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Tort Trial & Insurance Practice Law Journal

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I. INTRODUCTION

This article discusses noteworthy admiralty and maritime decisions involving seamen, longshoremen, passengers, maritime liens and attachments, oil pollution, salvage, marine insurance, marine contracts, and other issues that arise in the practice of maritime law. The survey period includes opinions issued by federal and state courts in the United States between October 1, 2019, and September 30, 2020.

II. SEAMAN'S CLAIMS

A. *Jones Act Negligence, Unseaworthiness, and Maintenance and Cure*

In *Adriatic Marine, LLC v. Harrington*,[1] the plaintiff-seaman worked as an unlicensed engineer aboard an offshore supply vessel. While on watch, the seaman started to clean the bilge around the port main engine in the vessel's engine room. While performing this task, the seaman claimed that after he finished cleaning inside the bilge, he attempted to step out of the bilge by stepping on some piping, but lost his footing, thereby causing him to hit his lower back on an angle iron. As a result of his alleged incident, the seaman suffered injuries to his lumbar spine, specifically at the L4-5 and L5-S1 levels.[2]

Following the incident, the seaman sent a demand for maintenance and cure to the employer seeking payment for his medical treatment to his lower back. The employer subsequently filed a declaratory judgment action seeking a declaration from the district court that it was not responsible for maintenance and cure payments or, conversely, a determination regarding past and future liability for maintenance and cure generally.[3] In response, the seaman filed an answer and counter-claim asserting Jones Act negligence and unseaworthiness claims, as well as re-asserting his claim for maintenance and cure.[4] After completing discovery and deposing several physicians, the employer filed a motion for partial summary judgment arguing that the seaman's claims for maintenance and cure should be dismissed, because he willfully concealed and/or misrepresented pre-existing injuries to his lumbar spine during his pre-employment application process—in accordance with the well-established *McCorpen* defense.[5]

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1. Adriatic Marine, LLC v. Harrington, 442 F. Supp. 3d 929 (E.D. La. 2020).
2. *Id.* at 931–32.
3. *Id.* at 934. The employer had initiated maintenance and cure payments, but reserved its right to investigate the seaman's claim.
4. *Id.*
5. *See* McCorpen v. Central Gulf Steamship Corp., 396 F.2d 547 (5th Cir. 1968); Jauch v. Nautical Servs., 470 F.3d 207, 212 (5th Cir. 2006).

In analyzing the three prongs of *McCorpen*, the district court concluded that the plaintiff failed to disclose medical information to the employer and that this information was material to the employer's decision to hire him.[6] As for the third prong, the district court noted that the employer had also satisfied the causality prong. Specifically, the court noted "[t]he concealed medical information concerned recurring issues involving [plaintiff's] back pain, and included a prior diagnosis of degenerative disc disease and lumbar strain."[7] Despite the fact that the seaman had only suffered minor prior back injuries, the district court concluded that these prior lumbar back injuries were material to the employer's decision to hire him, and, thus the employer was entitled to invoke the *McCorpen* defense. As such, the district court granted the employer's motion for partial summary judgment and dismissed the plaintiff's maintenance and cure claims.

In *Upper Rivers Services, LLC v. Heiderscheid*,[8] Upper Rivers Services, LLC (URS) sought summary judgment on the issues of (1) Jones Act negligence and (2) maintenance and cure against a deckhand who, after he "picked up a piece of steel and turned to throw it in a bin," suffered a herniated disc for which he underwent surgery. The court found that the deckhand failed to show that URS breached a duty owed to him or that URS caused his injury. With respect to duty, it noted that the record was devoid of any evidence from which a jury could infer that URS acted unreasonably in relation to the deckhand's injuries as (a) he stated in a signed statement and confirmed in his deposition that he did not believe URS had done anything wrong to cause the injury, (b) he was aware that URS had equipment available for lifting heavy objects and had used that equipment before, and (c) he testified that he did not use URS' available equipment or ask for help because he did not think he needed help and routinely lifted things heavier than the 35-pound piece of steel. In the face of such evidence, his speculation that the lack of a "stretching routine" or other training might "possibly" have prevented his injury did not raise a dispute as to a genuine issue of material fact. With respect to causation, the court found the lack of expert evidence, including lack of any testimony from any medical professional, proved fatal as it was far from obvious that his injury stemmed from the act of lifting the steel considering his medical records showed that he reported having back pain for over a month before the accident. With respect to maintenance and cure, the deckhand offered no documentation, such as his cost

6. *Harrington*, 442 F. Supp. 3d at 937.
7. *Id*. at 938.
8. Upper Rivers Servs., LLC v. Heiderscheid, No. 19-cv-00242, 2020 WL 5017841 (D. Minn. Aug. 25, 2020).

of lodging, expenses, or medical bills. The court found that his testimony—that he paid $575 a month in rent and that he may be liable for the medical bills already paid—alone, was insufficient to recover maintenance and cure.

In *Brown v. Reinauer Transportation Companies*, *L.P.*,[9] an injured seaman appealed from the Eastern District of New York's decision granting summary judgment on his Jones Act negligence and unseaworthiness in favor of vessel owner, Reinauer Transportation Companies.

Although the seaman had been unable to explain the cause of his fall in his deposition testimony and failed to present any evidence of the existence of a dangerous condition on the vessel aboard which he was injured, the seaman argued on appeal that his contradictory summary judgment affidavit created a genuine issue of material fact as to the cause of his fall that precluded summary judgment.

The Second Circuit rejected the seaman's argument, holding that the seaman's summary judgment affidavit contradicting his own deposition testimony that he was unaware of the cause of his fall could not be used to create a genuine issue of material fact to defeat summary judgment.

B. *Other Issues Affecting Jones Act Seamen*

In *Saltzman v. Whisper Yacht*, *Ltd.*[10], the United States District Court for the District of Rhode Island considered a Jones Act action where two defendant-entities associated with the vessel on which the plaintiff was employed filed (amongst related claims for relief) a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on the basis that they were neither the vessel owners nor employers of the plaintiff. The plaintiff argued that the two defendant entities should not be dismissed because they, as well as another defendant, "all managed, supervised, crewed, and operated" the vessel, and "all were Plaintiff's employer."[11] The court noted that the United States Court of Appeals for the First Circuit had not adopted a rule regarding whether only one employer can be held liable for Jones Act purposes.[12] It analyzed rulings of the United States Court of Appeals for the Ninth and Fifth Circuits, and the United States District Court of Maryland, noting a circuit split wherein the Ninth Circuit has held that "there can be no more than one 'employer' for purposes of the Jones Act" (a holding which was followed by the District of Maryland),

9. Brown v. Reinauer Transp. Cos., 788 F. Appx. 47 (2d Cir. 2019).

10. Saltzman v. Whisper Yacht, Ltd., No. 19-285MSM, 2019 WL 6954223 (D.R.I. Dec. 19, 2019), *report & recommendation adopted by* No. 19-285MSM-PAS, 2020 WL 872599 (D. R.I. Feb. 21, 2020).

11. *Id.* at *4.

12. *Id.*

while the Fifth Circuit has held the opposite.[13] Finally, after stating that the First Circuit would more likely adopt the reasoning of the Ninth Circuit, the court reasoned that the identity of the employer(s) should be an issue of fact for the jury.[14] Therefore, the court denied the defendants' motion.[15]

In *Knudson v. M/V American Spirit*,[16] the plaintiff originally filed an action in 2014 alleging personal injuries sustained while serving as a seaman on *M/V AMERICAN SPIRIT* operating in the Great Lakes region. The case has been slowly progressing in the United States District Court for the Eastern District of Michigan since then. On March 25, 2020, the court ruled on four of plaintiff's and defendants' motions *in limine* in anticipation of a (now continued) 2020 jury trial date. (Plaintiff and defendants each filed motions *in limine* which renewed previously denied motions. The court denied these motions again. The two original motions *in limine* are outlined below.).

Defendants filed a motion *in limine* to exclude evidence, testimony, or argument related to the financial information of Defendant American Steamship company (ASC) as irrelevant to plaintiff's maintenance claim. Defendants argued that maintenance and cure is an obligation of plaintiff's designated employer (ASC). In denying ASC's motion, the court determined that ASC had acted as plaintiff's employer in various ways, had paid maintenance to plaintiff previously, and, crucially, it was ASC's actions that gave rise to plaintiff's request for punitive damages. Thus, the court concluded that ASC's financial condition is relevant to the punitive damage's inquiry.[17]

Further, defendants' motion urged exclusion of any evidence, testimony, or argument to suggest an amount or calculation of punitive damages that would exceed a 1:1 ratio to any compensatory damages. Defendants cited United States Supreme Court precedent of a 1:1 ratio that has been applied in maritime environmental contamination and vessel collision cases. However, the court noted that other courts had not applied the 1:1 ratio to certain maintenance and cure cases, and the motion was premature and not the appropriate subject of a motion *in limine*.[18]

In their second motion *in limine*, defendants sought to exclude the testimony of plaintiff's lay witness following her deposition, which was largely,

13. *Id.* (quoting Glynn v. Roy Al Boat Mgmt. Corp., 57 F.3d 1495, 1497, 1500 (9th Cir. 1995); Guidry v. S. La. Contractors, Inc., 614 F.2d 447, 452 (5th Cir. 1975); Ryan v. United States, 331 F. Supp. 2d 371, 382 (D. Md. 2004)).
14. *Id.* at *4–5.
15. *Id.* at *7.
16. Knudson v. M/V Am. Spirit, No. 14-14854, 2020 WL 145705, (E.D. Mich. Mar. 25, 2020).
17. *Id.* at *1.
18. *Id.*

but not entirely, comprised of hearsay statements inadmissible under Rule 802. The Court ordered that the lay witness' deposition should be purged of testimony not based upon her firsthand knowledge, but, to the extent her testimony was based upon her firsthand knowledge, that testimony would be admissible.[19]

In deciding the case of *Sanchez v. Smart Fabricators of Tex., LLC*,[20] the U.S. Fifth Circuit Court of Appeals will reconsider its test for determining Jones Act seaman status in order to align the Circuit with U.S. Supreme Court precedent. In *Sanchez*, the plaintiff worked as a welder on offshore rigs. He was employed by Smart Fabricators of Texas (SmartFab), but worked upon rigs for Enterprise Offshore Drilling, LLC (Enterprise). The plaintiff worked for SmartFab for a total of sixty-seven (67) days, broken down to: two days in an onshore shop (3% of his employment), four days on a vessel not owned by Enterprise (6% of his employment), forty-eight days on a jack-up rig owned by Enterprise and located near an inland pier (72% of his employment), and thirteen days on a jack-up drilling rig owned by Enterprise and located on the Outer Continental Shelf (OCS) (19% of his employment).[21] For his sixty-seven days of employment, the plaintiff worked day shifts and returned home at the end of each day. While working aboard the rig located on the OCS, the plaintiff tripped on a pipe welded to the deck and suffered injuries. After his incident, the plaintiff sued SmartFab in state court alleging he qualified as a Jones Act seaman. SmartFab subsequently removed the case, but the plaintiff contended that his Jones Act claims precluded removal.[22] The district court denied the plaintiff's motion to remand and granted SmartFab's motion for summary judgment, each for the same reason—the plaintiff did not qualify as a Jones Act seaman.[23] The plaintiff appealed and the sole issue for the Fifth Circuit to consider was the plaintiff's seaman status.

In considering the issue, the Fifth Circuit cited the two-prong test for seaman status as set forth by the U.S. Supreme Court in *Chandris, Inc. v. Latsis*.[24] In analyzing the plaintiff's employment, the Fifth Circuit narrowed its focus on the second prong which requires a substantial connection in terms of quantity (duration) and quality (nature of the work performed). In pertinent part, the Fifth Circuit focused on the "nature" inquiry.

19. *Id.* at *2.
20. Sanchez v. Smart Fabricators of Tex., LLC, 970 F.3d 550 (5th Cir. 2020).
21. *Id.* at 552.
22. *Id.*
23. *Id.*
24. Chandris, Inc. v. Latsis, 515 U.S. 347, 368 (1995). The two-prong test is (1) the employee's duties "must contribute to the function of the vessel or to the accomplishment of its mission," and (2) the employee "must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature." *Id.*

This case and issue have confounded the Fifth Circuit for some time. In March 2020, a panel of the court held that the plaintiff did not qualify as a seaman;[25] however, in April 2020, the court withdrew the panel's decision and granted rehearing. In August 2020,[26] a new panel of the Fifth Circuit determined that the plaintiff qualified as a Jones Act seaman. In its August 2020 decision, the Fifth Circuit focused on whether the plaintiff's employment subjected him to the perils of the sea.[27] Citing earlier precedent of *In re Endeavor Marine*[28] and *Naquin v. Elevating Boats, LLC*,[29] the Fifth Circuit explained that under *Endeavor Marine*, so long as the plaintiff could show he was exposed to the "perils of the sea," even if his duties were on a vessel jacked up next to a dockside pier, he could qualify as a Jones Act seaman.[30] Likewise, under *Naquin*, the plaintiff could establish seaman status if he was "doing [a] ship's work on vessels docked or at anchor in navigable water."[31] Considering this precedent, the plaintiff's employment aboard a drilling rig jacked up above water, and noting that near-shore workers "still remain exposed to the perils of a maritime work environment,"[32] the Fifth Circuit concluded that the plaintiff had shown he had a substantial connection in both nature and duration. The Fifth Circuit thus reversed and remanded.[33]

Following this August 2020 decision, the Fifth Circuit issued an order that it would reconsider *Sanchez* and its corresponding test for determining Jones Act status in the context for an offshore rig worker *en banc*.

III. LONGSHOREMEN CLAIMS

At issue in *Mays v. Chevron Holding*[34] was whether the Outer Continental Shelf Lands Act (OCSLA) extended to an injury occurring in state waters on a fixed platform. In this case, the decedent worked as a valve technician aboard a fixed platform located within state waters. He was directly employed by a subcontractor, who serviced valves on various platforms on behalf of the platform owner. The decedent was killed in an explosion occurring aboard a platform and his widow and children sued the platform owner for state-law wrongful death claims.[35] The platform owner defended

25. Sanchez v. Smart Fabricators of Tex., LLC, 952 F.3d 620 (5th Cir. 2020).
26. Sanchez v. Smart Fabricators of Tex., LLC, 970 F.3d 550 (5th Cir. 2020).
27. *Id.* at 554–55.
28. *In re* Endeavor Marine, 234 F.3d 287, 289 (5th Cir. 2000) (per curiam).
29. Naquin v. Elevating Boats, LLC, 744 F.3d 927 (5th Cir. 2014).
30. Sanchez, 970 F.3d at 555.
31. Naquin, 744 F.3d at 935.
32. Sanchez, 970 F.3d at 555 (quoting *Naquin*, 744 F.3d at 934).
33. *Id.*
34. Mays v. Chevron Holding, 968 F.3d 442 (5th Cir. 2020).
35. *Id.* at 444.

and claimed immunity under the applicable state workers' compensation scheme. The parties agreed that state immunity did not shield the platform owner *if* the decedent's accident fell under the ambit of the federal Longshore and Harbor Workers' Compensation Act (LHWCA),[36] which extends to injuries "occurring as the result of" natural-resource extraction on the Outer Continental Shelf (OCS).[37]

At the district court level, the issue of LHWCA coverage was submitted to the jury. The evidence submitted showed that: (1) the platform upon which the decedent was working on was located in Louisiana waters, but was connected to the platform owner's OCS platforms; (2) the fatal explosion was caused by gas flowing from those platforms; and (3) those OCS platforms had to be shut down due to the accident.[38] Considering this evidence, the jury found that the plaintiff's death was caused by the platform owner's OCS activities, which, therefore meant that the LHWCA applied and the platform owner could not claim state immunity. The jury then found the platform owner seventy percent (70%) at fault for the decedent's wrongful death and awarded his widow damages. The platform owner appealed.

On appeal, the Fifth Circuit considered under what circumstances OCSLA and, therefore the LHWCA, would extend to platform incidents occurring within state waters. Relying on the plain language of OCSLA, the Fifth Circuit noted that it requires "a link only between the employee's 'injury' and extractive 'operations conducted on the [OCS].'"[39] As such, citing this plain language and *Pacific Operators Offshore*, *LLC v. Valladolid*[40] in evaluating whether OCSLA would extend to this incident, the Fifth Circuit focused on the nature of operations and whether those operations show a "'substantial nexus between the injury and extractive operations on the shelf.'"[41] The appellate court also noted that this substantial nexus question is "fact-specific" and "depend[s] on the individual circumstances of each case."[42]

Considering the undisputed facts of this case, the Fifth Circuit held that the jury reasonably concluded the decedent's death had a "substantial nexus" with the platform owner's OCS activities.[43] The Fifth Circuit affirmed the

36. 33 U.S.C. §§ 901–950.
37. 43 U.S.C. § 1333(b).
38. *Mays*, 968 F.3d at 444.
39. *Id*. at 449 (citing 43 U.S.C. § 1333(b)).
40. 565 U.S. 207 (2012).
41. *Id*. (quoting Pac. Operators Offshore, LLC v. Valladolid, 565 U.S. 207, 211 (2012)).
42. *Id*. at 451 (quoting Baker v. Dir., OWCP, 834 F.3d 542, 548 (5th Cir. 2016)).
43. *Id*. at 451.

jury's findings and found that OCSLA, and, thus the LHWCA, applied to the decedent's incident.

In *Purvis v. Maersk Line A/S*,[44] a district court ruling for a shipowner was affirmed, finding there was no genuine issue of material fact suggesting Maersk breached its turnover duty.[45] Purvis sued Maersk for negligence under § 905(b) of the Longshore and Harbor Worker's Compensation Act after he was injured by a hatch cover crashing down and striking him in the head as he was climbing a ship's ladder, thus causing him to fall to a lower platform.[46] There were no witnesses to the fall.[47] Purvis alleged Maersk breached its turnover duty to him as a stevedore, arguing either there was a defect in the hatch cover or a Maersk employee must have left the hatch unlatched after opening it.[48] The Eleventh Circuit held the evidence put forth of a possible defect in the hatch door—namely a video of Purvis' attorney manipulating the door until it fell three years after the injury—and maintenance records showing hatch locks not working without accompanying information on whether it was the same hatch and whether those condition(s) had ever been repaired, was speculative and failed to prove a breach of duty.[49] The court also held the condition of an unlatched hatch cover would have been obvious to Purvis as a "reasonably competent" longshoreman, therefore also precluding recovery for a breach of the turnover duty on Purvis' alternative theory.[50]

IV. PASSENGER CLAIMS

In *Brees v. HMS Global Maritime Inc*.[51] a ferry passenger sued a ferry operating company, its general manager, and other company employees alleging a violation of his right to free speech and claimed unlawful searches of his vehicle when he attempted to board a ferry.[52] He asserted violations of the First, Fourth, and Fourteenth Amendments of the United States Constitution and various state laws.[53] Defendants moved for summary judgment.[54]

The district court held that the ferry holding area was a non-public forum for purposes of the right to free speech.[55] Thus, the ferry's policy

44. Purvis v. Maersk Line A/S, 795 F. App'x 756 (11th Cir. 2020).
45. *Id*. at 759.
46. *Id*. at 757.
47. *Id*. at 758.
48. *Id*. at 759.
49. *Id*.
50. *Id*. at 759–60.
51. Brees v. HMS Global Maritime Inc., 431 F. Supp. 3d 1207 (W.D. Wash. 2020).
52. *Id*. at 1212–13.
53. *Id*.
54. *Id*. at 1213.
55. *Id*. at 1215–16.

against "foul, abusive, or disruptive language" in order to "provide a safe and enjoyable experience for all … passengers" was reasonable and viewpoint neutral, and therefore not unconstitutional.[56] The district court held that the claim of a unconstitutional search also failed as a matter of law.[57] The ferry loading area had a conspicuously posted sign providing that failure to consent or submit to screening or inspection would result in revocation of authorization to board.[58] The district court ruled that the alleged searches were consistent with the government's special need to prevent and deter terrorist attacks and to safeguard the nation's maritime and transportation infrastructure. This important and special need dwarfed the plaintiff's privacy interest in avoiding minimally invasive vehicle screenings.[59] The district court also held that the plaintiff inadequately pled that the ferry company and its general manager violated his rights under the Equal Protection Clause of Fourteenth Amendment and that the passenger's allegations against the county and ferry company did not amount to extreme and outrageous conduct.[60] The district court thus issued summary judgment for the defendants.[61]

In *White v. Fincantieri Bay Shipbuilding*,[62] plaintiff allegedly suffered a traumatic brain injury and herniated cervical disc while working as a technician installing and testing the steering equipment aboard a towing vessel, the M/V *MILLVILLE*, as it underwent sea trials on Lake Michigan.[63] Plaintiff was in the galley of the vessel when, without notice, the sea trials began. Plaintiff claims that he was "violently thrown" causing him serious injuries.[64]

In addition to suing his employer (Engine Motor, Inc. (EMI)), plaintiff also sued the company that built the vessel (Fincantieri Bay Shipbuilding, Inc. (FBS) and Fincantieri Marine Group, LLC (collectively Fincantieri)), the owner of the vessel (Wawa, Inc. (Wawa)), and the operator of the vessel (Keystone Shipping, Co. (Keystone)). Plaintiff filed claims under the Longshore and Harbor Workers' Compensation Act (Longshore Act), the Jones Act, and general maritime law. Further, the plaintiff asserted claims for common law negligence, *respondeat superior*, and punitive damages under Wisconsin law.[65]

56. *Id.*
57. *Id.* at 1217.
58. *Id.*
59. *Id.*
60. *Id.* at 1218–19.
61. *Id.* at 1222.
62. White v. Fincantieri Bay Shipbuilding, 429 F. Supp. 3d 582, 584 (E.D. Wis. 2019).
63. *Id.* at 585.
64. *Id.*
65. *Id.* at 584.

