents and the Executive Committee of the American College of Coverage and Extracontractual Counsel. He is also active in the Federation of Defense and Corporate Counsel, having served as a Senior Director, member of the Executive Committee, Vice President, Dean of the Litigation Management College Graduate Program, and chair of the Insurance Coverage Section.

Mr. Celebrezze was a member of the civil grand jury in the City and County of San Francisco for a one year term. He was a member of the Board of Trustees of the Mechanics' Institute, a 6,000 member, 165,000 volume non-profit library in San Francisco, for 16 years, including serving as President of the Board for four years. He is a member of the President's Visiting Committee of St. Ignatius High School in Cleveland, Ohio.

Mr. Celebrezze has received many honors and recognitions for his insurance work and excellence. He has been recognized annually for many years by the pre-eminent legal directory Chambers USA as a leader in insurance, with highest esteem by his peers. Mr. Celebrezze has also been praised and recognized by Benchmark Litigation as a leader in his field.

Kyle D. Logue
University of Michigan Law School
Lunch Keynote

Kyle D. Logue is the Douglas A. Kahn Collegiate Professor of Law at the University of Michigan Law School. A member of the Michigan faculty since 1993, he teaches and writes in the fields of insurance, torts, tax, and law-and-economics. His scholarly work has appeared in numerous journals over the years, including, among others, the Michigan Law Review, the Yale Law Journal, the Stanford Law Review, the University of Chicago Law Review, and the University of Virginia Law Review. In 2013 Professor Logue was awarded the Liberty Mutual Prize for the outstanding paper in the area of property and casualty insurance law. He has been a member of the American Law Institute since 2010, and he also serves as the Associate Reporter of the ALI's Restatement of the Law of Liability Insurance. He is a coauthor of one of the leading textbooks on insurance law, entitled Insurance Law and Public Policy: Cases and Materials (4th ed. 2017).

Logue earned his BA, summa cum laude, from Auburn University, where he was a National Harry S. Truman Scholar and a Phi Kappa Phi National Fellow. He received his JD from Yale Law School, where he was an Olin Fellow and an articles editor on the Yale Law Journal. Before joining the Michigan Law faculty, Professor Logue worked as an attorney at Sutherland, Asbill & Brennan in Atlanta. Before that, he served as a law clerk to the Hon. Patrick E. Higginbotham of the U.S. Court of Appeals for the Fifth Circuit.

Professor Logue has been a visiting professor at the University of Virginia School of Law, the University of Alabama Law School, and Tsinghua University School of Law in Beijing. From 2006 to 2008, he served as the University of Michigan Law School's Associate Dean for Academic Affairs. From 2006 to 2016, he held the Wade and Dores McCree Collegiate Professorship at the University of Michigan. In 2016 he was named to the Kahn professorship.

Michael Barnes
Dentons US LLP

Michael Barnes is a coverage advisor and trial lawyer in Dentons' Litigation and Dispute Resolution department, working in the San Francisco office. As a member of the firm's Core Coverage and Claims Practice, Michael counsels insurers on claims-handling and coverage issues, defends bad faith suits, and litigates contribution actions among insurers.

Michael has advised clients on thousands of claims in more than forty states under policies of general liability, homeowners, commercial and personal automobile, environmental impairment liability, professional liability, directors and officers liability, disability, health and accident, fidelity, long-term care and marine insurance. In addition to advising clients in California and the West, he has acted as national coverage counsel for firm clients, coordinating coverage positions and drafting briefs on significant issues involving their business philosophies. Michael also handles commercial litigation against insurers and other firm clients.

Michael has first-chaired jury and bench trials in both state and federal court, and was trial counsel in Blair v. Allstate, featured in the Daily Journal's Top Defense Verdicts of 2003. In 2008 and 2009, Michael obtained consecutive federal court defense verdicts in three cases, including Schaber v. Allstate and Cecena v. Allstate. He has also been involved in more than fifty appeals and writ proceedings as appellate counsel, co-counsel or amicus counsel, including seminal decisions such as Collin v. American Empire, Delgado v. Auto Club,Swain v. California Casualty and Hartford v. Swift Distribution. As coverage counsel in trial court proceedings, Michael's work has led to numerous published decisions on issues of first impression, such as Allstate v. LaPore, American Empire v. Bay Area Cab, Samson v. Allstate, Lindsey v. Admiral, Great American v. Ace Oil, Moncada v. Allstate and Fireman's Fund v. National Bank of Cooperatives.