Fincantieri filed a 12(b)(6) Motion to Dismiss three of the causes of action (*i.e.*, 1. Claims of unseaworthiness, 2. Common law negligence, and 3. Punitive damages).[66] As to the unseaworthiness cause of action, Fincantieri argued the Plaintiff was a longshoreman and therefore could not bring a claim for unseaworthiness as Plaintiff was not a seaman as only seaman can bring such claims. The Court found the Plaintiff was a longshoreman based off his allegations in his Complaint and therefore, because the warranty of seaworthiness extends only to seaman, Plaintiff could not bring a seaworthiness action.[67]

As to the common law negligence actions under Wisconsin law, Fincantieri argued Plaintiff's claims should be dismissed because they are preempted by federal law. The Court held although courts have allowed plaintiffs to plead tort law claims along with the Longshore Act, it was only where there was some doubt over whether the plaintiff has a claim under the Longshore Act. The Court held that because there seems to be no dispute that Plaintiff had valid claims under the Longshore Act, it would therefore dismiss Plaintiff's common law Wisconsin claims.[68]

Finally, as to the punitive damages claims, Fincantieri argued Plaintiff should be precluded from seeking punitive damages under Wisconsin law because it is also preempted by federal maritime law. However, the Court found that punitive damages are generally available under maritime law and courts in the circuit have held punitive damages may be sought by both seamen and longshoremen.[69]

In *Chessen v. Am. Queen Steamboat Operating Co.*, the plaintiff was a passenger on one of defendant's, American Steamboat Operating Company (American Queen), cruise ships when she caught her foot on an oversized tablecloth and tripped sustaining injuries.[70] The incident occurred on October 17, 2017.[71] Plaintiff filed an Amended Complaint against American Queen to assert a claim under the general maritime law. American Queen, in response, filed a Motion for Summary Judgment, arguing Plaintiff failed to file suit within the one-year limitation period set forth in the Passage Ticket Contract (Contract) that governed her trip and was sent to her on October 5, 2017.[72] Prior to filing suit, American Queen received a letter dated November 15, 2017 from plaintiff's counsel regarding the

66. *Id.* at 586.
67. *Id.* at 587.
68. *Id.* at 588.
69. *Id.* at 588–89.
70. Chessen v. Am. Queen Steamboat Operating Co., 461 F. Supp. 3d 845, 848 (S.D. Ind. 2020).
71. *Id.*
72. *Id.* at 847.

injury and, in response, American Queen advised that any litigation would need to take place in Indiana pursuant to the Contract.

The district court followed the "reasonable communicativeness" test set out in *Thompson v. Ulysses Cruises, Inc.*[73] The reasonable communicativeness test has two factors that courts consider: (1) the manner in which the crucial language is presented in the ticket, and (2) extrinsic factors surrounding the purchase and subsequent retention of the ticket. The district court held that the one-year limitation period in the contract was reasonably communicated and, thus, enforceable against plaintiff. Therefore, the Court granted American Queen's Motion for Summary Judgment.[74]

In *Higgs v. Costa Crociere S.P.A. Co.*,[75] the Eleventh Circuit reversed the district court's ruling which reduced a jury's award for past medical expenses from the amount the jury found to be reasonable (approximately the amount billed by the Plaintiff's healthcare providers) to the amount actually paid to satisfy the bills by the Plaintiff and her insurance company.[76] The question was one of first impression before the Eleventh Circuit: "how to calculate past medical damages in a maritime tort action," when there is a dramatic difference between the amount billed for treatment and the amount actually paid by the insurance company.[77] Finding the collateral source rule to be applicable both substantively and as an evidentiary rule, the appeals court held the appropriate measure of medical damages in a maritime tort case is the reasonable value determined by the jury upon consideration of any relevant evidence, including the amount billed, the amount paid, and any expert testimony and other relevant evidence the parties may offer.[78] In so ruling, the court declined to apply a bright-line rule that would categorically limit medical damages to the amount actually paid by an insurer in maritime tort claims, thus reversing the district court ruling and remanding for entry of judgment in the amount the jury found to be reasonable.[79]

The court also held in *Higgs* that the cruise line's notice of the danger posed from a mop bucket was inferable because the one-foot-tall bucket filled with dirty water was placed around a blind corner by a crewmember in a high traffic area.[80] The Eleventh Circuit found the danger posed by the placement would be obvious to anyone, including the crewmember who knowingly placed it there.[81] Although there were additional facts put

73. Thompson v. Ulysses Cruises, Inc., 812 F. Supp. 900 (S.D. Ind. 1993).
74. *Id.* at 850.
75. Higgs v. Costa Crociere S.P.A. Co., 969 F.3d 1295 (11th Cir. 2020).
76. *Id.* at 1299.
77. *Id.* at 1308.
78. *Id.* at 1310–18.
79. *Id.* at 1299–1300.
80. *Id.* at 1303.
81. *Id.*

forth on the issue, the court stated this was "more than enough" evidence to establish Costa's actual notice of the hazard.[82]

In *Tesoriero v. Carnival Corp.*,[83] the Eleventh Circuit rejected an appellant's argument that Carnival had constructive notice of a dangerous condition involving a vanity chair that broke while the passenger was sitting in her cabin—attributable on old, dried glue—because the repair efforts would only have been visible after the chair broke and daily inspection by the cruise line's housekeeping staff did not reveal a visible defect in the chair.[84] In doing so, the court declined to impose an "implicit legal requirement that all furniture on a cruise ship be either disassembled or subjected to daily stress testing."[85] The court also resolved uncertainty in the circuit regarding the doctrine of *res ipsa loquitor*—ruling that a plaintiff who relies on *res ipsa loquitur* to show a breach of duty still bears the burden of proving that a duty existed in the first place.[86] Appellant could not rely on the theory of *res ipsa* because she had failed to prove notice, which is a prerequisite to imposing liability for a maritime negligence tort.[87]

In *Broberg v. Carnival Corp.*,[88] judgment for the cruise line was affirmed on a claim for negligent over-service of alcohol relating to a passenger who fell overboard and died. The evidence showed the cruise line served the passenger at least sixteen drinks during an approximate twelve hour time period.[89] Eye witnesses testified that the passenger appeared intoxicated, but was still able to sit on a chair, walk normally, and did not appear in danger or at risk.[90] Based on multiple eye witnesses testifying that the passenger did not appear to be so intoxicated that would cause concern for her safety, the district court concluded that the cruise line was not on notice that the passenger was intoxicated to the point of being in serious danger.[91] The Eleventh Circuit was not left with a "definite and firm conviction" that the district court erred in concluding the cruise line did not have notice of the danger and affirmed judgment in favor of Carnival.[92]

82. *Id.*
83. Tesoriero v. Carnival Corp., 965 F.3d 1170 (11th Cir. 2020).
84. *Id.* at 1179–80.
85. *Id.*
86. *Id.* at 1181–82.
87. *Id.* at 1183.
88. Broberg v. Carnival Corp., 798 F. App'x 586 (11th Cir. 2020).
89. *Id.* at 587–88.
90. *Id.* at 588.
91. *Id.* at 590.
92. *Id.*

V. CONTRACT

In *Rocque v. Zetty*, the United States District Court for the District of Maine addressed the "total loss rule," which limits the amount of damages to the vessel's value when the vessel is adjudged a complete loss, under an oral ship repair contract.[93] In this case, a 37-foot Egg Harbor Deluxe Cruiser sank after it had been repaired by a boatyard pursuant to an oral contract.[94] The boat owner sued the boatyard for breach of contract, breach of duty of good faith and fair dealing, fraudulent and negligent misrepresentation, and sought punitive damages.[95] The boatyard moved for summary judgment.[96] The court held that the "total loss rule" did not limit the boat owner's damages where the oral ship repair contract did not limit recovery to contractually specified damages or exclude consequential damages, and that the boat owner could not claim breach of duty of good faith and fair dealing separately from the breach of contract cause of action.[97]

Following *In re Doiron*,[98] the Fifth Circuit in the 2019 case of *Barrios v. Centaur, LLC*, expanded the *Doiron* test to apply to all mixed-services contracts, not only those arising in an oil and gas context.[99] In *Barrios*, while offloading a generator from a crew boat to a barge, the plaintiff suffered injuries. The plaintiff's employer had previously executed a master service contract with the owner of a dock for repair work to be performed at a dock facility, including the installation of a concrete containment rail.[100] To complete the construction of the concrete containment rail, the plaintiff's employer chartered a barge to serve as a work platform and to hold equipment. The barge was moved up and down the river using a tugboat and winch, as the construction progressed.[101]

The plaintiff sued both the barge owner and his employer for his injuries. The barge owner cross-claimed against the employer, seeking contractual indemnity and additional insured status under the master service

93. Rocque v. Zetty, 456 F. Supp. 3d 257 (D. Me. 2020).
94. *Id.* at 259–60.
95. *Id.* at 261–64, 267.
96. *Id.* at 259.
97. *Id.* at 262–63.
98. In *In re Larry Doiron, Inc.*,879 F.3d 568 (5th Cir.) (*en banc*), *cert. denied*, 138 S. Ct. 2033 (2018), the Fifth Circuit set forth a new test to determine whether an oil and gas services contract is maritime in nature. The two-part test queried (1) whether the contract provides services to facilitate the drilling or production of oil and gas on navigable waters; and (2) whether the parties expect that a vessel will play a substantial role in the completion of the contract. Nonetheless, the *Doiron* test only considered maritime or non-maritime nature of contracts relating to the exploration, drilling, and production of oil and gas. The Fifth Circuit noted that the test *could* apply to a non-oil and gas services contract if the activity "involves maritime commerce and work from a vessel."
99. Barrios v. Centaur, LLC, 942 F.3d 670 (5th Cir. 2019).
100. *Id.* at 673–74.
101. *Id.*

agreement. At issue was whether the master service contract should be considered a maritime contract or a non-maritime contract.[102] If maritime in nature, the indemnity provision contained in the master service contract would be enforceable under general maritime law; however, on the other hand, if state law applied, the indemnity provision would be invalidated. At the district court level, the court held that the contract was a "land-based construction contract," and, therefore governed by state law.[103] The barge owner appealed.

The sole issue on appeal was whether the dock contract should be considered maritime in nature. In considering the issue and citing to *Doiron* and *Norfolk Southern Railway Co. v. Kirby*,[104] the Fifth Circuit noted that in determining whether a contract is maritime in nature courts should focus on the primary objective of the contract.[105] The Fifth Circuit determined that a broader test should apply in order to evaluate whether a dock construction contract was maritime in nature. The *Barrios* court announced the following test: "[t]o be maritime, a contract (1) must be for services to facilitate activity on navigable waters and (2) must provide, or the parties must expect, that a vessel will play a substantial role in the completion of the contract."[106] Applying this test to the facts at hand, the Fifth Circuit concluded that the master service contract satisfied the first prong because the construction of a concrete containment rail would facilitate activities on navigable waters. Specifically, the containment rail was designed to prevent materials from spilling into the river. With respect to the second prong, the court likewise concluded that the parties contemplated the substantial use of a vessel—namely the barge that would be shifted throughout the pendency of the project and used as a work platform.[107] Accordingly, applying this broader test, the Fifth Circuit concluded that the master service contract was maritime in nature, and, thus reversed the district court.[108]

In *Dunn v. Hatch*,[109] a deckhand on a fishing vessel sued the operators of a salmon fishing boat seeking to recover wages due to him under an oral employment agreement.[110] At the bench trial, the district court found that the vessel operator forged a written employment contract and failed to fully comply with its discovery obligations, but the district court ruled that the deckhand was entitled to $1,905.45 in wages. Additionally, the trial court awarded the deckhand costs and attorney fees as a sanction against

102. *Id.* at 674–75.
103. *Id.* at 674.
104. Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14 (2004).
105. *Barrios*, 942 F.3d at 679-80.
106. *Id.* at 680.
107. *Id.* at 681–82.
108. *Id.* at 682.
109. Dunn v. Hatch, 792 F. App'x 449 (9th Cir. 2019).
110. *Id.* at 451.

the boat operators, but the District Court denied the plaintiff's request for punitive damages. The deckhand appealed, and the vessel operators cross-appealed.[111]

On appeal, the deckhand alleged that the district court erred in dying punitive damages for the operator's litigation misconduct. The Ninth Circuit held that because there is no historical basis for allowing punitive damages in these circumstances, punitive damages were not available.[112] The Ninth Circuit further held that the award of attorneys' fees to as sanction against the vessel operator for discovery abuses was not an abuse of the District Court's discretion.[113]

VI. MARINE INSURANCE

In *Atlantic Specialty Ins. Co. v. Karl's Boat Shop, Inc.*, a marine insurer filed a declaratory judgment action alleging that the assured misrepresented material facts and violated the doctrine of *uberrimae fidei* during negotiations for the policy, and requesting avoidance of the policy.[114] The policy required the assured to demand that owners of vessels stored at its facility sign waivers indemnifying the assured (and thereby the marine insurer).[115] The marine insurer filed a motion for summary judgment on its declaratory judgment action.[116] It argued that the assured "routinely failed to require vessel owners to sign the waivers," that thereby the policy could be avoided, and that it was entitled to deny coverage of third-party claims stemming from a fire at the assured's facility.[117]

The district court granted the marine insurer's motion for summary judgment.[118] That court held it had jurisdiction pursuant to 28 U.S.C. § 1333 because the dispute involved a contract for marine insurance, even though the insurance was for a storage facility located inland.[119] After comparing the jurisdictional approaches for "determining when an insurance contract's 'primary objective' is maritime" in the Sixth and Second Circuits, the court adopted the Sixth Circuit's test.[120] In regard to misrepresentation, the court found that Massachusetts law does not materially differ from federal law and, therefore, applied Massachusetts law.[121] The court reasoned

111. *Id.*
112. *Id.* at 451–52.
113. *Id.* at 452.
114. Atl. Specialty Ins. Co. v. Karl's Boat Shop, Inc., No. 19-11219-WGY, 2020 WL 4904932 at *1 (D. Mass. Aug. 20, 2020).
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at *4.
120. *Id.* at *5–6.
121. *Id.* at *10 (quoting Com. Union Ins. Co. v. Pesante, 459 F.3d 34, 37 (1st Cir. 2006)).

there was a misrepresentation because there was no evidence that would allow for a reasonable inference that the assured ever complied with the policy's waiver requirement.[122] In regard to the doctrine of *uberrimae fidei*, the assured argued that the doctrine "is now obsolete because English law no longer recognizes" it, and that the Supreme Court of the United States has instructed admiralty courts to keep in harmony with English law.[123] The court rejected this argument due to First Circuit precedent adopting the doctrine.[124] Therefore, the court held that the policy was voidable.[125]

A panel of the Third Circuit was presented with "a simple question of federal maritime law: Who bears the burden of proving a fortuitous loss?" in *Chartis Prop. Cas. Co. v. Inganamort*.[126] In *Inganamort*, the insureds sought coverage under their all-risk insurance policy after learning their 65-foot fishing vessel had partially submerged.[127] Upon investigation, the insurance company learned that there were several potential sources of water ingress, rusted-out electrical breakers, and a nonfunctioning battery charger, all of which led to the ceasing function of the bilge pumps.[128] The insurance company sought a declaratory judgment confirming that the source of the loss was not "fortuitous," but was instead the result of disrepair and neglect.[129] After the insured failed to establish any evidence about how the loss actually happened, the trial court entered judgment in the insurance company's favor.[130]

On appeal, the insureds argued they bore no burden of demonstrating fortuity and the trial court erred in holding that it did.[131] The panel disagreed, holding the other Circuits were in harmony in that the policyholder bears the burden of proving a loss was fortuitous for establishing coverage under an all-risk policy.[132] "That burden is not heavy, but it is more than negligible."[133] At best, the insureds established that their vessel had negligently fallen into disrepair, which the Third Circuit noted may "create perverse incentives if such damage resulting from failure to maintain a vessel" and was considered fortuitous.

122. *Id.* at *11.
123. *Id.* at *14.
124. *Id.*
125. *Id.* at *15.
126. Chartis Prop. Cas. Co. v. Inganamort, 953 F.3d 231, 234 (3d Cir. 2020).
127. *Id.* at 232–33.
128. *Id.* at 233.
129. *Id.*
130. *Id.*
131. *Id.* at 235.
132. *Id.* at 234–35 (citing Banco Nacional de Nicaragua v. Argonaut Ins. Co., 681 F.2d 1337, 1340 (11th Cir. 1982); Morrison Grain Co., Inc. v. Utica Mut. Ins. Co., 632 F.2d 424, 429 (5th Cir. 1980); Atl. Lines Ltd. v. Am. Motorists Ins. Co., 547 F.2d 11, 12 (2d Cir. 1976); and *Boston Ins. Co. v. Dehydrating Process Co.*, 204 F.2d 441, 443 (1st Cir. 1953)).
133. *Id.* at 235 (citations omitted).

In *United States Fire Insurance Company v. Hawaiian Canoe Racing Associations*,[134] the marine insurer for a canoe club brought an action against insured and an escort boat owner seeking declaratory judgment that the marine insurance policy did not provide coverage for an injury to a canoe paddler. The litigation arose from serious injuries suffered when a woman was struck by the propeller of an outboard engine while attempting to re-board an escort vessel involved in the insured's recreational activities.[135] The marine insurer moved for summary judgment asking the district court to declare that it did not owe defense and indemnity for the personal injury claims brought against the insured canoe club.[136]

The district court held, as a preliminary matter, that Hawaii state law applied because Hawaii had a "materially greater interest" in seeing its laws applied to this insurance dispute than federal admiralty law.[137] The district court then analyzed the terms of the policy, rejected parole evidence, and ruled that the underlying injury arose out of a boat's operation rented by the insured within the meaning of the policy's watercraft exclusions to coverage.[138] The district court found that the policy's protection and indemnity (P&I) endorsement did not provide coverage because the vessel giving rise to the injury was not listed on the P&I vessel schedule. Finally, because the injured party was a "passenger" within the meaning of the exclusion to coverage under the policy's charterer endorsement, it likewise provided no coverage to the insured. Judgment was entered for the insurer.

In *Dakota Minnesota. & Eastern Railroad Corp. v. Ingram Barge Co.*,[139] the court previously ruled that Ingram Barge Co. (Ingram) was negligent in causing the damage to Dakota, Minnesota & Eastern Railroad Corporation's (DME) Sabula Bridge and then awarded damages and pre-judgment interest. On appeal, the Eighth Circuit remanded the case to address whether Ingram's negligence was the sole cause of the allision. On remand, the court found that the *Carroll Towing* test provided support that the bridge's current configuration was reasonable because the cost of precautions to prevent allisions (replacing the bridge) outweighed the benefit obtained by that precaution (preventing allusion-related losses). In reaching this conclusion, the court granted heavy weight to the infrequency of reported allisions with the bridge when compared to the number of vessels that passed through the bridge's channel and minimized the potential number of future allisions to six per year. Further, it found that

134. U.S. Fire Ins. Co. v. Haw. Canoe Racing Assn's, 424 F. Supp. 3d 1061 (D. Haw. 2019).
135. *Id.* at 1064–65.
136. *Id.* at 1068.
137. *Id.* at 1071.
138. *Id.* at 1071–74.
139. Dakota, Minn. & E. R.R. Corp. v. Ingram Barge Co., 429 F. Supp. 3d 615 (N.D. Iowa 2019).

although the bridge was narrower than almost all other Mississippi River bridges, it remained a lawful bridge and met all current federal laws and regulations. As such, the court found that a reasonable person in DME's place would not find replacing the bridge was warranted, assessed no comparative negligence against DME based on the bridge's configuration, and again awarded DME the same amount of damages ($276,860.85) and prejudgment interest ($26,868.50) as its original ruling.

DME then argued it should get a supplemental award of prejudgment interest to the date of the judgment on remand.[140] As explained by the court, at issue was who should bear the burden when a district court commits a reversible error that does not change the ultimate outcome of the case. The court reasoned that since the purpose of awarding prejudgment interest is to ensure the injured party is fully compensated and awarding prejudgment interest in maritime cases is the rule rather than the exception, there was no compelling reason it should be denied during the period of delay between a vacated original judgment and the judgment on remand. Furthermore, such a ruling was consistent with the fact that if the original judgment was for the defendant, but a successful appeal by the plaintiff led to a judgment for the plaintiff on remand, the plaintiff would have received prejudgment interest until the ruling on remand date. The court found no reason a plaintiff who received the same favorable judgment originally and on remand should be denied the accrual of interest simply because there was a successful appeal by the defendant in the interim.

The Eleventh Circuit reversed and remanded a district court's bench trial ruling in *Geico Marine Ins. Co. v. Shackleford*,[141] based on Geico Marine's "navigational limit" included in its marine insurance policy requiring the insured vessel to be north of Cape Hatteras, North Carolina, during hurricane season (June 1 to November 1).[142] The court held the navigational limit was dispositive in barring coverage for damage to the 65-foot sailboat because the plain language of the policy was unambiguously contained within the insurance contract included the navigational limit, and maritime law requires absolute enforcement of express navigational limits.[143] The court further held Geico Marine did not waive its right to enforce the navigational limit knowing the insured would sail the vessel out of the navigational limit just days before hurricane season.[144] This is because the limit only applied to the vessel when it was "afloat," and Geico was told the

140. Dakota, Minn. & E. R.R. Corp. v. Ingram Barge Co., No. C15-1038-LTS, 2020 WL 1663413 (N.D. Iowa Apr. 3, 2020).

141. Marine Ins. Co. v. Shackleford, 945 F.3d 1135 (11th Cir. 2019).

142. *Id*. at 1140.

143. *Id*. at 1140–43.

144. *Id*. at 1142.

vessel was sailing to Ft. Lauderdale for "extensive repairs" which would reasonably lead one to expect the vessel would be hauled for such repairs.[145]

Insurer, XL Specialty, brought action in diversity seeking declaratory judgment that the successive marine cargo insurance policies it issued to the insured were void *ab initio* based on the maritime doctrine of *uberrimae fidei* under federal admiralty law.[146] The insured disputed the applicability of the maritime doctrine of *uberrimae fidei* based on its contention that the marine cargo insurance policies in question were not maritime contracts.

The Southern District of New York ruled that, since the principal objective of marine cargo insurance policies is maritime commerce and the policies in question were replete with the terminology of maritime commerce, they were, therefore, maritime contracts to which the doctrine of *uberrimae fidei* could apply to rescind them on the basis of the insured's alleged misrepresentations.

VII. CARGO

In *Siemens Energy, Inc., et al. v. CSX Trans., Inc.*,[147] Siemens Energy, Inc. and Progressive Rail, Inc. filed a lawsuit against CSX transportation, Inc. for damages to two electrical transformers allegedly sustained during the Baltimore, Maryland to Ghent, Kentucky rail portion of a multimodal transportation. Siemens Energy's parent company, Siemens AG, manufactured the transformers and selected German freight forwarder Kuehne + Nagel AG & Co. to make the arrangements to transport the transformers from Germany to Kentucky. Blue Anchor Line, and arm of K+N AG, issued bills of lading identifying Siemens AG as the shipper and Siemens Energy as the consignee and containing three limitation of liability provisions: (1) a "Clause Paramount" noting that the Carriage of Goods by Sea Act, 46 U.S.C. Sec. 30701, would apply to the entire journey; (2) a "Himalaya Clause" extending the bill of lading's limitation of liability to provisions to subcontracting parties ultimately providing services; and, (3) a "Covenant Not to Sue" which provided that the Siemens entities (termed "Merchants") agreed that "no claim or allegation could be made against any subcontractor whatsoever" providing transportation.[148]

The ocean leg of the transportation was uneventful, so the Plaintiffs filed suit against CSX, the inland rail carrier. During the course of the transportation, Progressive Rail had prepared a bill of lading covering the rail shipment designating itself as the shipper and Gallatin Steel as the consignee.

145. *Id*.
146. XL Specialty Ins. Co. v. Prestige Fragrances, Inc., 420 F. Supp. 3d 172 (S.D.N.Y. 2019).
147. Siemens Energy, Inc., et al. v. CSX Trans., Inc., 446 F. Supp. 3d 184 (E.D. Ky. 2020).
148. *Id*. at 186-87.

CSX argued that the Blue Anchor Line bill of lading issued as part of the initial arrangements for transportation originating in Germany was a "through bill of lading" and, as a result, it was entitled to the limitations of liability contained in the "through bill of lading." Siemens and Progressive Rail argued that the Blue Anchor Line bill of lading was not a 'through bill of lading' and CSX was not entitled to the limitation of liability provisions. Relying upon the Supreme Court's decision in *Norfolk S. Ry. Co v. Kirby*[149] and *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*[150], the district court held that the Blue Anchor Line bill of lading was a "through bill of lading", and that the unnecessary issuance of the Progressive Rail bill of lading did not change the terms or impact of the 'through bill'. Consequently, the district court granted summary judgment to CSX. Siemens filed a notice of appeal of the grant of summary judgment to the Sixth Circuit, who affirmed the district court's judgment following the same precedent and factual predicates set forth by the lower court.[151]

VIII. MARITIME LIENS, ATTACHMENT, AND SHIP MORTGAGE ACT

A. *Maritime Liens*

In *Martin Energy Services, LLC v. Bourbon Petrel M/V*,[152] the Fifth Circuit held that a fuel supplier could not assert a maritime lien on a vessel owner's three support vessels because the support vessels only carried the fuel in their cargo tanks to refuel *other* seismic vessels. The Fifth Circuit explained that the fuel transported by the support vessels was not "necessary" to those support vessels, and, thus no lien attached.[153] The decision clarifies the scope of "necessaries" under the Commercial Instruments and Maritime Liens Act (CIMLA), 46 U.S.C. §§ 31301–31343 and provides clarity to suppliers.

B. *Attachment*

In *Tango Marine*, *S.A. v. Elephant Grp. Ltd.* and *E.N. Bisso & Son*, *Inc. v. Bouchard Transportation Co.*, *Inc.*, the issue before the Eastern District of Virginia and the District of Maryland, respectively, was what level of specificity a plaintiff's verified complaint and accompanying affidavit needed to meet with respect to a Supplemental Admiralty Rule B(1) attachment and garnishment of assets.[154] The district courts in both cases noted that

149. Norfolk S. Ry. Co v. Kirby, 543 U.S. 14 (2006).
150. Kawasaki Kisen Kaisha Ltd. v. Regal- Beloit Corp., 561 U.S. 89 (2010).
151. See Progressive Rail Inc. v. CSX Transp., Inc., 981 F.3d 529 (6th Cir. 2020).
152. Martin Energy Servs., LLC v. Bourbon Petrel M/V, 962 F.3d 827 (5th Cir. 2020).
153. *Id*.
154. Tango Marine, S.A. v. Elephant Grp. Ltd., 431 F. Supp. 3d 726, 729 (E.D. Va. 2020); E.N. Bisso & Son, Inc. v. Bouchard Transp. Co., Inc., No. CV SAG-19-3629, 2019 WL 7185555, at *1 (D. Md. Dec. 26, 2019).

the Fourth Circuit had not answered this question, but the Second Circuit had in *DS-Rendite Fonds Nr. 108 VLCC Ashna GmbH & Co. Tankschiff KG v. Essar Capital Ams., Inc*.[155] In both cases, the Second Circuit's reasoning in *DS-Rendite* was persuasively discussed.

Accordingly, in *Tango*, the Eastern District of Virginia found that the verified complaint, which contained allegations incorporating "on information and belief" phraseology to allege that the garnishee held "property" in which the defendant held an interest, was insufficient to sustain attachment under Rule B despite the plaintiff's memorandums clarifying the business relationship between the garnishee and the defendant.[156] In *E.N Bisso*, the District of Maryland similarly found that broad allegations that did not allege whether each garnishee had a resident agent appointed for service of process within the District of Maryland combined with the verified complaint's single allegation concerning the garnishees' possession of assets was insufficient to sustain attachment under Rule B.[157]

C. *Ship Mortgage Act*

In *TMF Trustee Limited v. M/T MEGACORE PHILOMENA*,[158] the holder of a preferred vessel mortgage brought an *in rem* foreclosure action against a borrower in default on payments. The lender arrested the vessel, then six months passed without the owner posting a bond to secure the ship's release.[159] The mortgage holder moved for an interlocutory order for sale of the ship and for summary judgment. The borrower claimed that the mortgage lender engaged in wrongful acceleration and arrest of the vessel, breaching the mortgage agreement.[160] The district court ruled in favor of the mortgage holder, finding that that wrongful acceleration of the mortgage did not absolve the lender of its obligation to make the final balloon payment on the loan.[161] The district court ordered the sale of the ship and granted summary judgment for the lender, then the borrower appealed.

The Ninth Circuit held that borrower's six-month delay in securing the ship's release from arrest by the borrower was unreasonable.[162] As a result, the District Court's order for the sale of the vessel by the mortgagor was permissible. The Ninth Circuit's decision stated that the borrower's failure to make payments constituted a breach of the mortgage contract and that

155. DS-Rendite Fonds Nr. 108 VLCC Ashna GmbH & Co. Tankschiff KG v. Essar Capital Ams., Inc., 882 F.3d 44, 47 (2d Cir. 2018); *accord* Submersible Sys., Inc. v. Perforadora Cent., S.A. de C.V., 249 F.3d 413, 421 (5th Cir. 2001).
156. *Tango*, 431 F. Supp. 3d at 731–32.
157. *E.N. Bisso & Son, Inc.*, 2019 WL 7185555, at *3.
158. TMF Trustee Ltd. v. M/T Megacore Philomena, 792 F. App'x 472 (9th Cir. 2019).
159. *Id*.
160. *Id.* at 475.
161. *Id.* at 474.
162. *Id.* at 475.

the borrower's allegation of the mortgage holder's unclean hands did not prevent the sale of the vessel. The trial court's judgment was affirmed.[163]

IX. CRIMINAL

In *United States v. Van Der End* and related proceedings *United States v. Suarez*, the Second Circuit held that the Due Process Clause does not require Maritime Drug Law Enforcement Act (MDLEA) crimes committed on board stateless vessels to have a nexus to the United States in order for those crimes to be prosecuted by the United States.[164]

In another case before the Second Circuit involving the prosecution of Maritime Drug Law Enforcement Act (MDLEA) crimes, *United States v. Alarcon Sanchez*,[165] Defendants operating the speed boat *El Vacan* were stopped by the U.S. Navy and the U.S. Coast Guard 135 nautical miles off the coast of Costa Rica after a Navy helicopter observed crewmembers throwing large bales from the vessel's deck overboard.

The *El Vacan* was determined to be stateless due to its lack of visible registration markings, subjecting it to the jurisdiction of the United States pursuant to the MDLEA. The vessel had been carrying around 550 kilograms of cocaine and arrested the vessels crew. The United States also charged two land-based Columbian conspirators, Alarcon Sanchez and Salinas Diaz, with violating and conspiring to violate the narcotics trafficking provisions of the MDLEA and extradited them from Columbia to face those charges.

Sanchez and Diaz argued that charging foreign land-based conspirators who were not on the high seas exceeded the scope of the MDLEA and lacked a sufficient nexus to the United States. They further argued that extending the MDLEA to reach these foreign land-based conspirators exceeded Congressional legislative authority under the Define and Punish Clause of the Constitution.

The Second Circuit rejected these arguments, opining that prosecuting foreign land-based conspirators is a means that rationally relates to the legitimate end of prosecuting MDLEA conspirators who are on the high seas. Thus, Congress did not exceed its authority in extending MDLEA to cover conduct of land-based conspirators under the Necessary and Proper Clause. The Second Circuit reasoned that the conspirators most likely to control, direct, finance, and profit from drug trafficking were more apt to remain on land than to venture on the seas, making it necessary to confer

163. *Id*.

164. United States v. Van Der End, 943 F.3d 98 (2d Cir. 2019), *cert. denied*, 141 S. Ct. 619 (2020); United States v. Suarez, 786 F. App'x 317, 318 (2d Cir. 2019).

165. United States v. Alarcon Sanchez, 972 F.3d 156 (2d Cir. 2020).

federal jurisdiction over land-based conspirators to reasonably address the serious problem of drug trafficking on the high seas.

X. LIMITATION OF LIABILITY

In response to a single-claimant Limitation action in the U.S. District Court for the Western District of Pennsylvania, the claimant sought to lift the stay to proceed with certain claims in state court upon approval of certain stipulations.[166] The court recognized it was bound to lift the stay to permit the single claimant to proceed with his personal injury claims in state court under prevailing Third Circuit law so long as the claimant waives "any claim of res judicata regarding this issue of limited liability based on the state court judgment[, and] Claimant must concede the shipowner's right to litigate all of the issues regarding limitation of liability in the federal court."[167] The claimant set forth a stipulation that the vessel owner was "entitled to litigate all issues regarding limitation of liability in federal court **except** issues concerning his claim for general maritime maintenance and cure."[168] He also set forth a stipulation that he "waives any claim of *res judicata* relevant to the issue of limitation of liability pursuant to the provisions of the Act based on any jury or non-jury trial decision or judgment he may obtain against MHA in state court."[169]

The court required amendment of both stipulations. Regarding the stipulation of litigating all limitation of liability issue in federal court, the court recommended deletion of the language concerning reserving the maintenance and cure issue for the federal court, as there was a potential of double recovery, which was inconsistent with case law indicating that a defendant need not pay twice for the same medical expenses a seaman claims.[170] The court further noted that no party had presented case law indicating whether claims for maintenance and cure were outside the scope of the Limitation of Liability Act.[171] Regarding the stipulation of waiver of *res judicata*, the court noted that the careful drafting of the stipulation appeared to have exempted the claimant's parallel administrative claim under the Longshore and Harbor Workers Compensation Act from its scope.[172] The court

166. Marion Hill Assocs. v. Pushak, No. 20-379, 2020 WL 4719661, at *1 (W.D. Pa. July 23, 2020).
167. *Id*. at *2 (citing Gorman v. Cerasia, 2 F.3d 519, 524 (3d Cir. 1993)).
168. *Id*.
169. *Id*. at *3.
170. *Id*. at *2–3 (citing Brister v. A.W.I., Inc., 946 F.2d 350, 361 (5th Cir. 1991)).
171. *Id*. at *3; *cf. In re* Oskar Tiedemann & Co., 367 F.2d 498, 1966 A.M.C. 1934 (3d Cir. 1966) (holding that final limitation of liability decree indicating vessel owner is exonerated from all further liability and which no maintenance and cure claims were asserted at the time, that the post-limitation claims of maintenance and cure were barred by the limitation order).
172. *Id*. at *3–4 (citing 46 U.S.C. § 30511(c)).

recommended revising the stipulation to include waiver of *res judicata* to include a decision or judgment in any proceeding or forum.

The U.S. District Court for the District of New Jersey considered two challenges to a limitation petition arising out of a pleasure craft accident.[173] The claimants contended that an individual owner-operator of a vessel may not proceed with a limitation petition and disclaim privity or knowledge,[174] and also that the limitation actions are only meant to be available for "capital investors, and not individual operators of pleasure-craft who operate their own vessels."[175] In denying the motion to dismiss, the *Garb* court rejected the *Fecht* approach, joining a chorus of other Circuits and Districts within the Third Circuit[176] by noting that "'a denial of an owner's petition for exoneration from liability cannot be based solely on a finding that the owner was the operator of the vessel at the time the collision occurred,' because doing so on a motion to dismiss would effectively excuse the claimant from carrying the initial burden" of demonstrating what caused the accident.[177] Declining to "turn the burden-shifting analysis on its head," the district court denied the motion to dismiss on this basis.[178] The *Garb* court also dispensed with the argument that the Limitation of Liability Act of 1851 did not apply in this case, noting that the Supreme Court had discussed limitation of liability proceedings brought by owners of pleasure boats.[179]

The U.S. District Court for the District of New Jersey determined whether to increase the limitation fund of a vessel to include fishing permits on the basis that they were appurtenances to the vessel.[180] The court had set the limitation fund of $60,967.85, which included the scrap value of the vessel ($40,000) and the value of the scallop catch for that voyage.[181] A few months after the collision, the vessel owner sold the fishing permit issued to the vessel for $1,475,000 to a third party.[182] The claimants moved to increase the value of the limitation fund to account for the fishing

173. Garb v. Garb, No. 18-11769, 2019 WL 6907495, at *1 (D.N.J. Dec. 19, 2019).

174. *Id*. at *3 (citing Fecht v. Makowski, 406 F.2d 721, 722, 1969 A.M.C. 144 (5th Cir. 1969)).

175. *Id*. at *5.

176. *Id*. at *4 (citing Estate of Muer v. Karbel, 146 F.3d 410, 416 (6th Cir. 1998); *In re* M/V Sunshine, *II*, 808 F.2d 762, 764 (11th Cir. 1987); *In re* Farrell Lines, 530 F.2d 7, 10 (5th Cir. 1976); *In re* Complaint of Cirigliano, 708 F. Supp. 101, 104 (D.N.J. 1989); *In re* Tourtellotte, No. 09-2787, 2010 WL 5140000 (D.N.J. Dec. 9, 2010)).

177. *Id*. at *5 (quoting *Cirigliano*, 708 F. Supp. at 103).

178. *Id*.

179. *Id*. (citing Levinson v. Deupree, 345 U.S. 648, 1953 A.M.C. 972 (1953); Coryell v. Phipps, 317 U.S. 406 (1943); *Just v. Chambers*, 312 U.S. 383 (1941)).

180. *In re* Complaint of B&C Seafood, LLC, 426 F. Supp. 3d 82, 83–84 (D.N.J. 2019).

181. *Id*. at 84.

182. *Id*.

permit, which they contended had a value of $1,370,000 at the time of the incident.[183]

The court denied the motion to increase the limitation fund. While the court noted that case law existed recognizing that fishing permits are appurtenances for the purposes of maritime liens,[184] the limitation fund could only extend to all appurtenances comprising whatever was "on board" for the object of the voyage.[185] "Even though a copy of the fishing permit may have been on the vessel at the time of the collision, the value of the permit rests with the intangible right to fish which comes with it."[186]

In *In re Complaint of J.F. Brennan Co.*,[187] J.F. Brennan Company, Inc. (Brennan) filed a complaint seeking exoneration from, or limitation of, liability under the Limitation of Shipowners' Liability Act. Brennan is the owner and operator of a John Deere 470G excavator and a floating work platform comprised of 11 sectional Flexi float barges. Brennan filed the limitation action due to claims arising out of an incident that occurred on the Fox River on March 25, 2019.[188]

Jeffrey Helser (Hesler) filed a claim alleging he was severely injured during the incident on March 25, 2019. Shortly thereafter, Brennan filed its initial third-party complaint against Brooks Tractor Incorporated (Brooks) claiming it is liable to Helser and Brennan for damages. Subsequently, Brooks filed an answer to Brennan's complaint and filed a crossclaim against Brennan. Further, Helser filed two motions to dismiss, a stipulation supporting his motion to dissolve the injunction invoked under the Act, and a motion to strike information provided by Brennan that identifies Brooks as a claimant.[189]

Additionally, Pierce Pacific Manufacturing, Inc. (Pierce) made an initial appearance in the action and sought leave to file a claim and an answer in the limitation proceeding. Pierce's motion was unopposed by Brennan, but contested by Helser. Thereafter, Brennan sought leave to amend its third-party complaint and its initial complaint in the proceeding. *Id.* at 4.

In addressing all of the above filings, the trial court first addressed Brennan's request for leave to file an amended complaint and an amended third-party complaint. The court found Brennan's amended complaints were not

183. *Id.*

184. *Id.* at 85 (citing Gowen, Inc. v. F/V Quality One, 244 F.3d 64, 2001 A.M.C. 1478 (1st Cir. 2001); PNC Bank Del. v. F/V Miss Laura, 381 F.3d 183, 2004 A.M.C. 2314 (3d Cir. 2004)).

185. *Id.* at 86–87 (citing *In re* Waterman S.S. Corp., 794 F. Supp. 601, 608, 1992 A.M.C. 2658 (E.D. La. 1992); *The Buffalo*, 154 F. 815, 816 (2d Cir. 1907)).

186. *Id.* at 87.

187. *In re* Complaint of J.F. Brennan Co., No. 19-C-1402, 2020 U.S. Dist. LEXIS 128873, at *2 (E.D. Wis. July 22, 2020).

188. *Id.* at 2.

189. *Id.* at 3.

futile as they relate to each party identified as a claimant in the action, but, because the proceeding remained in its early stages, the Court granted the motion for leave to amend.[190] Second, the court addressed the motions to dismiss wherein it found the pending motions to dismiss moot because due to the filing of an amended complaint.[191] Third, the court addressed Hesler's motion to strike directed at Hesler's claims that counsel received by mail "Plaintiff's Information to Claimant's Pursuant to Rule F(6)", which identified Brooks as a claimant. Helser not only asked the court to strike the correspondence sent by Brennan's counsel pursuant to this rule, but also asked the court to designate Helser as the single claimant in the proceeding. The court found this tactic was not an appropriate method to designate Helser as the single claimant or object to Brooks' entry into this action by asking the court to strike documentation identifying Brooks as a claimant. Therefore, the court denied Hesler's Motion to Strike.[192] Lastly, the court held that Hesler's and Brooks's "stipulations" to dissolve the injunction and request to stay the proceeding were rendered moot by the amended complaint and Pierce's entry into the suit.