Michael also advises firm corporate clients on risk management issues ranging from insurance coverage questions to indemnity agreements, using his litigation expertise to provide real-world insight into corporate protection strategies. Similarly, Michael regularly advises our insurance clients on policy drafting and revisions, again using his courtroom experiences to complement the clients' knowledge of marketing factors and competitive trends.

Michael is a frequent speaker and writer on insurance coverage and litigation topics, including monthly contributions to the Insurance Litigation Reporter, where he sits on the editorial board. He recently co-authored chapters on liability insurance for the New Appleman on Insurance Law Library Edition and New Appleman Insurance Law Practice Guide, and presented the insurer's perspective at the 2009 and 2010 Insurance Year In Review events sponsored by the Bar Association of San Francisco.

Christopher R. Mosley
Sherman & Howard LLC

Chris Mosley is a Member of Sherman & Howard's Trial Group and Chair and founder of the Firm's Insurance Recovery Group. He specializes in representing corporate policyholders in disputes against their insurers. During his career, Chris has helped businesses recover more than $100 million from insurance companies. His expertise extends to all types of commercial insurance policies in virtually all industries.

Christine Haskett
Covington & Burling LLP
From Rain Checks to Real Disasters: Insurance as the Necessary Grease in the Wheels of Commerce

Christine Haskett represents global companies in complex coverage disputes with their insurers. Ms. Haskett's practice encompasses disputes involving property and business interruption insurance, asbestos liabilities, product liability claims, construction claims, and D&O insurance. Ms. Haskett represents companies in a wide range of industries, and she has particular expertise within the chemical, oil, and manufacturing industries and with cases involving technologies that leverage her Chemical Engineering background.

Leo Martinez
University of California Hastings College of the Law
From Rain Checks to Real Disasters: Insurance as the Necessary Grease in the Wheels of Commerce

Leo P. Martinez is the Albert Abramson Professor of Law at the University of California, Hastings College of the Law. He served as UC Hastings' Academic Dean for twelve years and he served as the Acting Chancellor and Dean of the College in the 2009-10 academic year.

Professor Martinez is a current member of the Council of the Section on Legal Education and Admissions to the Bar for the American Bar Association (ABA). He is a past president of the Association of American Law Schools (AALS). He has chaired or served on more than two-dozen ABA law school site evaluation visits and he has assisted more than ten law schools in their strategic planning. He is a member of the American Law Institute (ALI), he is one of the academic Advisers on the ALI's Principles of the Law of Liability Insurance project, and he was a member of the ABA Task Force on the Future of Legal Education.

Outside of academia, Professor Martinez has been an active participant in local and national non-profit organizations that seek to improve the world. He has chaired the boards of four different non-profit organizations including KQED, Inc.; Public Advocates, Inc.; the St. Francis Hospital Foundation; and Public Media Company. He is a member of the board of CollegeTrack, a Bay Area-based organization that provides mentoring for high school students living in low-income and under-served areas within the United States and he is a member of the University of Kansas Chancellor's Advisory Board (he is a rabid Jayhawk fan).

Professor Martinez is a co-author of a leading insurance law casebook, a co-editor of a four-volume insurance treatise, and the author of many articles on tax, insurance law, and legal education that have appeared in journals ranging from the Stanford Law Review to the Tulane Law Review to the Yale Law and Policy Review to the China EU Law Journal.

Professor Martinez has been honored with Annual Latino/a Law Professors Award in recognition of "outstanding contributions to the Latino/a community in general and Latino/a law professors in particular," he has been recognized as a Distinguished Alumnus by UC Hastings Law Raza Law Students Association, and he was recognized in 2011 for leadership in the legal arena and in the public interest with the Public Advocates Voices of Conscience Award. In 2010, in recognition for his service to the

College the Hastings Board of Directors approved the establishment of the $100,000 endowed Leo P. Martinez student scholarship at Hastings.

Gary P. Blitz
Aon Transactional Solutions
How Transactional Liability Insurance Has Changed the Way Private Equity Firms and Corporations Approach Public and Private M&A Transactions

Gary is a Managing Director of Aon Financial Solutions Group and a Senior Vice President of Aon Risk Services of New York, Inc. Gary splits his time between the New York City and Washington, DC offices.