At issue in *In re Prosper Operators, Inc.*[193] was whether a vessel owner timely provided proper notice to potential claimants in an action under the Limitation of Liability Act (Limitation Act).[194] Finding that the vessel owner failed to publish notice in a newspaper as required by Supplemental Rule F(4), the Fifth Circuit affirmed the dismissal of the limitation action.[195] The plaintiff suffered injuries when he attempted to jump from a well platform onto a vessel. The plaintiff filed suit against the vessel owner in state court alleging an unseaworthy condition of the vessel caused his injuries.[196] Thereafter, on September 26, 2016, the vessel owner initiated a limitation action in federal court seeking exoneration and/or limitation of liability in accordance with the Limitation Act. Upon filing, the district court issued an order approving the vessel owner's action and directing the vessel owner, in accordance with Supplemental Rule F(4), to send direct notice of its action to known claimants and to publish notice of its action in a local newspaper for four weeks prior to April 14, 2017.[197]

The vessel owner sent notice of the limitation action via two letters from the vessel owner's counsel dated January 18 and January 25, 2017.[198] Two years later, on February 20, 2019, the vessel owner filed a motion seeking

190. *Id.* at 4, 5.
191. *Id.* at 5, 6.
192. *Id.* at 7, 8.
193. 813 F. App'x 955 (5th Cir. 2020).
194. 46 U.S.C. §§ 30501–30512.
195. *In re* Prosper Operators, Inc., 813 F. App'x 955, 956 (5th Cir. 2020).
196. *Id.*
197. *Id.*
198. *Id.*

an extension of time to publish notice in the newspaper. The injury claimant opposed the motion and filed a second motion to dismiss arguing that the vessel owner had failed to fulfill its notice obligations under Supplemental Rule F(4).[199] The district court denied the vessel owner's motion to extend and granted the injury claimant's motion to dismiss.

On appeal, the Fifth Circuit clarified that the notice and publication requirements of the rule "are not excusable 'technicalities.'"[200] Because the notice and publication requirements "are designed to warn potential claimants that they must file their claims within the monition period or lose them",[201] the Fifth Circuit found the vessel owner's failure to timely publish notice of the limitation action to be sufficient grounds for dismissal.

In re New Canyonlands by Night, LLC[202] involved an action for exoneration or limitation of liability, which arose from a September 8, 2017 boat accident on the Colorado River. The claimants (14 passengers on the vessel at the time of the accident) sought entry of summary judgment against the vessel owners (New Canyonlands by Night, LLC and Canyonlands River Tours, LLC—collectively referred to as "Canyonlands").[203] The claimants asserted that Canyonlands were not entitled to exoneration or limitation of liability because Canyonlands' negligent acts, of which Canyonlands had privity or knowledge, caused the accident.[204]

The claimants specifically argued that Canyonlands breached their duty by, (1) improperly installing the vessel's steering system; (2) failing to have a coherent protocol or policy in place for inspecting the vessel; and (3) by failing to have the vessel and the steering system inspected after Canyonlands purchased the vessel.[205] The district court explained that the claimants' identification of "undisputed facts" were characterizations of, or inferences drawn from, the record evidence, acceptance of which would be contrary to the standard of review on summary judgment—*i.e.* in the light most favorable to the party opposing the motion, Canyonlands.[206] The court concluded that the evidence was insufficient to establish that the steering ram was not suitable for the vessel and genuine issues of material fact existed as to whether Canyonlands breached their duty of reasonable care by improperly installing the vessel's steering system.[207]

199. *Id*. at 957.
200. *Id*. at 958.
201. *Id*.
202. *In re* New Canyonlands by Night, LLC, No. 2:17-CV-01293-DN, 2019 WL 5684455, *1 (D. Utah Nov. 1, 2019).
203. *Id*. at *1.
204. *Id*.
205. *Id*. at *2.
206. *Id*. at *3.
207. *Id*.

The court further explained that the claimants did not cite sufficient evidence or legal authorities to prove the appropriate standard of care for implementing inspection protocols or having the vessel inspected.[208] Therefore, because the claimants did not establish a baseline from which the reasonableness of Canyonlands conduct could be determined, the court held that genuine issues of material fact existed as to whether Canyonlands breached their duty of reasonable care by failing to have protocols for inspecting the vessels and failing to have the vessel and its steering system inspected.[209] Accordingly, the court denied the claimants' motion for summary judgment.[210]

In re Complaint of the United States,[211] involved a motion to transfer venue to the District of Arizona by Claimants, D.D. and G.D., by and through Paul Theut, Guardian ad Litem, and Tara Gagliardi. The United States, Limitation Plaintiff, and Claimant (Aramak Sports and Entertainment Services, LLC (Aramark)), opposed the case's transfer.[212] The court explained that because the public vessels subject of the case were found in Utah when the United States initiated the case, the District of Utah constituted the only proper venue for this case under the Public Vessels Act (PVA), 46 U.S.C. § 31101–31113.[213] In addition, the court determined that the competing interests and assertions of convenience among the parties did not favor transfer of venue, particularly given that the government's convenience was a concern of venue provisions in legislative enactments.[214] Furthermore, the court concluded that even if the District of Arizona may be more convenient to some material witnesses, the convenience of those witnesses did not sufficiently outweigh the convenience of other material witnesses who would be available to testify at a Utah trial.[215]

Additionally, the availability of process to compel the presence of witnesses did not favor transfer to the District of Arizona.[216] Moreover, the court found that the relative ease of access to sources of proof did not favor transfer to the District of Arizona nor did congestion of the court's calendar.[217] The court further determined that the location of the subject incident and the interests of justice did not favor transfer to the District

208. *Id.*
209. *Id.*
210. *Id.* at *4.
211. *In re* Complaint of the United States, No. 4:18-CV-00065-DN-PK, 2020 WL 5775863, *1 (D. Utah Sept. 28, 2020).
212. *Id.* at *1.
213. *Id.* at *3.
214. *Id.*
215. *Id.* at *5.
216. *Id.* at *6.
217. *Id.*

of Arizona.[218] Therefore, the court concluded that a transfer was not in the interest of justice for the convenience of the parties and witnesses and the motion to transfer venue was denied.[219]

XI. ADMIRALTY JURISDICTION

After obtaining a multimillion dollar judgment from a London court based upon the breach of an option to purchase a vessel, the judgment creditor initiated suit in a Pennsylvania state court seeking to enforce the judgment.[220] The judgment debtors removed the case to the U.S. District Court for the Eastern District of Pennsylvania and the creditors promptly moved to remand arguing that the underlying breach of contract is based upon a sale of a vessel, which does not supply the court with jurisdiction under 28 U.S.C. § 1333(1).[221]

The district court remanded the case to state court, holding that the breach of the sale of a vessel did not constitute a breach of a maritime contract.[222] However, the court declined to grant the creditor its costs associated in compelling remand under 28 U.S.C. § 1447(c).[223] The removing parties caught a significant break, as the district court believed that the issue as to whether a contract for the sale of a vessel was a maritime contract constituted a colorable basis for the removal, even though the court cited no case law supporting the contention that the breach of a contract for the sale of a vessel supplied admiralty jurisdiction.[224] While the court correctly noted that discerning whether a contract was maritime in nature is often difficult to discern, it failed to note that it is hornbook law that a

218. *Id.* at *7.

219. *Id.* at *1, *8.

220. Eclipse Liquidity, Inc. v. Geden Holdings, Ltd., No. 20-1847, 2020 WL 3574540, at *1–2 (E.D. Pa. July 1, 2020).

221. *Id.* at *3.

222. *Id.* (citing Herman Family Revocable Trust v. Teddy Bear, 254 F.3d 802, 804 (9th Cir. 2001); Vrita Marine Co. v. Seagulf Trading LLC, 572 F. Supp. 2d 411, 412 (S.D.N.Y. 2008); Gerard Constr., Inc. v. Motor Vessel Va., 480 F. Supp. 488, 489 (W.D. Pa. 1979)).

223. 28 U.S.C.§ 1447(c) states, in pertinent part, "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Recent case law declining to impose attorney's fees and costs have typically involved the removal of cases from state court in contravention of the Saving to Suitors clause of 28 U.S.C. § 1333(1) and its interplay with the 2011 amendment to 28 U.S.C. § 1441; *see also* Riverside Constr. Co., Inc. v. Entergy Miss., Inc., 626 F. Appx. 443, 447 (5th Cir. 2015).

224. *Eclipse Liquidity*, 2020 WL 3574540, at *4–5; *cf.* Renegade Swish, LLC v. Wright, 857 F.3d 692, 700–01 (5th Cir. 2017) (noting that removal is "objectively reasonable when case law from other Circuits arguable support removal and this Circuit had not yet decided the precise question"); League of Women Voters of Pa. v. Commonwealth of Pa., 921 F.3d 378, 384 (3d Cir. 2019) (noting "that a colorable removal claim in an area of unsettled law does not merit a § 1447(c) award") (quotations and citations omitted).

contracts for the sale of vessels are not maritime contracts,[225] and that there is no Circuit split as to whether such contracts are maritime in nature.[226]

At issue in *In re Branson Duck Vehicles, LLC*[227] was whether admiralty jurisdiction existed and whether Ride the Ducks International (RDI) had standing to invoke the Limitation of Liability Act (LLA). With respect to the LLA, the court easily found RDI lacked standing because it was not the owner or charterer of the vessel at the time of the disaster. While RDI cited an unidentified opinion from the Northern District of California in support of its argument that admiralty jurisdiction should apply to it as a previous owner—because of the time and money it invested into the vessel prior to its sale to the current owner—the court found that such an expansion of the LLA's application was not supported by the statute's plain language. Furthermore, the court found that admiralty jurisdiction did not apply to Table Rock Lake because it lacked contemporary navigability in fact. While the court acknowledged (a) an extensive record regarding the current recreational and tourist activity on the lake and (b) its shores touched two different states, there was no meaningful evidence of trade or transportation activity such as to make the lake a "highway for commerce."

In *Davis v. Blue Aircraft LLC*,[228] passengers on a seaplane that crashed into a mountainside brought claims of negligence, negligent misrepresentation, vicarious liability, and negligent selection and retention against a seaplane operator. Poor visibility and weather conditions encountered by the seaplane while it was over navigable waters were the alleged cause of the crash.[229] The plaintiffs asserted that the court had admiralty and maritime jurisdiction over their claims pursuant to the Admiralty Extension Act, which provides admiralty jurisdiction when a tort occurs on navigable waters and is caused by a vessel on navigable water.[230] Defendant moved to dismiss the plaintiffs' maritime claims on the grounds that the court lacked admiralty jurisdiction.

225. *See* Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 1-10, at 26 (2d ed. 1975).

226. Gulf Coast Shell & Aggregate LP v. Newlin, 623 F.3d 235, 240 (5th Cir. 2010); *Teddy Bear*, 254 F.3d at 804; Magallanes Inv., Inc. v. Circuit Sys., Inc., 994 F.2d 1214, 1217 (7th Cir. 1993); Chase Manhattan Fin. Servs., Inc. v. McMillian, 896 F.2d 452, 460 (10th Cir. 1990); Cary Marine, Inc. v. M/V Papillon, 872 F.2d 751 (6th Cir. 1989); Hatteras of Lauderdale, Inc. v. Gemini Lady, 853 F.2d 848, 850 (11th Cir. 1988); Natasha, Inc. v. Evita Marine Charters, Inc., 763 F.2d 468, 470 (1st Cir. 1985) (Breyer, J.); Twin City Barge & Towing Co. v. Aiple, 709 F.2d 507, 507 (8th Cir. 1983); Flota Maritima Browning de Cuba, Coviadad Anonima v. Snobl, 363 F.2d 733 (4th Cir. 1966); The Ada, 250 F. 194, 198 (2d Cir. 1918) (Rogers, J., concurring).

227. *In re* Branson Duck Vehicles, LLC, No. 6:18-cv-03339-MDH, 2019 WL 6352654 (W.D. Mo. Nov. 27, 2019).

228. Davis v. Blue Aircraft LLC, No. 20-cv-80, 2020 WL 4233032 (D. Alaska July 23, 2020).

229. *Id.*

230. *Id.* at *2.

As a preliminary matter, the District of Alaska ruled that the seaplane was not a vessel within the meaning of the Admiralty Extension Act.[231] The district court further found that the alleged negligence was of the operator, not the vessel, such that the plaintiffs did not meet the standard for admiralty jurisdiction under the Admiralty Extension Act.[232] The maritime law claims were therefore dismissed for lack of admiralty jurisdiction.[233]

XII. PRACTICE, PROCEDURE, AND UNIFORMITY

In *Curtis v. Galakatos*, the United States District Court for the District of Massachusetts considered a personal injury suit by non-seafarers (both residents of New York) against the owner of a vessel that plaintiffs became injured on while vacationing in Greece.[234] The defendant, a Massachusetts resident, filed a motion to dismiss for forum *non conveniens* with a declaration that he would submit to the jurisdiction of a Greek court.[235] The court reasoned that Greece was "available" as an adequate alternative forum because of the defendant's jurisdictional stipulation in his declaration.[236] It further reasoned that Greece was an adequate forum because "the Court may set conditions on its dismissal of this action."[237] The court weighed private interest and public interest factors, and found that both weighed in favor of prosecution of the action in Greece.[238] Therefore, the court granted the defendant's motion for forum *non conveniens*.[239] An appeal of this ruling has recently followed.

The issue before the Eastern District of Virginia in *Glover v. Hryniewich*[240] was whether the doctrine of qualified immunity applied to a City of Norfolk (City) police officer who capsized a Norfolk Police Department harbor patrol boat during a sea trial exercise in the navigable waters of the United States. In addition, the district court was tasked with deciding whether the City could be held vicariously liable for its police officer's acts if its officer was entitled to qualified immunity, or, alternatively, whether the City was entitled to sovereign immunity.[241]

The district court held that the grant of qualified immunity was appropriate where the police officer committed a maritime tort while

231. *Id.* at *3.
232. *Id.* at *3–4.
233. *Id.* at *5.
234. Curtis v. Galakatos, No. 19-10786-GAO, 2020 WL 4593179 (D. Mass. Aug. 11, 2020)..
235. *Id.* at *1–2.
236. *Id.* at *2.
237. *Id.* (citing Ahmed v. Boeing Co., 720 F.2d 224, 225 (1st Cir. 1983)).
238. *Id.* at *3.
239. *Id.* at *4.
240. Glover v. Hryniewich, 438 F. Supp. 3d 625, 634–38 (E.D. Va. 2020).
241. *Id.* at 637–38.

performing a discretionary function in the scope of his employment.[242] As a result, the court granted qualified immunity to the police officer under the Discretionary-Ministerial Test, specifically declining to apply the conventional qualified immunity test applicable to constitutional torts under 42 U.S.C. § 1983. The district court also held that the City could not avoid *respondeat superior* liability even if its police officer was entitled to qualified immunity.[243] Finally, the district court held that the City was not an "arm of the state" under the applicable six-factor test, which would have allowed the City to assert sovereign immunity under the Eleventh Amendment, namely because Virginia's treasury would not be obligated to cover the City's potential losses and debts in this instance.[244]

On appeal,[245] the Fourth Circuit dismissed the City's appeal of the district court's decision finding that the City could be held vicariously liable, even if its police officer was entitled to qualified immunity.[246] The Fourth Circuit found that it lacked jurisdiction to review this issue because the district court's ruling on the City's vicarious liability was not a final order, nor did the district court's ruling qualify for review under the collateral order doctrine. As a result, the Fourth Circuit found that it could not review this issue until after a final judgment. The Fourth Circuit, however, affirmed the district court's holding the City was not entitled to sovereign immunity, noting it was bound by the same precedent as the district court. As to the City's compelling maritime security argument, the Fourth Circuit concluded that this argument did not outweigh the fact that Virginia's treasury would not have to pay a judgment in the case.

In *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*,[247] the issue before the Eastern District of Virginia was whether the court should amend a 20-year old Order issued by the same court, which absolutely prohibited the salvor of the *TITANIC* (R.M.S. Titanic, Inc.) from cutting into the *TITANIC*'s wreck or detaching any part of it. The salvor-movant sought to alter that Order so that it may be allowed to cut into some sections of the *TITANIC*'s Marconi Suite and detach artifacts as a part of "Expedition 2020."[248] The United States of America, on behalf of NOAA as amicus, filed a Report and Recommendation which expressed NOAA's approval of some aspects of the proposed plan while opposing others.[249]

242. *Id*. at 634–36.
243. *Id*. at 639–40.
244. *Id*. at 640–41.
245. Glover v. City of Norfolk, Va., 836 F. App'x 139 (4th Cir. 2020).
246. *Id*. at 140.
247. R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 461 F. Supp. 3d 336, 337, *amended on denial of reconsideration*, 475 F. Supp. 3d 507 (E.D. Va. 2020).
248. *Id*. at 337–39.
249. *Id*.

The district court granted the movant's request for amendment of the July 28, 2000 Order on the condition that, on or before June 18, 2020, the salvor submit a funding plan that detailed the anticipated costs of sources of funding for the Expedition 2020, which could be filed under seal.[250] If that condition was met, according to the district court, the salvor would be permitted to "minimally … cut into the wreck, as necessary to access the Marconi Suite, and to detach from the wreck the Marconi wireless device and associated artifacts …"[251] The court's opinion was amended due to COVID-19 to allow the salvor additional time to comply with the court's condition.[252] The United States of America has filed an appeal to the district court's opinion.

In *Farhat v. United States*,[253] the United States Government moved to dismiss for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted a case that arose as a result of a boating accident in the McClellan-Kerr Arkansas River Navigational System.[254] The decedents' boat's motor failed, would not restart, and the boat drifted toward the W.D. Mayo Lock and Dam No. 14 gates, eventually striking Gate 1 and being pulled under water with all of the passengers.[255] Three people/passengers died as a result of the accident and one other passenger sustained injuries.[256]

The plaintiffs filed suit in the Eastern District of Oklahoma alleging wrongful death and personal injury claims against the United States under the Federal Tort Claims Act (FTCA) for negligence in operating the W.D. Mayo Lock and Dam No. 14.[257] The United States filed a motion to dismiss asserting that the plaintiffs' claims were not governed by the FTCA but rather by the Suits in Admiralty Act (SAA), 46 U.S.C. §§ 30901–30918. The SAA requires that a civil action be brought within two years after the cause of action arose.[258] The United States argued that because the plaintiffs filed their complaint approximately two years and seven months after the accident, the action was untimely and barred by the statute of limitations.[259] In the alternative, the United States claimed that the district court lacked subject matter jurisdiction because the plaintiffs filed their complaint outside the SAA's two-year statute of limitations, or that Plaintiffs

250. *Id*. at 341.
251. *Id*. at 342.
252. *R.M.S. Titanic*, 475 F. Supp. 3d at 511.
253. Farhat v. United States, No. CIV-19-401-SPS, 2020 WL 5751618 (E.D. Okla. Sept. 25, 2020).
254. *Id*. at *1.
255. *Id*.
256. *Id*.
257. *Id*.
258. *Id*.
259. *Id*.

failed to state a claim because equitable tolling could not save their claim.[260] The district court explained that the plaintiffs conceded that their claims arose exclusively under the SAA.[261]

The court concluded that the limitations period in the SAA was not jurisdictional and the case should not be dismissed for lack of subject matter jurisdiction.[262] The court reasoned that the SAA's statute of limitations, like the FTCA, only addresses the timeliness of a claim but does not refer to the jurisdiction of the district courts or the courts' authority to hear untimely suits.[263] In addition, Congress separated the statute of limitations in the SAA from the jurisdiction grant, which generally indicates that the deadline is not jurisdiction.[264]

The court then turned the question of whether the two-year limitations period should be equitably tolled in this case and explained that equitable tolling is granted sparingly in cases in which the litigant had been pursuing his rights diligently and that some extraordinary circumstances stood in his way.[265] The court here held that the plaintiffs' complaint failed to allege their own diligence or the existence of any extraordinary circumstances.[266] Therefore, the Court granted the United States' motion to dismiss for failure to state a claim upon which relief can be granted.