He joined Aon after a twenty-year legal career at firms such as Mintz Levin, Piper Rudnick and KMZ Rosenman. As leader of the Financial Risks Practice, Gary became a nationally recognized expert in the insurance of financial and transactional risks, such as M&A insurance, insurance programs covering tax and regulatory risks, litigation buyouts, environmental insurance and credit enhancements. Throughout his career, Gary has been active in the development of such products. Gary also was a founder of ML Insurance Strategies, the insurance brokerage affiliate of the law firm of Mintz Levin.

Gary began his career as a tax lawyer and has practiced in the financial insurance area for almost twenty years. In his legal practice, Gary acted as legal counsel to U.S., London and international insurers, many of which regularly underwrite financial risks. He also worked with corporate clients in both a brokerage and legal capacity in purchasing such insurance programs and negotiating the terms and conditions.

His articles have appeared in numerous publications, and he regularly speaks on subjects related to his practice.

Joseph G. Finnerty III
DLA Piper LLP (US)
How Transactional Liability Insurance Has Changed the Way Private Equity Firms and Corporations Approach Public and Private M&A Transactions

Joseph G. Finnerty III is a litigation partner who served as Vice Chairman of the firm’s US Litigation Practice for seven years and Chaired the New York Litigation Practice Group for eight.

Joe concentrates his commercial litigation practice in counselling and litigation for leading insurance companies worldwide, and in business litigation. He defends leading insurers in significant D&O, financial institutions and M&A coverage disputes, and public and private companies and their management in M&A, fiduciary duty, fraud and securities law claims. Joe also has significant experience in class action litigation arising out of the Alien Tort Claims Act.

Joe regularly represents leading transaction liability insurers in disputes arising under representations and warranties and tax opinion insurance, and in the management and resolution of insurance claims for financial statement based and other substantial or significant losses arising out of M&A transactions. Joe also regularly represents the leading insurers of financial institutions worldwide in a broad range of matters, including disputes arising out of the disgorgement of illgotten gains paid to the SEC and other regulators.

Joe successfully represented the largest insurer of investment banks in litigation over coverage for more than US$300 million in SEC penalty and disgorgement orders, defended the directors of a public company in death spiral preferred stock litigation, and he represented lead insurance underwriters in a US$140 million representations and warranties insurance dispute. He also led the successful defense of one of the country's largest insurance brokers in a consolidated class action MDL proceeding arising out of the alleged unlawful sale of insurance seeking the disgorgement of premiums in excess of US$500 million, and he led the successful defense and dismissal of two separate Alien Tort Claims +Act class action litigations against Sheikh Mohammed bin Rashid Al Maktoum, the Ruler of Dubai.

More broadly, Joe's insurance practice includes litigation, investigations and counseling in connection with financial institutions liability, directors and officers liability, M&A insurance (including representations and warranties and tax opinion insurance), alternative risk transfer products, captive insurance programs, professional liability, business interruption and manuscripted new product coverages. He has represented the industry's leading liability insurance carriers, including The Chubb Group, AIG, Berkshire Hathaway, Zurich Financial, St. Paul Travelers, Munich Re, Beazley, AXIS, The Hartford and CNA, as well as various Lloyd's syndicates and London underwriters, among many others.

Michael W. Huddleston
Munsch Hardt Kopf & Harr, PC
How Transactional Liability Insurance Has Changed the Way Private Equity Firms and Corporations Approach Public and Private M&A Transactions

Mike represents policyholders and assists claimants in insurance recovery involving commercial insurance coverage. He began his career handling complex appeals and insurance litigation. Mike has been involved in many landmark insurance law decisions in Texas, including State Farm Fire & Cas. v. Gandy, Federal Ins. v. Samsung, Zurich Insurance v. Nokia, State Farm Insurance v. Johnson, William M. Mercer v. Woods, and St. Paul Insurance v. Dal-Worth Tank, Pa. Nat'l Insurance v. Kittyhawk, and St. Paul Insurance v. Convalescent Services.

Mike's is considered to be one of Texas' leading experts regarding the duty of liability carriers to settle under the Stowers doctrine. He is often called upon to assist in the drafting and handling of settlement offers in complex personal injury and professional liability cases. He is also often asked to assist policyholders in successfully protecting themselves from adverse verdicts where coverage is disputed.

Mike's insurance practice involves a very wide-range of insurance products, including D & O, professional liability, employment practices, fiduciary liability, commercial general liability, cyber liability, technology errors and omissions, excess/umbrella, nonsubscriber plans and employer's liability coverage, healthcare provider insurance, commercial property, builder's risk, business interruption, executive liability, FLSA coverage, Medicare fraud coverage, product recall, crime and fidelity, adjuster errors and omissions, and reinsurance.

Mike is often called upon to serve as a litigation manager or quarterback in complex cases. This is due in part to not only his insurance expertise, but also his work in handling a number of non-insurance appellate matters involving commercial litigation and personal injury. His other appellate decisions include Rose v. Doctor's Hospital (constitutionality of medical malpractice caps) and Christopherson v. Allied Signal (en banc)(expert witness standards pre-Daubert).

His work also includes the drafting of risk management (self-insurance, indemnity and exculpatory clauses, etc.) and insurance procurement provisions in construction, real estate and other commercial contracts. He has also participated in insurance audits and acquisition analysis.

Mike has served as a mediator/arbitrator in complex commercial and insurance matters. He has also served as an expert witness in complex insurance cases. Mike has served on the Planning Committees and served as a Presiding Officer at most of the major insurance law seminars in Texas. He is a prolific writer and commentator on insurance law continuing legal education.

Peter K. Rosen
Latham & Watkins LLP
How Transactional Liability Insurance Has Changed the Way Private Equity Firms and Corporations Approach Public and Private M&A Transactions

Peter K. Rosen is the global Chair of the Insurance Coverage Litigation Practice.

He represents insurance policyholders in matters involving:

- Commercial general liability policies
- Cyber insurance
- Directors' and officers' liability insurance policies
- Environmental insurance
- Fidelity insurance
- Professional liability policies
- Property disputes
- Representations and warranties insurance
- Surety bonds

Most recently, Mr. Rosen was the lead lawyer for the retail leaseholder at the World Trade Center in the massive insurance coverage litigation arising out of the 9/11 attacks. His role in the World Trade Center insurance coverage litigation gained him worldwide recognition.

Mr. Rosen's practice also includes:

- Broker-dealer matters
- Private securities disputes
- Securities litigation
- Special investigations

Additionally, he counsels boards of directors and senior management on directors' and officers' litigation, compensation and benefits agreements, corporate governance issues, employment practices, insurance strategies, indemnification and bylaws and agreements.

Mr. Rosen is recognized by Chambers USA as a leading lawyer in the insurance area.

Mr. Rosen teaches insurance law and corporate governance as an adjunct professor at the USC Gould School of Law.

Marialuisa S. Gallozzi
Covington & Burling LLP
Good Faith/Bad Faith Claims Investigations: Information vs. Evidence – A Distinction with a Difference

Marialuisa (ML) Gallozzi has helped for-profit and nonprofit policyholders develop and execute efficient and practical insurance recovery strategies that have secured over half a billion dollars for complex, high-value claims. She also helps clients to place and renew insurance coverage, transfer risk in contracts and transactions, and prepare for and manage crises.

Chambers USA described her as “incredibly good at complex settlement structures” and Business Insurance named her as one of its "Women to Watch" in 2014. In 2016, Washington DC Super Lawyers named her one of its "Top 50 Women Lawyers." Recent engagements include:

- Cyber: Lead counsel to a hospital system in obtaining insurance recoveries for a system-wide ransomware attack.
- Captive: Advice on business interruption coverage.
- Employee theft: Represented global companies in significant employee theft losses in the United States and Africa.
- Property: Represented D.C. nonprofit corporation in insurance recovery for earthquake damage to historic Union Station.
- Product Contamination/Recalls: Advised U.S. suppliers and manufacturers in connection with first-party and third party coverage claims.

Rick Hammond
HeplerBroom
Good Faith/Bad Faith Claims Investigations: Information vs. Evidence – A Distinction with a Difference

Rick Hammond focuses his practice in the area of insurance law. He serves as national counsel on matters relating to:

- Property Insurance Coverage
- Defense of municipalities, elected officials and corporate executives in high profile business and municipal litigation cases
- Fire and explosion cases
- Bad faith defense

Mr. Hammond also serves as an Adjunct Professor on Insurance Law for the John Marshall Law School, and as an expert witness on insurer bad faith and insurance law and coverage issues.

Prior to joining HeplerBroom in 2016, he practiced with a regional full-service defense firm, where he represented both corporate and municipal clients in insurance coverage matters.