Lebedinsky v. MSC Cruises, S.A.[267] involved a cruise passenger's personal injury action for improper venue. The passenger filed her personal injury claim in the U.S. District Court for the Southern District of Florida.[268] However, there was a forum selection clause contained in the cruise's terms and conditions which required her to bring her lawsuit in Italy.[269] The district court dismissed the action for improper venue, and an appeal to the Eleventh Circuit followed.[270] The court upheld the dismissal, first finding the "reasonable communicativeness test" was satisfied and the clause's formation was not induced by fraud or overreaching; the forum selection language was set out in identical type as the rest of the conditions but under clear, plain-English headings, the clause's language was clear and unambiguous, and Lebedinsky had the time and opportunity to become meaningfully informed of the clause.[271] The court also found the forum

260. *Id.*
261. *Id.*
262. *Id.* at *4.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. Lebedinsky v. MSC Cruises, S.A., 789 F. App'x 196 (11th Cir. 2019).
268. *Id.* at 199.
269. *Id.*
270. *Id.*
271. *Id.* at 200–01.

selection clause did not deprive her of a day in court because of inconvenience or unfairness since the cruise began and ended in Italy and made no U.S. stops—so Italy was the forum where a dispute relevant to that voyage would most likely arise.[272] Potential for decreased recovery in an Italian court did not deprive the passenger of a remedy because it was not "so inadequate that enforcement would be fundamentally unfair."[273]

XIII. REGULATIONS UPDATE

A. *Vessel Incidental Discharge National Standards of Performance (October 2020)*

On October 26, 2020, the U.S. Environmental Protection Agency (EPA) issued the 329-page "Vessel Incidental Discharge National Standards of Performance,"[274] which aims to set a new framework for regulating discharges "incidental to the normal operation of vessels." The change is aimed at bringing consistency and certainty to the oversight of such discharges from approximately 82,000 U.S.- and foreign-flagged commercial vessels operating in U.S. waters, including tankers, bulk carriers, container ships and cruise ships. This new regime will be rolled out in two parts, with the October 26, 2020, proposed rule being part one and the proposed rule will be opened to the public for comments.

B. *No Sail Orders and Suspension of Further Embarkation; Notice of Modification and Extension and Other Measures Related to Operations*[275]

Robert R. Redfield, the current director of the Centers for Disease Control and Prevention (CDC), issued the original No Sail Order for cruise ships that became effective on Saturday, March 14, 2020. Redfield had reason to believe that cruise ship travel may continue to introduce, transmit, or spread the 2019 Novel Coronavirus. Effective April 15, 2020, the CDC announced a modification and extension of the No Sail Order and Other Measures Related to Operations that was previously issued on March 14, 2020—subject to the modifications and additional stipulated conditions set forth in the Order. The Order was supposed to continue in operation until the earliest of the expiration of the Secretary of Health and Human Services' declaration that COVID-19 constitutes a public health emergency; the CDC Director rescinds or modifies the order based on specific public health or other considerations; or 100 days from the date of publication in the Federal Register. The Order was renewed on Thursday, April 9, 2020

272. *Id*. at 202.
273. *Id*. at 202–03.
274. U.S. EPA, Vessel Incidental Discharge National Standards of Performance (2020), https://public-inspection.federalregister.gov/2020-22385.pdf.
275. 85 Fed. Reg. 21004

and extended again on Thursday, July 16, 2020.[276] In doing so, the CDC supported the June 19th decision by the Cruise Lines International Association (CLIA) to extend voluntarily the suspension of operations for passenger cruise ship travel until September 15, 2020.[277] CLIA also submitted a response to the CDC's request for public comment[278] including its elements and answers to 28 questions the CDC posed to the public about the resumption of cruising. The "Healthy Sail Panel" also submitted a 65-page response to the CDC's request, including 74 recommendations as to how to approach the return to cruising.

In line with CLIA's announcement of voluntary suspension of operation by its member companies, CDC has extended its No Sail Order to ensure that passenger operations on cruise ships did not resume prematurely.

C. *Coronavirus Disease Guidance for Ships*

On September 17, 2020, the Coronavirus Disease 2019 Guidance for Ships was updated to clarify CDC's recommendation for non-cruise ships upon entry into a U.S. port after one or more confirmed cases of COVID-19 is identified.

The update specified that this Order would remain in effect until the earliest of either (1) The expiration of the Secretary of Health and Human Services' declaration that COVID-19 constitutes a public health emergency; (2) the CDC Director rescinds or modifies the order based on specific public health or other considerations; or (3) September 30, 2020.[279]

D. *National Defense Authorization Act for Fiscal Year 2020*[280]

1. Sealift Programs

Congress passed a compromise National Defense Authorization Act for fiscal year 2020 (NDAA). The NDAA reauthorizes the Maritime Security Program (MSP) through the year 2035, providing a stipend to 60 militarily useful US-flag vessels in exchange for their participation in an Emergency Preparedness Agreement with the Department of Defense (DOD) ensuring availability to the Government for sealift purposes in times of war and national emergency.[281] Eligible vessels must be commercially viable, operated in the US international trade, and not older than fifteen years. The

276. Center for Disease Control & Prevention, Cruise Ship No Sail Order Extended Through September 2020 (July 16, 2020), https://www.cdc.gov/media/releases/2020/s0716-cruise-ship-no-sail-order.html [hereinafter CDC].

277. Cruise Lines Int'l Assoc., CLIA Announces Voluntary Suspension of Cruise Port Operations (June 19, 2020), https://cruising.org/en/news-and-research/press-room/2020/june/clia-announces-voluntary-suspension-of-cruise-operations-from-us-ports.

278. 85 Fed. Reg. 44,083.

279. CDC, *supra* note 276.

280. Pub. L. No. 116-92, 133 Stat. 1190 (2019).

281. Nat'l Def. Auth. Act, § 3502 (2020).

reauthorization provides an annual stipend of $5.3 million for FY 2022–2025, $5.8 million for FY 2026–2028, $6.3 million for FY 2028–2032, and $6.8 million for FY 2032–2035 for each enrolled vessel. Under existing provisions of law, the Navy has a limited exception to buy-American rules to procure up to two foreign-built vessels for sealift purposes if such vessels previously participated in the MSP.[282]

Under existing provisions of law, the Navy has a limited exception to "Buy American" rules to procure up to two foreign-built vessels for sealift purposes if such vessels previously participated in the MSP. A new provision in the NDAA directs that the Navy "shall" enter into a contract for the procurement of two used vessels under that authority using amounts authorized for Operation and Maintenance, Navy, for fiscal year 2020.

2. Cable Security Fleet

The NDAA establishes a Cable Security Fleet aimed at ensuring reliable US-flag cable laying vessel capability.[283] Like the MSP, the Cable Security Fleet vessels are commercially operated by US citizens and commercially viable, but also must be made available to the U.S. Government when necessary under pre-negotiated contingency contracts.

Currently, there are two vessel contracts authorized, each providing a $5 million annual stipend through 2035. Vessels must be operated in the "cable services" defined as "installation, maintenance, or repair of submarine cable and related equipment, and related cable vessel operations," and be less than 40 years of age. Applications will be awarded to those vessels determined by the Department of Defense, in its sole discretion, to best meet national security requirements, after which priority shall be granted to "Section 2" citizens under the Shipping Act.[284]

3. Tanker Security Fleet

Section 3511 of the NDAA amends the Tanker Security Fleet by making the annual stipend fixed at $6 million per year for a maximum program of ten vessels commencing in fiscal year 2021 (October 1, 2020). Unlike the Maritime Security Program, the tank vessel contracts would be renewable annually and subject to a seven-year limit and the stipend would not be reduced when the vessel is under charter to the U.S. Government (except for a narrow exception for the carriage of international food aid). Also, as with the MSP, the Tanker Security Fleet would be subject to annual appropriations and vessels can be built outside the United States and reflagged under the U.S. registry.

282. 10 U.S.C. § 1032(f)(3).
283. *Id.* § 3521. The provision originated in the House bill, H.R. 2500, § 3521.
284. 46 U.S.C § 50501.

4. Ports Initiatives

Within the NDAA is there is a Ports Improvements Act, which codifies a competitive grants program for improving the safety, efficiency, or reliability of the movement of goods through ports and intermodal connections to ports.[285] Applicants may be states and local governments, public agencies established by one or more states, special purpose districts with transportation functions, Indian tribes, or groups of the foregoing. Projects may be within ports, or outside the ports but directly related to intermodal connections and used to improvement the movement of goods into and out of the port. The Act authorizes up to $500 million for such projects, provided that no funds may be used to grant awards to purchase fully automated cargo handling equipment that is remotely operated or monitored if such equipment would result in a net loss of jobs within a port.[286]

5. Maritime Safe Act

The NDAA contains the Maritime Security and Fisheries Enforcement Act (Maritime SAFE Act), which was originally reintroduced in May of 2019 by Senators Roger Wicker (R-MS) and Chris Coons (D-DE) to promote a whole-of-government strategy to combat illegal, unreported, and unregulated (IUU) fishing globally.[287] The Maritime SAFE Act establishes improved processes among the US and its allies aimed at combatting IUU. It directs the Secretary of State to coordinate with regional intergovernmental fisheries management organizations and to engage in diplomatic missions with priority regions suffering from IUU and with priority flag states known to have vessels engaging in IUU activities, in an attempt to curtain IUU.[288] The law also establishes an interagency working group and directs US Federal agencies, including the Coast Guard, Navy, and Department of Commerce, to improve law enforcement activities within such priority regions and flag states, through expanded training, increased stakeholder outreach, and assessment of existing resources available to combat IUU and other illegal trade including weapons, drugs, and human trafficking.

The Maritime SAFE Act also pursues increased transparency among consumers and seafood suppliers regarding the ethical and legal sourcing of seafood products, improved information sharing and transparency, and better traceability systems to strengthen fisheries management, enhance domain awareness, and deter IUU fishing. The law requires the

285. *Id.* § 3514.
286. *Id.* § 3501(a)(9).
287. Press Release, Wicker, Coons Reintroduce SAFE Act, (May 1, 2019), https://www.wicker.senate.gov/public/index.cfm/press-releases.
288. NDAA §§ 3531–3572.

development of an overall IUU strategy, and various reports on the progress being made to combat IUU, including specifically human trafficking in the seafood supply chain.

6. Personnel and Training

Section 2504 of the NDAA codifies into law the "Military to Mariner" executive order, requiring the Coast Guard and other relevant agencies to identify all training and experience within their service that may qualify for merchant mariner credentialing and submit a list of such training to the Coast Guard National Maritime Center to determine whether it will count toward maritime credentials.[289] The United States Coast Guard Commandant shall make a determination of whether training and experience counts for credentialing purposes no later than 6 months after the date on which the United States Coast Guard National Maritime Center receives a submission under subsection identifying a training or experience and requesting such a determination.

The law also includes several provisions related to the United States Merchant Marine Academy at King's Point (Academy). In addition to the 50 slots the Secretary of Transportation can use to appoint candidates of value to the Academy, the Secretary will have 40 new slots available to individuals sponsored by the Academy to attend preparatory school during the academic year prior to entrance in the Academy.[290] Another provision directs the Secretary of Transportation to enter into an agreement with NAPA to evaluate the US Merchant Marine Academy to help it "keep pace with more modern Campuses."[291] Finally, Congress requires an update on the Academy's implementation of sexual assault prevention and response program measures mandated under prior provisions of law.[292]

7. Offshore Wind and Coastwise Laws

Section 3518 of the NDAA pursues clarity in directing the Government Accountability Office to prepare a report within six months that examines the inventory of coastwise qualified vessels for emerging offshore energy needs, projected vessel needs for the offshore wind industry over the next decade, actions taken or proposed by offshore wind developers to ensure sufficient capacity in compliance with US coastwise laws, and the potential benefits to the US maritime and shipbuilding industries and the US economy associated with the use of US coastwise qualified vessels to support offshore energy development and production.

289. *Id.* § 3511.
290. *Id.* § 3504.
291. *Id.* § 3513.
292. *Id.* § 3517.

E. *IMO Cyber Security Deadline*

The International Maritime Organization (IMO) has set a January 2021 deadline for shipping interests to incorporate cyber risk management into their existing Safety Management Systems.[293] Several of these systems should be considered at high risk, including bridge systems, cargo-handling and management systems, propulsion and machinery management and power control systems, access control systems, passenger-servicing and management systems, passenger-facing public networks, administrative and crew welfare systems, and communication systems. Cyber response plans need to detail tasks to be undertaken when a cyber incident occurs.

Insurers will play a key role in the management of risk and development of the subject plans. In addition, the US Coast Guard (USCG) has guidance available on cyber security exposure that maritime interests may use as guidance.[294]

F. *International Response to Take Action to Protect Seafarers from COVID-19 Related Disruptions*

IMO, along with thirteen countries, have come together to issue a statement acknowledging the growing humanitarian crisis involving displaced crewmembers and committing to provide relief.[295] The COVID-19 pandemic has disrupted international trade and travel, leaving an estimated 200,000 seafarers stranded on ships worldwide. The extended period of time on ships has led to worries of crew fatigue and mental health issues, which could result in serious maritime accidents if seafarers are not relieved and replaced.

The IMO and the 13 signatory countries seek to designate seafarers as essential workers, which would allow them to travel home by providing waivers to travel restrictions and increasing the availability of commercial flights to their countries of origin. The joint statement was signed by representatives of Denmark, France, Germany, Greece, Indonesia, the Netherlands, Norway, the Philippines, Saudi Arabia, Singapore, United Arab Emirates, the United Kingdom, and the United States.

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293. Int'l Maritime Org., Annex 1 (draft), https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/5ps/Design%20and%20Engineering%20Standards/docs/msc.428(98)_Maritime_Cyber_Risk.pdf.

294. U.S. Dep't Homeland Sec., Cybersecurity, U.S. Coast Guard, https://homeport.uscg.mil/missions/cybersecurity.

295. Int'l Maritime Org., Governments Pledge Action for Seafarers at Crucial Crew Change Summit (July 9, 2020), https://www.imo.org/en/MediaCentre/PressBriefings/Pages/22-crew-change-summit.aspx.

G. *Docket No. 19-05, Interpretive Rule on Demurrage and Detention Under the Shipping Act*

Effective May 18, 2020, the Federal Maritime Commission's (FMC) published its final rule "Docket No. 19-05, Interpretive Rule on Demurrage and Detention Under the Shipping Act" (Final Rule).[296] This final rule is the most recent iteration of the FMC's regulatory focus on demurrage and detention practices at U.S. ports and the FMC reported that over 100 comments were received in response to its request for public comment. The FMC responded favorably to select comments by revising and clarifying certain provisions, but largely stuck to the language of the Proposed Rule issued in September 2019 — including the FMC's view and application of the "Incentive Principle." In response to jurisdictional and procedural comments about the binding nature of the Final Rule, the FMC reiterated that as an "interpretative" rule, the Final Rule does not mandate conduct but rather gives guidance on how conduct may be interpreted in future adjudications. Although the Final Rule is not retroactive, it is unclear how policies and practices in effect prior to the effective date of May 18, 2020, will be evaluated in a future adjudication.

H. *Modification and Revocation of Ruling Letters Relating to CBP's Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points*

On December 19, 2019, U.S. Customs and Border Protection (CBP) issued its decision in its Customs Bulletin, "Modification and Revocation of Ruling Letters Relating to CBP's Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points" (Decision), which became effective on February 17, 2020.

The Decision makes key changes to three main categories: (1) Vessel Equipment; (2) Lifting Operations; and (3) Pipelaying, Drilling-Related Operations, and Offshore Wind Energy Facilities.

1. Vessel Equipment

CBP has historically used the "Mission of the Vessel" concept to justify certain subsea installation, repair, and maintenance work but there was ambiguity, and often misapplication, with regard to the Jones Act. Notwithstanding that these transportations should have been reserved to the Jones Act fleet, the application of this concept allowed foreign-flag vessels to undertake transportation of certain items. The Decision specifically revoked the application of "Mission of the Vessel" and established a

296. 85 Fed. Reg. 29,638.

new definition of vessel equipment. Under this interpretation, the Decision narrowed the scope of vessel equipment to include only items that are "necessary and appropriate for the navigation, operation, or maintenance of a vessel and for the comfort and safety of the persons on board."

2. Lifting Operations

CBP clarified in its Decision that lifting operations are distinct from transportation within the meaning of the Jones Act. Accordingly, offshore "lifting operations" now include the lifting by cranes, winches, or lifting beams, or other similar activities or operations, from the time that the lifting activity begins when unlading from a vessel or removing offshore facilities or subsea infrastructure until the time that the lifting activities can be safely terminated in relation to the unlading, installation, or removal of offshore facilities or subsea infrastructure.

3. Pipelaying, Drilling-Related Operations, and Offshore Wind Energy Facilities

CBP confirmed in its Decision that its existing rulings on pipelaying and cable laying remain valid and are unaffected by its Decision. In addition, while not providing a similar statement with regard to drilling, it noted that drilling ruling letters previously identified for revocation pertaining to cement, chemicals, and other consumable materials remain in force. CBP also addressed offshore winding, stating that any future interpretations by CBP on the application of the Jones Act to wind energy facilities or other activities will be in response to ruling requests based on specific transactions.

I. *OFAC Sanctions Advisory Targeted at the Maritime, Energy and Metals Sectors and Related Communities*

On May 14, 2020, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC), together with the Department of State and the United States Coast Guard, published the long-awaited Sanctions Advisory regarding the maritime industry, energy and metals sectors, and related communities that was originally due in early April.[297] The Advisory reflects the U.S. government's ongoing commitment to prevent sanctions evasion, smuggling, criminal activity, facilitation of terrorist activity, and proliferation of weapons of mass destruction, particularly related to Iran, North Korea, and Syria. It further expands on multiple previous shipping

297. U.S. Dep't of Treasury, Sanctions Programs and Country Information (2021), https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information.

advisories issued in 2018 and 2019.[298] The Advisory reflects OFAC's May 2, 2019 Framework for Compliance and calls for all parties addressed to develop risk-based compliance to engage in information sharing, to the extent permissible under local law. Key aspects of the advisory include: (1) Deceptive Practices; (2) General Practices for Identification of Sanctions Evasion; and (3) Guidance Specific to Role in the Maritime Industry.

298. *Id.*

RECENT DEVELOPMENTS IN ALTERNATIVE DISPUTE RESOLUTION

Deborah Greenspan, Fredric Brooks, Jonathan Walton, and Grace Chamoun[*]

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I. INTRODUCTION

This article discusses recent developments in the field of alternative dispute resolution. During the past year, numerous trial and appellate courts addressed issues presented in the aftermath of recent rulings by the United States Supreme Court with respect to the pursuit of arbitration on a class-wide basis and to the applicability of the interstate transportation workers

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exception to the Federal Arbitration Act[1] to delivery drivers, ride-share drivers and others. The article also discusses ongoing developments this past year in several other significant areas of dispute resolution: enforcement of arbitration agreements by nonsignatories to contracts, waiver of the right to arbitrate, and grounds for vacatur of an arbitration award. Finally, the article highlights how the COVID-19 pandemic has impacted the ADR arena, and the responses and adjustments mediators and arbitrators have made in moving to a remote environment.

II. THE CONTINUED VIABILITY OF CLASS-WIDE ARBITRATION FOLLOWING THE SUPREME COURT'S RULINGS IN *LAMPS PLUS AND STOLT-NIELSEN V. VARELA*

In recent years, the United States Supreme Court has foreclosed efforts to impose class arbitration on parties to an arbitration agreement in the absence of a clear contractual basis to do so. In the past year, courts have addressed continued efforts to avoid those rulings, and the Supreme Court has declined to re-enter the arena on the issue.

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*[2] and *Lamps Plus, Inc. v. Varela*,[3] the Supreme Court held that there must be an "affirmative 'contractual basis for concluding that the part[ies] agreed to [class arbitration],'" and thus neither an agreement's silence nor its ambiguity on the availability of class arbitration "provide the necessary 'contractual basis' for compelling class arbitration."[4] The high Court's reasoning is premised on the view that class arbitration "is not only markedly different from the 'traditional individualized arbitration' contemplated by the FAA, it also undermines the most important benefits of that familiar form of arbitration."[5]

1. 9 U.S.C. §§ 1 *et seq.* ("FAA").
2. 559 U.S. 662 (2010).
3. 139 S. Ct. 1407 (2019).
4. *Lamps Plus*, 139 S. Ct. at 1415, 1419 (quoting *Stolt-Nielsen*, 559 U.S. at 684).
5. *Id.* (citing *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018); *see also Stolt-Nielsen*, 559 U.S. at 686-687. The Supreme Court in *Lamps Plus* explained its reasoning as follows:

> In individual arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." . . . Class arbitration lacks those benefits. It "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." . . . Class arbitration not only "introduce[s] new risks and costs for both sides," . . . it also raises serious due process concerns by adjudicating the rights of absent members of the plaintiff class—again, with only limited judicial review. . . . Because of these "crucial differences" between individual and class arbitration, *Stolt-Nielsen* explained that there is "reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration."

Lamps Plus, 139 S. Ct. at 1416 (citations omitted).