Mary Craig Calkins
Kilpatrick Townsend
Beyond Champerty: The Rise of Third Party Litigation Funding

Mary Craig Calkins is a partner in Kilpatrick Townsend's Los Angeles office, where she leads the West Coast Insurance Practice. She has more than 30 years of insurance coverage experience, recovering hundreds of millions of dollars on behalf of policyholders in complex, high-stakes directors and officers liability, entertainment/intellectual property coverage disputes, cyber and technology risks, first- and third-party claims and broker liability issues. She also advises company management on how to maximize insurance protections. Mary is the Immediate Past President and a member of the Executive Committee of the American College of Coverage and Extracontractual Counsel, an honorary organization of the country's top insurance coverage lawyers. She is also an active leader of the American Bar Association Section of Litigation, where she is former co-chair of the Insurance Coverage Litigation Committee, chaired the national Women of the Section of Litigation Annual Conference in 2014 and 2015, and currently holds several senior leadership positions. Mary has been listed by Chambers USA in the area of Insurance: Policyholder (2006-2016), named as a "Top 100 Women Litigator" by the Los Angeles/San Francisco Daily Journal (2007-2009, 2014), recognized as one of 50 "Women to Watch" by Business Insurance Magazine, and has been listed repeatedly in International Who's Who of Insurance and Reinsurance Lawyers, Legal 500, and the prestigious 2013 Expert Guide to the World's Leading Women in Business Law. Mary is a frequent author, lecturer and media resource on insurance topics, and serves as a arbitrator.

Michael F. Aylward
Morrison Mahoney LLP
Beyond Champerty: The Rise of Third Party Litigation Funding

Michael F. Aylward is a senior partner in the Boston office of Morrison Mahoney LLP where he chairs the firm's Complex Insurance Coverage Practice group. For the past four decades, he has represented insurers and reinsurers in coverage disputes around the country concerning the application of liability insurance policies to commercial claims involving intellectual property disputes, environmental and mass tort claims and construction defect litigation. He has served as lead counsel in major coverage cases around the country and has successfully argued several landmark appeals on issues such as the pollution exclusion, "known loss" the meaning of "occurrence" and the scope of CGL coverage for cybernet and intellectual property claims. He has also advised various medical malpractice insurers concerning professional liability claims and consults frequently on bad faith and ethics disputes. He has also served as an arbitrator in numerous insurance coverage matters and has testified as an expert in matters involving coverage and reinsurance issues arising out of such claims.

In 2012, Mr. Aylward was among the twelve founding members of the American College of Extra-Contractual and Coverage Counsel and continues to serve on its Executive Committee and Board of Regents. He has also served in leadership roles for the American Bar Association (Insurance CLE); Federation of Defense and Corporate Counsel (chair, Reinsurance, Excess and Surplus Lines Section) and the International Association of Defense Counsel (Reinsurance and Excess Committee Chair). He is a frequent lecturer on insurance, ethics and bad faith issues and has published numerous articles on these topics, including a chapter on Understanding Bad Faith in the 2012 Appleman insurance treatise. In 2014, he was appointed by the American Law Institute to serve as one of the 43 Advisers on the pending Restatement of the Law of Liability Insurance.

Mr. Aylward is a graduate of Dartmouth College, where he received his B.A. with Honors (History) in 1976 and the Boston College Law School (J.D. Cum Laude, 1981).

Walter J. Andrews
Hunton & Williams LLP
Autonomous Vehicles and Aircraft: The Impact on Insurance

As the head of the firm's insurance coverage practice, Walter offers clients more than 25 years of experience managing insurance-related issues, including program audits, policy manuscripting, counseling, litigation and arbitration. He works with companies in a diverse range of industries, including financial services, consumer products, food and beverages, chemicals, real estate and municipalities.

Walter is admitted to practice before courts and arbitral bodies across the United States and abroad, including the United States Supreme Court, US Courts of Appeal for the Second, Third, Fourth, Sixth, Seventh, Eighth and Eleventh Circuits, and US District Courts for the Eastern and Western Districts of Virginia, Eastern District of Washington, Western District of Washington, District of North Dakota, Southern and Middle Districts of Florida, Southern District of New York, and Eastern District of North Carolina. He litigates insurance coverage and bad faith disputes around the nation, involving business interruption, product liability, construction defect, reinsurance matters, cyberinsurance and e-commerce issues, and other emerging claims. These matters involve a variety of insurance contracts, including professional liability, first party property, general liability insurance policies, cyberinsurance, and various reinsurance agreements.