In the past year, several decisions applying *Lamps Plus* have addressed related issues, including who decides on the availability of class arbitration (the court or the arbitrator) and whether an agreement to arbitrate evidences an intention of the parties to delegate the issue to the arbitrator. In *Shivkov v. Artex Risk Solutions, Inc.*,[6] the United States Court of Appeals for the Ninth Circuit affirmed a district court ruling that compelled arbitration on an individual basis. The case had been filed as a putative class action by plaintiffs who had contracted with defendant insurance management consultants to create captive insurance companies to which the plaintiffs paid premiums they claimed as tax-deductible business expenses.[7] After the IRS issued delinquency notices and sough to impose penalties, the plaintiffs settled with the IRS and brought the putative class action.[8]

In affirming the district court's granting of the defendants' motion to compel arbitration, the Ninth Circuit first addressed the question of who decides if class arbitration is permissible. After noting that the Supreme Court has not had occasion to decide the issue,[9] the court joined seven other Circuit Courts in concluding that "the availability of class arbitration is a gateway question for a court to presumptively decide."[10] The court found "no reason to create an unnecessary circuit split."[11] The court reasoned that the availability of class arbitration "raises the question whether any of those possible class members have actually agreed to arbitration in the first place" and thus "answering this question 'resolves the foundational question of "with whom" [the defendants] chose to arbitrate.'"[12] Most importantly, the court found that class arbitration "belongs to the gateway category because 'the structural features of class arbitration make it a "fundamental" change from the norm of bilateral arbitration'" and that

6. 974 F.3d 1051 (9th Cir. 2020)

7. 974 F.3d at 1056-57.

8. *Id.* at 1057.

9. *Id.* ("*See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 n.4 (2019) (not deciding the question because the parties agreed that the issue was one for the court to decide); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 n.2, 133 S. Ct. 2064, 186 L.Ed.2d 113 (2013) (not deciding the question because the parties agreed that the issue was one for the arbitrator to decide); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 680, 130 S. Ct. 1758, 176 L.Ed.2d 605 (2010) (not deciding the question because the parties entered into a supplemental agreement that expressly assigned the issue of the availability of class arbitration to the arbitration panel)").

10. 974 F.3d at 1065 (citing *20/20 Commc'ns, Inc. v. Crawford*, 930 F.3d 715, 718–19 (5th Cir. 2019); *Herrington v. Waterstone Mortg. Corp.*, 907 F.3d 502, 506–07 (7th Cir. 2018); *JPay, Inc. v. Kobel*, 904 F.3d 923, 935–36 (11th Cir. 2018); *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972 (8th Cir. 2017); *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 873 (4th Cir. 2016); *Opalinski v. Robert Half 'Intern. Inc.*, 761 F.3d 326, 334–35 (3d Cir. 2014); *Reed Elsevier, Inc. v. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 598–99 (6th Cir. 2013)).

11. *Id.*

12. 974 F.3d at 1066 (quoting *Herrington*, 907 F.3d at 508 (quoting *Stolt-Nielsen*, 559 U.S. at 683).

the Supreme Court "has all but endorsed this reason for treating class arbitration as a gateway issue."[13]

Next, the court in *Shivkov* rejected the plaintiffs' argument that the arbitration clause in the case before it evidenced a clear and unmistakable intent to delegate the issue to the arbitrator because it referred to the American Arbitration Association. The court explained the plaintiffs' argument as follows:

> (1) the Clause refers to the AAA . . . (2) which renders the AAA Rules applicable, (3) which in turn encompass the AAA's Supplementary Rules, (4) which include Supplementary Rule 3's instruction that "the arbitrator shall determine as a threshold matter . . . whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class," and (5) thus the parties delegated the issue of class arbitration to the arbitrator.[14]

The court found that while the argument "touches on a circuit split on whether incorporation of the AAA Rules is sufficient evidence that the parties clearly and unmistakably delegated the issue of class arbitration to the arbitrator," the clause at issue in the case merely referenced the AAA and did not incorporate the AAA Rules.[15] The court concluded: "[W]e have never held that a mere reference to the AAA shows clear and unmistakable intent to delegate a gateway issue to an arbitrator, and Plaintiffs identify no authority from any sister circuit holding as much."[16]

Finally, having concluded that the question of class arbitration was a gateway issue for the court and there was no clear evidence to delegate the issue to the arbitrator, the court had no trouble concluding that the agreements at issue did not permit the class arbitration since neither silence nor ambiguity could provide the basis for reaching such a conclusion.[17]

In *Marbaker v. Statoil USA Onshore Properties, Inc*,[18] the United States Court of Appeals for the Third Circuit similarly concluded that contractual language in the leases at issue in that case fell "far short" of the *Lamps Plus*

13. 974 F.3d at 1066 (quoting *Herrington*, 907 F.3d at 509 (quoting *Stolt-Nielsen*, 559 U.S. at 686) and citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011); *Stolt-Nielsen*, 559 U.S. at 685).

14. 974 F.3d at 1068.

15. *Id.* at 1068. The arbitration clause stated:

> You and we agree that in the event of any dispute that cannot be resolved between the parties, that we will agree to seek to resolve such disputes through mediation in Mesa, Arizona, and if that fails, that all disputes will be subject to binding arbitration in Mesa, Arizona, with arbitrators to be agreed upon by the parties, and if no agreement is reached, then arbitrated by the American Arbitration Association (AAA). . . .

Id. at 1057-58.

16. *Id.* at 1068.

17. 974 F.3d at 1069 (quoting *Lamps Plus*, 139 S. Ct. at 1416-17).

18. 801 F. App'x. 56 (3d Cir. 2020).

standard and thus did not authorize class arbitration. The leases did not mention class arbitration, and the court found that while express reference to class-wide arbitration was "not essential, its absence makes it harder to show that the parties consented to it."[19] Further, the court pointed to bilateral language repeatedly used in the leases to describe the disputing parties, thus "contemplating disputes between just two parties."[20] Additionally, the court found that while the parties agreed to follow the AAA rules, and arguably agreed to follow the AAA's Supplemental Rules, which sometimes allow class arbitration, "the Association buries the Supplementary Rules in 'a daisy-chain of cross-references—going from the Leases themselves to the rules of the American Arbitration Association to the Commercial Rules and, at last, to the Supplementary Rules.'"[21] The court reasoned that "a short general reference to the AAA's rules does not 'incorporate[ ] a panoply of collective and class action rules'" and does not "'manifest the parties' consent to class arbitration."[22]

Nevertheless, some efforts to pursue class arbitration have found success. Seven months after the Supreme Court's ruling in *Lamps Plus*, the United States Court of Appeals for the Second Circuit in *Jock v. Sterling Jewelers Inc.* ("*Jock IV*")[23] held that the district court had erred in vacating an arbitrator's certification of a class that broadly included employees who had not opted into the arbitration proceeding. The Second Circuit based its decision on a finding that the arbitration agreement at issue in the case empowered the arbitrator to decide class arbitrability, and on the resulting deferential standard of review applicable under FAA Section 10(a)(4).

The case involved an effort by current and former retail sales employees to proceed with class arbitration against Sterling Jewelers for claims alleging gender-based discrimination in violation of Title VII of the Civil Rights Act of 1964[24] and the Equal Pay Act.[25] The contract at issue required all employees to sign a "RESOLVE" program" (the "RESOLVE

19. *Id.* at 60–61.

20. *Id.* at 61. Specifically, "[e]ach arbitration clause sets out a process for resolving disputes about 'this Lease,' singular. . . . Each lease is signed by a 'Lessor' and a 'Lessee,' singular. . . . And three of the arbitration clauses explicitly govern 'disagreement[s] between Lessor and Lessee,' referring to those two individual parties." *Id.*

21. *Id.* at 61 (quoting *Chesapeake Appalachia LLC v. Scout Petrol.*, 809 F.3d 746, 761(3d Cir. 2016)).

22. *Id.* (quoting *Scout Petrol.*, 809 F.3d at 762–63). The court also found that even if "the parties had directly mentioned the Supplementary Rules, we still would not infer consent. Those rules say that when 'construing the applicable arbitration clause,' the reviewer '*shall not consider* the existence of these Supplementary Rules' in deciding whether the clause allows class arbitration." 801 F. App'x. at 62 (quoting AAA Suppl. R. 3) (emphasis added by court)).

23. 942 F.3d 617 (2d Cir. 2019), *cert. denied*, No. 19-1382, 2020 WL 5882321 (U.S. Oct. 5, 2020).

24. 42 U.S.C. § 2000e *et seq*.

25. 29 U.S.C. § 206(d).

Agreement").[26] The RESOLVE Agreement mandated participation in arbitration and provided that "[t]he Arbitrator shall have the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction" and that any claim arising thereunder will be arbitrated "in accordance with the National Rules for the Resolution of Employment Disputes of the American Arbitration Association."[27]

The decision marked the fourth time the case had gone before the Second Circuit.[28] The litigation first arose after an arbitrator's award had construed the RESOLVE Agreement to permit class-wide arbitration. The district court, following *Stolt-Nielsen*, originally vacated the arbitrator's decision, but in a 2011 ruling, the Second Circuit in *Jock I* "reversed, holding that the District Court impermissibly substituted its own legal analysis for that of the arbitrator instead of focusing its inquiry on whether the arbitrator was permitted to reach the question of class arbitrability that had been submitted to her by the parties."[29] The Second Circuit in *Jock I* found that the arbitrator "had a colorable justification under the law to reach the decision she did" and distinguished *Stolt-Nielsen* on the ground that "the parties in *Stolt-Nielsen* stipulated that their arbitration agreement contained 'no agreement' on the issue of class arbitration, whereas the plaintiffs in this case merely conceded that there was no explicit agreement to permit class arbitration, thus leaving open the possibility of an 'implied agreement to permit arbitration.'"[30]

Subsequently, the district court affirmed the arbitrator's certification of a class of approximately 44,000 women with respect to plaintiffs' Title VII disparate impact claims for declaratory and injunctive relief.[31] In *Jock II*, the Second Circuit again reversed and remanded, "clarifying that *Jock I* 'did not squarely address whether the arbitrator had the power to bind absent class members to class arbitration given that they, unlike the parties here, never consented to the arbitrator determining whether class arbitration was permissible under the agreement in the first place.'"[32] The *Jock II* panel identified the question to be considered on remand as "whether an arbitrator, who may decide . . . whether an arbitration agreement provides for class

26. 942 F.3d at 620.

27. *Id.* Under the RESOLVE Agreement, employees "waiv[e] [their] right to obtain any legal or equitable relief . . . through any government agency or court, and . . . also waiv[e] [their] right to commence any court action. [They] may, however, seek and be awarded equal remedy through the RESOLVE Program." *Id.*

28. *See* Jock v. Sterling Jewelers Inc., 646 F.3d 113 (2d Cir. 2011) ("*Jock I*"); Jock v. Sterling Jewelers Inc., 703 F. App'x. 15 (2d Cir. 2017) (summary order) ("*Jock II*"); Jock v. Sterling Jewelers Inc., 691 F. App'x. 665 (2d Cir. 2017) (summary order) ("*Jock III*").

29. 942 F.3d at 620 (citing *Jock I*, 646 F.3d at 123-24).

30. *Id.* at 620–21 (citing *Jock I*, 646 F.3d at 119, 124).

31. *Id.* at 621.

32. *Id.* (quoting *Jock II*, 703 F. App'x at 17).

procedures because the parties 'squarely presented' it for decision, may thereafter purport to bind non-parties to class procedures on this basis."[33]

On remand, the district court then vacated the arbitrator's class determination decision, finding that (i) the arbitrator lacked the authority to certify the class under the RESOLVE Agreement because the district court had "considered the question of whether the RESOLVE agreement authorizes class procedures in 2010 and decided that it does not"[34] and (ii) "even if the arbitrator's 'erroneous interpretation' of the RESOLVE Agreement could bind the 254 plaintiffs who had 'authorized the arbitrator to make that determination' by submitting the question to her or opting into the proceeding, that erroneous interpretation could not bind absent class members."[35]

This year in *Jock IV*, the Second Circuit again reversed the district court, distinguishing the Supreme Court's precedent in *Lamps Plus*. The court began by emphasizing that it was operating under an "extremely deferential standard of review" under the FAA, stating: "Courts are empowered to vacate arbitration awards only 'where the arbitrator[] exceeded [his or her] powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.'"[36] The district court had relied on its own earlier conclusion that the arbitrator's interpretation was "wrong as a matter of law" and was premised on reasoning found in Justice Alito's concurrence in *Oxford Health* that an arbitrator's "'erroneous interpretation'" of a contract that does not authorize class procedures cannot bind absent class members who have "'not authorized the arbitrator to make that determination.'"[37] The Second Circuit, however, agreed with the plaintiffs' argument that that "because all Sterling employees signed the RESOLVE Agreement, all Sterling employees 'agreed that, if any of them initiated a putative class proceeding, the arbitrator in that proceeding would be empowered to decide class-arbitrability—and, if he or she found it appropriate, to certify a class encompassing other employees' claims.'"[38]

The Second Circuit looked to the language of the agreement providing for the application of the AAA Rules:

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33. *Id.* (quoting *Jock II*, 703 F. App'x at 18). "*Jock III* dismissed an appeal from the District Court's decision that it lacked jurisdiction to consider Sterling's motion to vacate an interim decision of the arbitrator." *Id.* (citing *Jock III*, 691 F. App'x at 665).

34. *Id.* at 622 (quoting Sp. App. 6).

35. *Id.* (quoting Sp. App. at 8 (quoting *Oxford Health*, 569 U.S. at 574 (Alito, J., concurring))).

36. *Id.* (quoting 9 U.S.C. § 10(a)(4) and citing *Stolt-Nielsen*, 559 U.S. at 671). The Court explained: "The focus of our inquiry under Section 10(a)(4) is "whether the arbitrator[ ] had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrator[ ] correctly decided that issue."" *Id.* (quoting *Jock I*, 646 F.3d at 122 (quoting *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 824 (2d Cir. 1997))).

37. 942 F.3d at 623 (quoting *Oxford Health*, 569 U.S. at 574 (Alito, J., concurring)).

38. *Id.* (quoting Appellant Br. at 23).

> The AAA Supplementary Rules for Class Arbitration ("Supplementary Rules") apply to "any dispute arising out of an agreement that provides for arbitration pursuant to" the AAA rules "where a party submits a dispute to arbitration on behalf of . . . a class or purported class." . . . The Supplementary Rules provide that "the arbitrator shall determine as a threshold matter . . . whether the applicable arbitration clause permits the arbitration to proceed on behalf of . . . a class." . . . The RESOLVE Agreement's incorporation of the AAA Rules evinces agreement to have the arbitrator decide the question of class arbitrability.[39]

The court found further support for its conclusion that the absent class members authorized the arbitrator to decide the question of whether the arbitration could proceed on a class basis in the fact that the RESOLVE Agreement provided that "[q]uestions of arbitrability" and "procedural questions" "shall be decided by the arbitrator."[40] The court concluded that "[b]ecause the absent class members, no less than the parties, thus 'bargained for the arbitrator's construction of their agreement' with respect to class arbitrability," the arbitrator acted within her authority in purporting to bind the absent class members to class procedures.[41]

Finally, the Second Circuit in *Jock IV* concluded that *Lamps Plus* and its holding that ambiguous agreements cannot provide the contractual basis to compel arbitration did not undermine its original reasoning in *Jock I*. First, the Second Circuit found that a "crucial difference" between the two cases "is that the parties in *Lamps Plus* 'agreed that a court, not an arbitrator, should resolve the question about class arbitration'" and thus the "class arbitrability decision in *Lamps Plus* was . . . subject to *de novo* scrutiny rather than the deferential standard of review that circumscribes courts' review of arbitrators' decisions."[42] Second, the Second Circuit concluded that "*Lamps Plus* leaves undisturbed the proposition, affirmed in *Stolt-Nielsen*, that an arbitration agreement may be interpreted to include implicit consent to class procedures."[43]

39. *Id.* at 623–24 (citing AAA Supplementary Rules 1(a), 3 (2010)).

40. *Id.* at 624. The court explained that since the agreement provides for the arbitrator to decide the question of class arbitrability, "it must mean . . . that if any Sterling employee initiates a putative class proceeding, 'the arbitrator in that proceeding [will] be empowered to decide class-arbitrability—and, if he or she [finds] it appropriate, to certify a class encompassing other employees' claims.' To hold otherwise would be inconsistent with the nature of class litigation and would in effect negate the power of the arbitrator to decide the question of class arbitrability." *Id.* at 625.

41. *Id.* at 624 (quoting *Oxford Health*, 569 U.S. at 569 (internal quotation marks omitted)).

42. *Id.* at 626 (citing 139 S. Ct. at 1417 n.4).

43. *Id.* The court also stated that its reasoning in *Jock I* is "fully consistent with the Supreme Court's decision in the more analogous case of *Oxford Health*, 569 U.S. 564, 133 S.Ct. 2064." *Id.* Ultimately, the court noted that "it remains to be decided whether the arbitrator exceeded her authority in certifying an opt-out, as opposed to a mandatory, class for injunctive and declaratory relief," and remanded the case to decide that issue. *Id.*

In October 2020, the Supreme Court denied a petition for a writ of certiorari.[44]

III. COURTS ADDRESSING SCOPE AND APPLICATION OF THE INTERSTATE COMMERCE EXCEPTION TO THE FAA

Section 1 of the FAA exempts transportation workers, including "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the application of the FAA.[45] Following the Supreme Court's 2019 decision in *New Prime Inc. v. Oliveira*,[46] which held that the exception applies not just to employer-employee contracts but also to contracts involving independent contractors, a flood of litigation has challenged the boundaries of the FAA Section 1 carveout for interstate commerce as applicable to the large numbers of Americans now working for enterprises such as ride-sharing companies, food-delivery services, and Amazon.

Many district and circuit courts have applied *New Prime* to conclude the contracts at issue were exempt from the FAA under Section 1.[47] In two notable cases against Amazon, the First Circuit in *Waithaka v. Amazon.com, Inc.*[48] and the Ninth Circuit in *Rittmann v. Amazon.com, Inc.*,[49] both extended the *New Prime* ruling to delivery drivers for Amazon Flex ("AmFlex"). Under the AmFlex program, Amazon contracts with individuals to make "last mile" deliveries of products from Amazon warehouses. AmFlex delivery providers "occasionally cross state lines to make deliveries, but most of their deliveries take place intrastate."[50] Nevertheless, the First and Ninth Circuits held that the phrase "engaged in interstate commerce" is not limited to workers who cross state lines but rather encompasses workers involved in a greater scheme involving interstate commerce.

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44. *Sterling Jewelers, Inc. v. Jock*, No. 19-1382 2020 WL 5882321 (U.S. Oct. 5, 2020).
45. 9 U.S.C. § 1.
46. 139 S. Ct. 532, 202 L. Ed. 2d 536 (2019).
47. *See, e.g.*, *Reno v. Western Cab Co.*, No. 2:18-CV-00840(APG)(NJK), 2020 WL 5606897, at *1 (D. Nev. Sept. 18, 2020) (where the plaintiffs are current and former cab drivers); *Smith v. Allstate Power Vac, Inc.*, No. 17-CV-07475(NG)(SMG), 2020 WL 5086584, at *4 (E.D.N.Y. Aug. 26, 2020) (where the plaintiff was a truck driver that extracted waste for removal both intrastate and occasionally across state lines); *Romero v. Watkins & Shepard Trucking, Inc.*, No. EDCV19-2158(PSG)(KKX), 2020 WL 5775180, at *1, *6–9 (C.D. Cal. July 10, 2020) (where the plaintiff, a delivery truck driver, delivering furniture and carpets from across the country only throughout California, was exempt from arbitration under the FAA but compelled to arbitrate under Nevada state law); *Abram v. C.R. England, Inc.*, No. CV2000764MWFMRWX, 2020 WL 5077365, at *2–4 (C.D. Cal. Apr. 15, 2020), motion to certify appeal denied, No. CV-20-764-MWF (MRWX), 2020 WL 5077373 (C.D. Cal. June 23, 2020) (where the plaintiff was a truck driver).
48. 966 F.3d 10 (1st Cir. 2020).
49. 971 F.3d 904 (9th Cir. 2020).
50. *Rittmann*, 971 F.3d at 907.

In both cases, the plaintiffs who drove for AmFlex brought actions seeking declarations that they were employees of Amazon—not independent contractors—and therefore were entitled to increased pay.[51] In response, Amazon filed motions to compel arbitration, arguing that the plaintiffs were not engaged in interstate commerce and therefore did not fall within the FAA's exemption for transportation workers.[52] In rejecting what it described as Amazon's "cramped construction" of Section 1, the court in *Waithaka* relied on FELA precedents and textual interpretation of the FAA to conclude that intrastate delivery drivers "who haul goods on the final legs of interstate journeys are transportation workers 'engaged in . . . interstate commerce,' regardless of whether the workers themselves physically cross state lines."[53] *Rittman* similarly concluded that Section 1 "exempts transportation workers who are engaged in the movement of goods in interstate commerce, even if they do not cross state lines."[54]

The court in *Rittman* distinguished another line of developing caselaw involving food delivery services like Doordash and Grubhub.[55] For example, in *Wallace v. Grubhub Holdings, Inc.*, the Seventh Circuit held that food delivery drivers who deliver take-out orders from local restaurants do not fall within the Section 1 exemption where they are mostly delivering meals from local restaurants to local patrons.[56] The court found that "[r]ather than focusing on whether they belong to a class of workers actively engaged in the movement of goods across interstate lines, the plaintiffs stress that they carry goods that have moved across state and even national lines. A package of potato chips, for instance, may travel across several states before landing in a meal prepared by a local restaurant and delivered by a Grubhub driver; likewise, a piece of dessert chocolate may have traveled all the way from Switzerland. The plaintiffs insist that delivering such goods brings their contracts with Grubhub within § 1 of the FAA. As they see it, the residual exemption is not so much about what the worker does as about where the goods have been."[57] The court rejected this argument, finding that to fall within the exemption, "the workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders. Put differently, a class of workers must themselves be 'engaged *in the channels* of foreign or interstate commerce.'"[58]

51. *Waithaka*, 966 F.3d at 15; *Rittmann*, 971 F.3d at 908.
52. *Rittman*, 971 F.3d at 908–09.
53. *Waithaka*, 966 F.3d. at 26.
54. *Rittmann*, 971 F.3d at 915.
55. *Id.* at 916–17.
56. 970 F.3d 798, 801 (7th Cir. 2020).
57. *Id.* at 802.
58. *Id.* (quoting McWilliams v. Logicon, Inc., 143 F.3d 573, 576 (10th Cir. 1998)).

Similarly, in *Bryant v. Tristate Logistics of Arizona LLC*, the district court's held that "couriers/warehouse workers who never made deliveries outside Arizona, but handled goods that traveled from other states for a company that operates in other states" were not exempt under Section 1 of the FAA.[59] Here, the plaintiffs failed to analogize to controlling authority, including *New Prime* or *Circuit City Stores Inc. v. Adams*, 532 U.S. 105 (2001).[60] Rather, the plaintiffs simply claimed they were "engaged in interstate commerce [because] [they] handle[d] goods that have traveled interstate."[61] Because the plaintiffs did not meet their burden and cite to compelling case law, the court granted the defendant's motion to compel.[62]

Courts have also addressed the applicability of the Section 1 exception to ride-share drivers. In *Rogers v. Lyft, Inc.*,[63] the United States District Court for the Northern District of California first rejected the argument that transportation workers could qualify under the Section 1 exception only if they transport goods—as opposed to people—in interstate commerce.[64] However, the court found that Section 1 "exempts only classes of workers engaged in transporting goods or people across state lines."[65] To answer this question, the court found that the relevant inquiry was:

> "not whether the individual worker actually engaged in interstate commerce, but whether the class of workers to which the complaining worker belonged engaged in interstate commerce." . . . The plaintiffs' personal exploits are relevant only to the extent they indicate the activities performed by the overall class. If a class of workers (say, truckers) transports goods or people between states, a trucker who only occasionally drives across state lines is still exempt from the FAA. . . . By the same token, however, the fact that some workers cross state lines in the course of their duties does not mean that the class of workers as a whole is engaged in interstate commerce.[66]

59. Bryant v. Tristate Logistics of Arizona LLC, No. CV-19-01552 (PHX) (SMB), 2020 WL 1455770, at *4 (D. Ariz. Mar. 25, 2020), *appeal dismissed*, No. 20-15725, 2020 WL 4073227 (9th Cir. June 30, 2020),

60. *Id.* at *3.

61. *Id.*

62. *Id.* at *7.

63. 452 F. Supp. 3d 904 (N.D. Cal. 2020); *see also* Singh v. Uber Techs., Inc., 939 F.3d 210, 214, 228 (3d Cir. 2019) (finding that the phrase "transportation workers" is not limited to workers who transport goods, but can also include workers who transport passengers, "so long as they are engaged in interstate commerce or in work so closely related thereto as to be in practical effect part of it," and remanding to the district court to determine the factual dispute of whether the plaintiff Uber driver was sufficiently engaged in interstate commerce). *But see* Kowalewski v. Samandarov, 590 F. Supp. 2d 477, 483–84 (S.D.N.Y. 2008) (reaching opposite conclusion).

64. *Id.* at 913–14.

65. *Id.* at 915.

66. *Id.* at 915–16 (quoting Bacashihua v. U.S. Postal Service, 859 F.2d 402, 405 (6th Cir. 1988)).

Under the facts of the case, the court concluded that the Lyft drivers, as a class, were not engaged in interstate commerce because their work "predominantly entails intrastate trips, an activity that undoubtedly affects interstate commerce but is not interstate commerce itself."[67] The court reasoned that although some drivers presumably regularly transported passengers across state lines, "the company is in the general business of giving people rides, not the particular business of offering interstate transportation to passengers. Interstate trips that occur by happenstance of geography do not alter the intrastate transportation function performed by the class of workers."[68]

The applicability of the Section 1 exception to business entities was addressed by the United States District Court for the Western District of Pennsylvania in *R & C Oilfield Servs., LLC v. Am. Wind Transp. Grp., LLC*.[69] In this case, plaintiff R & C Oilfield Services, LLC ("R & C") was an Oklahoma limited liability company that hauls wind energy equipment components.[70] R & C brought an action against American Wind to recoup money it was owned for transporting resources. It opposed defendant American Wind's motion to compel arbitration by arguing that "the independent contractor agreement formed between it and American Wind constitute[ed] a contract of employment concerning interstate commerce and is therefore not arbitrable under the FAA."[71] American Wind disagreed, arguing that the FAA exception was inapplicable because "R & C is a 'business entity' rather than an individual.'"[72]

To resolve this dispute, the court assessed whether the parties' contract could "be construed as one governing employment or, 'work by workers,'" since the *New Prime* decision did not stand for the blanket proposition that all independent contractor agreements are excluded from the FAA under Section 1.[73] It used the canon of *ejusdem generis* to interpret the scope of Section 1 of the FAA.[74] Under this canon, "general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[75] The language of Section 1 explicitly excuses "contracts of employment" from the FAA. The court reasoned that the specific mention of "seaman," "railroad employees," and the general term "any other class of workers," "clearly designate natural persons" and "cannot

67. *Id.* at 916.
68. *Id.*
69. R & C Oilfield Servs., LLC v. Am. Wind Transp. Grp., LLC, 447 F. Supp. 3d 339 (W.D. Pa. 2020).
70. *Id.* at 341.
71. *Id.* at 346.
72. *Id.*
73. *Id.* at 347.
74. *Id.* at 347–48.
75. *Id.* at 348 (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001)).

reasonably be read to apply to artificial business entities."[76] As such, the Court concluded that the exemption only applied to natural persons and did not exempt two business entities in a contractual dispute.[77]

IV. ENFORCEMENT OF AGREEMENTS BY NONSIGNATORIES TO CONTRACT

A rule of contract law is that one who is not a party to an agreement is not bound by the agreement and cannot enforce its terms against one who is a party.[78] Under this rule, nonsignatories to an arbitration agreement are not subject to, and cannot compel, arbitration. State contract law provides exceptions to this general rule, and those exceptions also apply to arbitration agreements.[79] As the Supreme Court noted in *Arthur Andersen LLP v. Carlisle*, "traditional principles" of state law allow an arbitration agreement to be enforced by or against nonsignatories through "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel."[80]

In *GE Energy Power Conversion France SAS Corp. v. Outokumpu Stanless USA, LLC*,[81] the Supreme Court held that nonsignatories to an arbitration agreement may compel arbitration under the 1958 United Nations Convention on the Recognition of Foreign Arbitral Awards ("New York Convention") against signatories under the doctrine of equitable estoppel.[82] This decision resolved a circuit split: the First and Fourth Circuits had held that nonsignatories may compel arbitration under the New York Convention under the equitable estoppel doctrine, while the Ninth and Eleventh Circuits had declined to apply the doctrine to arbitrations under the New York Convention.[83] The Supreme Court concluded that the equitable estoppel doctrine "allows a nonsignatory to a written agreement containing an arbitration clause to compel arbitration where a signatory to the written agreement must rely on the terms of that agreement in asserting its claims against the nonsignatory."[84]

In *In re Pacific Fertility Center Litigation*,[85] the Ninth Circuit held that clients of a fertility clinic could not be compelled to arbitrate with the

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76. *Id.*
77. *Id.*
78. Walsh v. Columbus, H.V. & A.R. Co., 176 U.S. 469, 479 (1900); Lawson v. Life of the S. Ins. Co., 648 F.3d 1166, 1167–68 (11th Cir. 2011).
79. Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 (2009) (quoting 21 R. Lord, Williston on Contracts § 57:19, at 183 (4th ed. 2001)).
80. *Id.*
81. 140 S. Ct. 1637 (2020).
82. *Id.* at 1643–48.
83. *Id.* at 1644 n.2.
84. *Id.* at 1644
85. 814 F. App'x. 206 (9th Cir. 2020).

manufacturer of a storage tank that allegedly malfunctioned and caused a loss of stored embryos and eggs.[86] The clients had signed informed consent agreements with the fertility clinic which contained arbitration provisions, and the manufacturer was not a signatory to those agreements.[87] The court found that the manufacturer could not invoke equitable estoppel to compel arbitration, as the clients' claims did not rely on the terms of the informed consent agreements and were not "intimately founded in or intertwined with the terms" of that agreement.[88]

In *Landry v. Transworld Systems Inc.*,[89] the Massachusetts Supreme Court held that a debt collector could not enforce an arbitration provision in the debtor's contract with a car rental company.[90] The debt collector argued that, by virtue of it being an agent of the car rental company that held the debt, it could enforce the arbitration provision.[91] The court disagreed, concluding that the claim against the debt collector—for unfair debt collection practices—did not arise under the arbitration agreement and that the debt collector was not a third-party beneficiary under the agreement.[92]

V. WAIVER OF THE RIGHT TO ARBITRATE

Parties to a contract may waive the right to arbitration. This may be done expressly or implicitly. A party can implicitly waive its right to arbitrate a dispute based on actions taken during litigation. Implied waiver generally requires an undue delay in asserting the right to arbitrate and some resulting prejudice.[93]

In *Brickstructures, Inc. v. Coaster Dynamix, Inc.*,[94] the Seventh Circuit affirmed the district court's finding that a party had waived its right to arbitrate. Brickstructures sued Coaster Dynamix after their joint venture to create a LEGO-compatible model rollercoaster kit fell apart.[95] Coaster Dynamix filed a motion to dismiss for failure to state a claim.[96] Brickstructures filed an amended complaint, and Coaster Dynamix moved again to dismiss, raising, for the first time, the joint venture agreement arbitration provision.[97] Brickstructures' attorneys wrote to Coaster Dynamix, demanding that the company withdraw the arbitration arguments because

86. *Id.* at 209.
87. *Id.* at 208.
88. *Id.* at 209.
89. 149 N.E.3d 781 (Mass. 2020).
90. *Id.*
91. *Id.* at 786–87.
92. *Id.* at 788–90.
93. Creative Sols. Group, Inc. v. Pentzer Corp., 252 F.3d 28, 32 (1st Cir.2001).
94. 952 F.3d 887 (7th Cir. 2020).
95. *Id.* at 889.
96. *Id.*
97. *Id.*

it had waived them by not advancing them in the first motion to dismiss.[98] Coaster Dynamix then withdrew the arbitration arguments.[99] A month after the second motion to dismiss was denied, Coaster Dynamix moved to compel arbitration.[100]

The Seventh Circuit concluded that Coaster Dynamix's withdrawal of the arbitration argument was "a litigation choice inconsistent with the right to arbitrate" which signaled its intent keep the dispute in federal court, and that "[h]aving put the arbitration card on the table and then taken it back, Coaster Dynamix was not permitted to play that card again later."[101]

In *Trout v. Organización Mundial de Boxeo, Inc.*,[102] a professional boxer sued the World Boxing Organization (WBO) in New Mexico state court. WBO regulations included a forum selection clause—which required that any action be maintained in Puerto Rico—and an arbitration provision.[103] The WBO responded to the suit by removing it to federal court, seeking transfer to the District of Puerto Rico, and, following transfer, moving to compel arbitration.[104] The boxer argued that the WBO waived its right to arbitrate by failing to raise the issue before the New Mexico state and federal courts.[105] The First Circuit disagreed, concluding that finding a waiver of the right to arbitrate would "require the WBO to relinquish its bargained-for right to select the forum in which to have its motion to compel arbitration adjudicated[.]"[106]

In *Sabatelli v. Baylor Scott & White Health*,[107] a radiologist brought claims of age and disability discrimination against his former employer in federal court.[108] More than a year later, the radiologist sought to arbitrate a claim for breach of his employment agreement.[109] The Fifth Circuit concluded that all of the radiologist's claims were subject to arbitration and that the radiologist waived his right to arbitrate by first bringing claims stemming from his termination in federal court before seeking to arbitrate.[110] The court noted that the radiologist's piecemeal approach to the litigation was more costly and that the employer could have saved costs at the beginning

98. *Id*.
99. *Id*.
100. *Id*. at 890.
101. *Id*. at 892.
102. 965 F.3d 71 (1st Cir. 2020).
103. *Id*. at 74.
104. *Id*. at 77.
105. *Id*.
106. *Id*.
107. 832 F. App'x. 843 (5th Cir. 2020).
108. *Id*. at 845.
109. *Id*. at 846.
110. *Id*. at 848–49.

by seeking to compel arbitration if it had known that the radiologist planned to arbitrate the contract claim.[111]

In *Borror Property Management, LLC v. Oro Karric North, LLC*,[112] a landlord wrote to its property manager asserting that the property manager was in breach of the parties' contracts and that the landlord would "proceed directly to litigate" as the contracts "do not limit litigation exclusively to arbitration."[113] The property manager then sued in federal court.[114] The Sixth Circuit held that the landlord's pre-litigation letter was not completely inconsistent with the right to arbitrate. The court reasoned that pre-litigation letters are "often more rhetorical art than legal science" and because "we cannot know a party's true intentions in crafting a pre-litigation posturing letter, we are understandably reluctant to give those letters the same legal force as we might give a party's representations in other settings."[115] This posturing should not be given the same legal force as it would be in other settings.[116] The court thus declined to "morph the routine party-to-party letter into one laden with dramatic legal consequences."[117]

In *Fagan v. Warren Averett Companies, LLC*,[118] an employee resigned her employment and filed a demand for arbitration against her employer.[119] The arbitration was dismissed, however, after the employer failed to pay the arbitration fees.[120] The employee then filed suit in state court, and the employer moved to compel arbitration.[121] The Alabama Supreme Court ruled that the employer's failure to pay the arbitration fee constituted a default under the parties' agreement and, therefore, the employer could not enforce the arbitration provision.[122]

While decisions on implied waiver often appear inconsistent or based on the unique facts of the case, they are generally linked in one respect. Among other considerations, courts often focus on the conduct and motivations of the party moving to compel arbitration and whether parties are engaged in unfair gamesmanship by delaying a motion to enforce arbitration rights.

111. *Id.* at 849.
112. 979 F.3d 491 (6th Cir. 2020).
113. *Id.* at 494.
114. *Id.*
115. I*d.* at 495.
116. *Id.*
117. *Id.*
118. No. 1190285, 2020 WL 6252771 (Ala. Oct. 23, 2020).
119. *Id.* at *2.
120. *Id.* at *3.
121. *Id.*
122. *Id.* at *8.

VI. GROUNDS FOR VACATUR OF AN ARBITRATION AWARD

Judicial review of arbitration awards is narrow. Under the FAA, vacatur of an arbitration award is available only in certain enumerated circumstances. One such circumstance is "where there was evident partiality . . . in the arbitrators."[123] Indeed, an arbitration award may be vacated when the arbitrator fails to "disclose to the parties any dealings that might create an impression of possible bias."[124] However, "long past, attenuated, or insubstantial connections between a party and an arbitrator" are insufficient to show evident impartiality.[125]

In *Monster Energy Company v. City Beverages*, LLC, the Ninth Circuit vacated an arbitration award based on an arbitrator's inadequate disclosures.[126] Monster Energy Co. arbitrated a dispute with its franchisee that was administered by JAMS, as specified in the parties' agreement. Prior to the arbitration, the arbitrator disclosed that "[e]ach JAMS neutral, including me, has an economic interest in the overall financial success of JAMS" and that, due to the size and nature of JAMS, the parties should assume that the arbitrator "participated in an arbitration, mediation or other dispute resolution proceeding with the parties, counsel or insurers in this case and may do so in the future."[127]

The arbitrator ruled against the franchisee, and the franchisee petitioned for vacatur of the award.[128] The franchisee argued that the award should be vacated because the arbitrator did not disclose his ownership interest in JAMS or that the company had administered 97 arbitrations for Monster of the past five years.[129] The court agreed and vacated the award, concluding that these facts created an impression of bias that should have been disclosed.[130]

In *Credit Suisse Securities (USA) LLC v. Carlson*,[131] a party sought vacatur of an arbitration award because the arbitrator had failed to disclose his ongoing representation of a plaintiff in another matter in which the defendants were represented by a law firm which was now representing one of the parties in the arbitration.[132] The Texas district court held that, while a reasonable person could conclude that the arbitrator was partial, the party had not met the "stringent burden required to overturn an arbitration

123. 9 U.S.C. § 10(a)(2).
124. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 149 (1968).
125. New Regency Prods., Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101, 1110 (9th Cir. 2007).
126. 940 F.3d 1130, 1138 (9th Cir. 2019).
127. *Id*. at 1133.
128. *Id*..
129. *Id*. at 1136.
130. *Id*.
131. Civil Action H-19-1470, 2020 WL 32339 (S.D. Tex. Jan. 2, 2020).
132. *Id*. at *1.

award for evident partiality."[133] In *Golden v. O'Melveny & Myers LLP*, a California district court held that evident partiality was not established where the arbitrator's son had sought employment with both the respondent and the respondent's counsel and, after closing arguments, the arbitrator was hired by the respondent's counsel on an unrelated matter.[134]

Circuit courts are divided on whether "manifest disregard" can serve as grounds for vacating an arbitration award.[135] Courts that continue to apply the standard require that the arbitrator has understood, but decided to ignore, the controlling law and that this resulted in significant injustice to the moving party.[136] In *DynaColor, Inc. v. Raberi Tech., Inc.*, the arbitrator denied a party's unjust enrichment claim because the party failed to prove causation, even though causation is not a requirement element of unjust enrichment.[137] The Fifth Circuit concluded that, while the arbitrator erred, the decision was supportable on other grounds and, therefore, "even if manifest disregard remains a basis for vacating an arbitration award," it was not shown in that case.[138] Less than a week later, in *Quezada v. Bechtel OG & C Construction Services, Inc.*,[139] the Fifth Circuit rejected a party's argument that the mediator had exceeded his authority by misapplying Fifth Circuit law, concluding that this was a claim of manifest disregard, which had been "squarely rejected" as a ground for vacatur of an arbitration award.[140]

VII. REMOTE ALTERNATIVE DISPUTE RESOLUTION TAKES CENTER STAGE DURING THE PANDEMIC

With courthouses shuttered across the county, litigants and courts have turned to remote ADR procedures as a way to continue to resolve disputes. Consistent with the inherent flexibility that underlies alternative dispute resolution, mediators and arbitrators alike adapted to the realities of the world-wide pandemic. Third party neutrals have embraced technology and have continued to conduct mediations and arbitrations remotely. Initial

133. *Id.* at *5.

134. Golden v. O'Melveny & Myers LLP, Case No. 2:14-cv-08725-CAS(AGRx), 2019 WL 5693760, at*18–19 (C.D. Cal. Nov. 1, 2019).

135. *See* DynaColor, Inc. v. Raberi Tech., Inc., 795 F. App'x 261, 263–64 (5th Cir. 2020) (comparing Med. Shoppe Int'l, Inc. v. Turner Invs., Inc., 614 F.3d 485, 489 (8th Cir. 2010), and Frazier v. CitiFinancial Corp., 604 F.3d 1313, 1324 (11th Cir. 2010) (rejecting "manifest disregard" as a basis for vacating an arbitration award), *with* Wachovia Sec., LLC v. Brand, 671 F.3d 472, 480 (4th Cir. 2012), *and* Schwartz v. Merrill Lynch & Co., 665 F.3d 444, 452 (2d Cir. 2011), and Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1277, 1290 (9th Cir. 2009) (continuing to recognize "manifest disregard" as a basis for vacating arbitration awards).

136. 795 F. App'x 261 (5th Cir. 2020).

137. *Id.* at 263.

138. *Id.* at 265.

139. 946 F.3d 837 (5th Cir. 2020).

140. *Id.* at 844.

concerns about presentation of documents and the ability to effectively create "break out rooms" have been resolved.