Ramji Kaul
University of Michigan Law School
Moderator, *Autonomous Vehicles and Aircraft: The Impact on Insurance*

Ramji Kaul joined the Office of Career Planning in 2015 as an attorney-counselor and now serves as the assistant dean for career planning. Kaul is a double University of Michigan graduate, receiving his BA with distinction in English literature in 2002 and his JD, cum laude, in December 2004. After graduating from the Law School, Kaul joined the Chicago office of Dentons, where he was in private practice for more than 10 years. As a partner in the litigation and disputes resolution group, he litigated cases in state and federal courts, focusing on complex commercial litigation, catastrophe and major claims litigation, and class action defense. Kaul was the co-chair of his Chicago office's summer associate program and participated as an interviewer in Michigan Law's on-campus interview program.

John C. Bonnie
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
Crisis Management and Incident Response: Using Insurance as a Loss Mitigation and Business Resiliency Tool

John Bonnie is a partner in the Atlanta office of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC. He is practice leader of the firm's Insurance Coverage Practice Group, concentrating on complex commercial disputes, litigation, arbitration and trial involving first and third party insurance obligations, alleged bad faith and other forms of extra-contractual liability. His practice and experience extend to all lines of coverage, including London market and Bermuda form policies; includes claims advice and counseling for insurers nationwide; and the representation of clients in matters involving written agreements to indemnify and other means of contractual risk transfer and allocation.

Meghan Magruder
King & Spalding
Crisis Management and Incident Response: Using Insurance as a Loss Mitigation and Business Resiliency Tool

Meghan Magruder is a Partner in King & Spalding's Atlanta office and a member of the Business Litigation Practice Group. Ms. Magruder represents corporate clients in insurance coverage and complex commercial litigation matters. She is listed in The Best Lawyers In America, Georgia Super Lawyers, and Top Women Attorneys in Georgia.

Ms. Magruder has more than thirty years of experience handling complex commercial litigation matters with particular emphasis in insurance claims, indemnity disputes, purchaser and supplier disputes, mass tort defense and product liability litigation. She handles multi-party, class action, and multi-jurisdictional litigation and various forms of dispute resolution. She also provides clients with counseling on preventative litigation strategies, and advises policyholders on a wide variety of insurance and risk management matters. She serves as lead trial counsel in jury and non-jury trials, as well as lead counsel in international arbitration disputes. Ms. Magruder was lead counsel in a lengthy international arbitration in London for the largest automotive company based in India and successfully obtained dismissal of over $100 million of claims against her client and an award of attorney's fees in favor of her client. The award was challenged in the English High Court and was upheld on appeal. Ms. Magruder was also lead trial lawyer in a three week federal court jury trial winning a verdict for her client that was second highest in the State in the contract verdict category. The case was appealed and in 2013, the verdict was upheld on appeal.

Ms. Magruder is a fellow in the Litigation Counsel of America, which is an invitation-only trial lawyer honorary society and represents less than one-half of one percent of American lawyers. Fellows are selected based upon excellence and accomplishments in litigation, trial work and superior ethical reputation. Ms. Magruder is also a fellow in the American College of Coverage Counsel for her work representing policyholders in connection with claims in negotiation, litigation and arbitration including international arbitration. She advises clients with respect to all types of insurance policies and all matters of claims, including cyber, commercial liability, all risk, property, directors and officers, crime, employment, environmental errors and omissions and electronics specialty policies. She handles property loss and business interruption claims, and she has been retained by companies to assist with insurance strategies in situations where large numbers of cases and class actions, such as consumer class actions, asbestos and other toxic tort litigations have been filed. Ms. Magruder also counsels clients on review of their insurance programs and adequacy of coverages.

Ms. Magruder also has substantial experience advising clients on corporate governance and risk management issues. She serves as general counsel for the Institute of Nuclear Power Operations, whose members include all U.S. based nuclear power facilities.

Ms. Magruder also represents clients in a variety of mass tort and product liability matters. For example, she has represented a major pharmaceutical company involved in class action consumer fraud cases. She has been national coordinating counsel for international automotive companies involved in benzene exposure litigation. She has also defended companies in multi-jurisdictional asbestos and lead litigation, and she has represented a building products manufacturer in a number of lawsuits alleging defective products.