Virtual proceedings raise a myriad of issues, including technology, process, confidentiality, privilege and consent. To address these issues, a wealth of guidelines, model procedures, considerations and/or resources have been provided by courts and alternative dispute resolution providers. For example, the AAA-ICDR published virtual hearing guides both for arbitrators and parties and for mediators and parties.[141] The International Institute for Conflict Prevention and Resolution ("CPR"), created an Annotated Model Procedural Order for Remote Video Arbitration Proceedings.[142] Similarly, JAMS provides guidance for virtual mediation and arbitration.[143] The Michigan State Court Administrative Office of Dispute Resolution published online mediation considerations and resources for community dispute resolution program centers.[144] The United States District Court for the Eastern District of New York offers remote mediation to civil litigants.[145]

Questions have arisen as to whether parties can be compelled to engage in remote arbitration. The National Academy of Arbitrators issued a formal advisory opinion on the issue of whether an arbitrator can "order that a matter proceed by way of a video hearing at the request of one party over the objection of the other party to the arbitration."[146] The opinion concluded that an arbitrator could "in exceptional circumstances" where the arbitrator determines that a video hearing "is necessary in order to provide a fair and effective hearing."[147] The opinion stated:

> In order to provide an "adequate hearing" by way of video, the arbitrator must be familiar with the platform offered to the parties, and must be confident that the parties have such familiarity as well, or have reasonable access to an effective alternative platform. As well, the arbitrator will be required to address prehearing matters such as the delivery of documents and how evidence is to

141. *See* Am. Arb. Ass'n, AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties (2021), https://go.adr.org/rs/294-SFS-516/images/AAA268_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties.pdf ; https://go.adr.org/rs/294-SFS-516/images/AAA288_Zoom_Guide_for_Mediators_Parties.pdf.

142. *See* CPR, New: CPR's Annotated Model Procedural Order for Remote Video Arbitration Proceedings (2021), https://www.cpradr.org/resource-center/protocols-guidelines/model-procedure-order-remote-video-arbitration-proceedings.

143. *See* JAMS, Virtual Mediation, Arbitration and ADR Services (2021), https://www.jamsadr.com/online.

144. *See* Office of Dispute Resol., Mich. Cts., Help During the Covid-19 Pandemic (2021), https://courts.michigan.gov/Administration/SCAO/OfficesPrograms/ODR.

145. *See* U.S. Dist. Ct. (E.D.N.Y.), Alternative Dispute Resolution, (2021), https://www.nyed.uscourts.gov/alternative-dispute-resolution.

146. *See* Nat'l Acad. Arb., Formal Adv. Op. No. 26 (Apr. 1, 2020), https://naarb.org/wp-content/uploads/2020/04/CPRG-Advisory-Opinion-26-4.2020.pdf.

147. *Id.*

be offered and admitted at the hearing, including restrictions on remote witnesses to ensure the reliability of the witness's testimony. A prehearing conference also can anticipate how to proceed, if at all, if there are interruptions in the effective use of video technology.[148]

In *Legaspy v. Financial Industry Regulatory Authority*,[149] the United States District Court for the Northern District of Illinois denied motions for a temporary restraining order and preliminary injunction against the Financial Industry Regulatory Authority, Inc. ("FINRA") in a case alleging FINRA breached its Code of Arbitration Procedure and the relevant submission agreement when it informed the parties that an in-person hearing was cancelled and ordered the hearing to be conducted remotely via FINRA's virtual hearing services. The court found that "whether or not there is a contract, courts do not police the procedures of arbitration. Under the Federal Arbitration Act, 'procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide.'"[150] The court further found that even if it could review FINRA's arbitral procedures mid-arbitration, the plaintiff would likely not succeed since FINRA Rule 12409 gives "the panel . . . the authority to interpret and determine the applicability of all provisions under the Code. Such interpretations are final and binding upon the parties." The court noted that the panel "did precisely that, concluding that the 'location' for its hearing under Rule 12213(a) will be remote."[151]

Mediation and arbitration alike have thus adapted as the COVID-19 pandemic has brought remote proceedings to the forefront of ADR practices across the county during the course of the past year.

148. *Id.*
149. Case No. 20 C 4700, 2020 WL 4696818 (N.D. Ill. Aug. 13, 2020).
150. *Id.* at *2 (quoting Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs., Inc., 623 F.3d 476, 480 (7th Cir. 2010)).
151. *Id.* at *3.

RECENT DEVELOPMENTS IN ANIMAL TORT AND INSURANCE LAW

Margrit Lent Parker and Fran Ortiz[*]

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I. INTRODUCTION

This survey covers several issues relating to dog bites, including whether owners can be held liable when a dog bites while under the care of a dog sitter, whether landlords can be liable to third parties based on contractual provisions in their leases or pet policies, and whether there are duties owed to third parties to keep a foster dog within a home to prevent injury or to vaccinate a dog for rabies. This survey also reviews two issues of first impression, including whether a statute for unclaimed personal property abrogates the common law theory of abandonment and whether a rat that carries bacteria that can harm a human is a product for purposes of products liability.

Three cases surveyed involved Equine Activity Liability Acts (EALAs). They addressed questions about whether an EALA applied to limit liability for work injuries while on the job (no), whether even with an EALA a racetrack still had a duty not to increase the risk associated with inherent risks of equine activities (yes), and whether knowingly allowing a child to wander around horses with a noisy toy gun warranted application of an EALA exception to immunity for willful and wanton conduct (yes). Two horse cases surveyed addressed considerations of assumption of risk and affirmed the application of the heightened burden of proof in sports injury cases that the plaintiff must show reckless conduct by the defendant, not just ordinary negligence. In one case, a rider was injured by another's horse while riding in an indoor arena, while in the other, the injured plaintiff was a spectator in the middle of the arena of a horse pulling competition. In the equine liability waiver case surveyed, a trail ride operator managed to enforce her liability waiver notwithstanding that, confusingly, the injured plaintiff signed two different waivers inconsistently naming multiple business as a released party.

Livestock fence laws figured into two cases with differing results based on divergent state law and policy in Hawaii, a 'fence-in' state, and Texas, a 'fence-out' state. Rounding out the survey are two insurance coverage cases, one concluding there was no coverage under a homeowner's policy for an infestation of brown recluse spiders. In the other involving an equine mortality insurance policy, the horse owner unsuccessfully argued that the insurer breached its contract or acted in bad faith by assuming control over the veterinary care of the insured horse instead of consenting to euthanasia and paying out on the policy.

II. ANIMAL TORT LAW

A. *Dog Bites*

1. Owner Liability

In *Dzierwa v. Ori*,[1] an Illinois appellate court considered whether liability could be imposed on dog owners for a dog bite that occurred when the dog was left in the hands of a dog sitter.[2] In the case, the defendants owned a Cane Corso which had never bitten or shown aggression to a person before, although the dog did once bite another dog at the dog park and would growl at strangers through the car and house windows.[3] The defendants did not generally keep the dog away from guests, but if a child showed fear of the dog, they would keep the dog away.[4] The defendants left their dog in the care of the brother of one of the defendants who was housesitting for the defendants.[5] The brother had taken this role before and was known to have invited friends over on previous housesitting visits.[6] While the defendants were out of town, the brother again invited friends over, including the plaintiff, who was bitten by the defendants' dog. The plaintiff sued the brother as well as the defendant-owners on negligence and the Illinois Animal Control Act.[7]

The defendant-owners moved for summary judgment, which the trial court granted, and the plaintiff appealed, arguing that the defendants knew or had reason to know of the dog's vicious propensities and that the defendants were "owners" under the Act.[8] The Illinois Court of Appeals reviewed and upheld the summary judgment.[9] The court first determined that the defendants in this case did not know or have reason to know of any vicious propensities in their dog because "fights between dogs do not presage attacks on humans"[10] and a dog's growling at people does not place an owner on notice that the dog is a threat.[11] As for the Animal Control Act, the court stated that it had previously held that an owner was not liable

1. 2020 WL 5939298 (Ill. App. Ct. Oct. 7, 2020).
2. *Id.* at *1.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* There was some dispute in the testimony about whether the brother had been instructed not to have anyone in the home other than his girlfriend.
7. 510 Ill. Comp. Stat. 5/1 *et seq* (2014).
8. *Dzierwa*, 2020 WL 5939298, at *1. The court noted that the plaintiffs not only had to prove the elements of negligence, but also that the defendant knew or had reason to know that the animal had a vicious propensity.
9. *Id.* at *3.
10. *Id.* at *2.
11. *Id.* The court noted that it could find no Illinois cases about growling dogs, but other jurisdictions that have reviewed the issue have held that growling does not notify an owner of a vicious propensity. *See, e.g.*, Hiner v. Mojica, 722 N.W.2d 914, 919 (Mich. Ct. App. 2006); Fontanas v. Wilson, 751 N.Y.S.2d 656, 657 (App. Div. 2002).

under the Act if the owner was not "in a position to control the dog or prevent injury,"[12] even though the express terms of the statute would suggest otherwise.[13] Although the plaintiff had argued that the defendants were liable under the Act because they controlled access to the dog, the court was unpersuaded, stating that they relinquished total control of the dog to the dog sitter.[14] Finding no liability, the court affirmed summary judgment.[15]

A Kentucky Court of Appeals also reviewed a dog sitter case in *Nicol v. Stevenson*.[16] At issue in the case was whether a dog owner could be strictly liable under the state's dog bite statute to a person who is caring for the dog on behalf of the owner.[17] The facts of the case were simple. The defendant dog owner went away for a weekend, leaving his dogs in the care of the plaintiff, who had watched the dogs on a previous occasion without incident.[18] While caring for the dogs in the defendant's home, one of the dogs knocked over the plaintiff, causing her to break a wrist.[19] The plaintiff sued the defendant, alleging strict liability under Ky. Rev. Stat. Ann. § 258.235(4), which provides that "[a]ny owner whose dog is found to have caused damage to a person, livestock, or other property shall be responsible for that damage."[20] The defendant moved for summary judgment, arguing that the plaintiff was ineligible for recovery because she fell into the statutory definition of "owner," which includes not only legal owners of a dog, but also "every person who . . . [h]as the dog in his or her care."[21] The plaintiff appealed, distinguishing her case from prior case law and asserting that she could not be considered an owner because she was not a paid professional provider of animal services and she watched the dogs on the defendants' property and not her own.[22] The court of appeals rejected the plaintiff's argument, stating that the prior case law on which the plaintiff relied made it clear there was no difference in liability between the legal

12. *Dzierwa*, 2020 WL 5939298, at *2 (citing Hayes v. Adams, 987 N.E.2d 402, 404–05 (Ill. App. Ct. 2013)).

13. *Id.* The Animal Control Act imposes civil liability on an owner of an animal if, without provocation, the animal "attacks, attempts to attack, or injures any person who is peaceably conducting himself or herself in any place where he or she may lawfully be." 510 Ill. Comp. Stat. 5/16 (2014). Owner is defined in the Act as a person "having a right of property in an animal, or who keeps or harbors an animal, or who has it in his care, or acts as its custodian, or who knowingly permits a dog to remain on any premises occupied by him or her." *Id.* 5/2.16 (2014).

14. *Dzierwa*, 2020 WL 5939298, at *3.

15. *Id.*

16. 2019 WL 5853728 (Ky. Ct. App. Nov. 8, 2019), *review denied*, Sept. 16, 2020.

17. *Id.* at *1.

18. *Id.*

19. *Id.*

20. Ky. Rev. Stat. Ann. § 258.235(4) (2013).

21. *Id.* § 258.095(5)(b)2. (2013).

22. *Nicol*, 2019 WL 5853728, at *1.

owner of a dog and a "second party owner."[23] Quoting from the case, the court explained:

> The statute was designed to expand liability to those parties who keep dogs, such as kennel owners, veterinarians, and other persons who keep dogs owned by others in their care, as well as any person who keeps a dog owned by another on their property. "Owner" in this case does not simply mean a person with a property interest in the dog, for reasons of public policy.[24]

The court affirmed the order for summary judgment.[25]

2. Landlord Liability

In *Raczkowski v. McFarlane*,[26] a Connecticut Court of Appeals considered whether a landlord owed a duty to a third party injured by a tenant's dog by virtue of the written lease agreement.[27] In the case, the plaintiff was walking her dog near the tenant's leased property when the defendant's dog ran out and bit the plaintiff, causing injury.[28] The injury occurred partly on the property.[29] The plaintiff sued the tenant's landlord, alleging that the landlord knew or should have known about the dog's dangerousness and the landlord failed to use reasonable care to keep the premises in a reasonably safe condition because the landlord allowed the dog to remain on the property.[30] The plaintiff further argued that the landlord's lease with the tenant created a duty to third parties in the landlord because the landlord retained control to approve any dog on the property.[31] The defendant-landlord moved for summary judgment, arguing that the plaintiff had not met her burden to prove the landlord's knowledge or that the landlord even had a duty to the plaintiff.[32] The plaintiff responded, providing as evidence an affidavit from the tenant's neighbor suggesting the tenant's dog had vicious propensities.[33] The trial court granted summary judgment to the defendant.[34] The plaintiff sought review, arguing genuine issues of material fact existed as to whether the lease created a duty in the landlord

23. *Id.* at *1–2.
24. *Id.* at *1 (quoting Jordan v. Lusby, 81 S.W.3d 523, 524 (Ky. Ct. App. 2002)).
25. *Nicol*, 2019 WL 5853728, at *2. The plaintiff also tried to argue she had no liability based on a Kentucky case establishing a landlord's liability for a dog bite caused by a tenant's dog. The court rejected the argument, stating that the landlord's liability was based on ownership of the premises, which was not the case for the plaintiff. *See* Benningfield *ex rel.* Benningfield v. Zinsmeister, 367 S.W.3d 561, 569 (Ky. 2012).
26. 225 A.3d 305 (Conn. App. Ct. 2020).
27. *Id.* at 307.
28. *Id.* at 308.
29. *Id.*
30. *Id.*
31. *Id.* at 309.
32. *Id.*
33. *Id.* at 308.
34. *Id.* at 307.

to investigate the dog's behavior to protect third parties and whether the landlord maintained control over the property by retaining the right to approve the dog.[35]

The court of appeals rejected both of the plaintiff's arguments.[36] With regard to the lease, the court stated that a duty to third parties is only created if the parties clearly intended in the contract to create that duty.[37] In this case, the lease stated: "'The tenant may keep a pet but this will increase the monthly payment by $50.00 per month. The tenant must keep the pet healthy and well groomed. The pet must pose no threat to anyone coming on the property. This is to be determined by the landlord.'"[38] According to the court, this language did not place an affirmative obligation on the landlord to investigate the dog's behavior nor did it create a benefit to third parties.[39] Instead, the provision giving the landlord the right to final approval was included solely for the landlord's benefit to determine whether the tenant could keep a pet at all.[40] The court also rejected the plaintiff's argument that the language of the lease meant that the landlord retained control of the premises, noting that landlords only owe a duty of reasonable care for portions of the premises not in the complete control of the tenant.[41] Reviewing the evidence submitted by the defendant, the court found that, under the lease, the tenant was responsible for outside maintenance, and therefore, the landlord had no duty for that part of the premises.[42] Finding no support for plaintiff's objections, the court of appeals affirmed the order for summary judgment.[43]

In *Burling by Next Friend Burling v. Skief*,[44] a Michigan Court of Appeals reviewed a similar issue regarding a landlord's liability.[45] In the case, the defendant owned a mobile home park.[46] One of the defendant's tenants acquired a dog, but did not immediately tell the landlord, despite a requirement to pay a pet fee.[47] When the defendant learned of the tenant's dog ten months later, the tenant paid the fee, coming into compliance with the pet policy.[48] Sometime later, the eight-year-old plaintiff was injured when the tenant's dog broke through a screen door after the plaintiff startled the ten-

35. *Id.* at 308–09.
36. *Id.* at 309.
37. *Id.* at 310 (citing Gateway Co. v. DiNoia, 654 A.2d 342, 346–47 (Conn. 1995)).
38. *Raczkowski*, 225 A.3d at 309 (quoting the language of the lease).
39. *Id.*
40. *Id.* at 311.
41. *Id.* at 312.
42. *Id.* at 313.
43. *Id.* at 312–14.
44. 2020 WL 6236650 (Mich. Ct. App. 2020).
45. *Id.* at *1.
46. *Id.*
47. *Id.* at *3.
48. *Id.*

ant's wife who was sitting near the dog.[49] Until that incident, the dog had a reputation as a friendly dog who played with children and other dogs and had never bitten before.[50] The plaintiff sued the defendant, alleging that the defendant was negligent in allowing the dog to stay on the property, even though the tenant had violated the landlord's pet policy, which the plaintiff asserted was enacted to protect people from harm.[51] The defendant moved for summary judgment, asserting that the plaintiff failed to show that the defendant knew or should have known of the dog's dangerous propensity and that the defendant's pet rules created a duty in the defendant.[52] The trial court agreed with the defendant and granted summary judgment.[53]

On appeal, the plaintiff asserted that the defendant owed the plaintiff a duty because the injury was foreseeable since the defendant was placed on notice of the dog's vicious nature at the time that the defendant learned of the tenant's ownership of the dog.[54] In support of the argument, the plaintiff proffered a report from animal control, which described the dog's conduct as "'aggressive' before the bite and 'territorial' after the bite."[55] The court of appeals found the report deficient, though, because it was unclear whether the aggressiveness "before the bite" referred to immediately before the bite or a behavior exhibited over a longer period of time.[56] Further, the court stated that, notwithstanding the report, aggressive and territorial behavior in conjunction with a bite is a trait common to dogs and does not show abnormally dangerous behavior.[57] Therefore, the court stated, the injury was not foreseeable and no duty was owed.[58]

The court also stated that the defendant owed no duty based on ownership of the premises, even though the plaintiff was also a tenant, because the defendant's control did not extend to the tenant's leased lot, where the injury occurred.[59] In addition, the court found that the defendant's pet regulation did not create a duty because a landlord "has no duty to third parties to enforce a pet provision in its rules and regulations"[60] and because a landlord cannot be held liable unless the landlord "knew of the dangerous nature of the dog at the time the parties entered into the lease."[61] Finding that the plaintiff had not shown that the defendant knew or should

49. *Id.* at *1.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at *2.
56. *Id.* at *1.
57. *Id.* at *2.
58. *Id.*
59. *Id.*
60. *Id.* at *3.
61. *Id.* (citing Braun v. York Props., Inc., 583 N.W.2d 503, 506 (Mich. Ct. App. 1998)).

have known about the dog's behavior, the court affirmed the summary judgment.[62]

3. Duty Owed

In *McGrellis v. Bromwell*,[63] the Delaware Supreme Court reviewed a directed verdict issued in a negligence case against a foster of rescue dogs.[64] In the case, the plaintiff was walking her dog in the middle of the street outside the defendants' house when one of defendants' foster dogs ran out the front door toward the plaintiff barking.[65] Although the plaintiff did not know whether the dog left the property and made contact with her, plaintiff did recall landing on the street and she suffered injury.[66] According to one of the defendants, his dog did not touch the plaintiff or the plaintiff's dog because the defendant had picked up the dog before it left the front steps of the house.[67] The plaintiff's medical records and testimony of the defendant noted that the plaintiff first stated that she was pulled down to the ground by her own dog.[68]

Despite her earlier statement, the plaintiff sued.[69] The defendants moved for a directed verdict, arguing that they did not owe a duty to prevent their dog from leaving the house, running around the property, or barking.[70] The lower court denied the motion, but the defendants renewed its motion after the jury twice indicated that it could not reach an agreement on negligence.[71] The court granted defendants' second motion, holding that defendants "did not owe a duty to a passerby to keep their dogs unseen and unheard on their property."[72]

Plaintiff appealed.[73] On review, the Delaware Supreme Court confirmed that the defendant did not owe a duty to the plaintiff.[74] Relying on the *Second Restatement of Torts*, the court stated that a duty arises to protect against reasonably foreseeable events, which was not the case here, because it was not reasonably foreseeable that a dog running into a yard would cause a person to fall in the street.[75] Moreover, the defendants' dog was not a "dangerous breed or vicious," which distinguishes this case from "dog

62. Burling *ex rel.* Burling, 2020 WL 6236650, at *3.
63. 2020 WL 547692 (Del. Jan. 31, 2020).
64. *Id.* at *1.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at *2.
75. *Id.*

fright" cases where courts have found a duty in these circumstances, and the defendants' dog stayed within the property lines, so was not obligated to be leashed.[76] The court also found no special duty arose simply because the defendants regularly fostered rescue dogs.[77] Finding no duty, the court found no error in directing a verdict against the plaintiff.[78]

In *Dilfield v. Bealing*,[79] a Georgia Court of Appeals reviewed the issue of whether a showing of dangerous propensity was required if the defendant failed to vaccinate a dog in accordance with a rabies statute or ordinance.[80] In the case, the plaintiffs' son was at the defendants' home playing with their daughter.[81] The defendants' dogs were crated in another room, which is what they usually did when they had guests.[82] However later that day, the plaintiffs' son returned home and indicated one of the defendants' dogs bit his leg.[83] The following day, the defendants informed the plaintiffs that the dog had not been vaccinated for rabies that year, resulting in the plaintiffs' son undergoing a series of rabies shots.[84] The plaintiffs sued, alleging negligence and negligence *per se* for failing to vaccinate the dog.[85] The defendants moved for summary judgment, arguing that there was no evidence to show that, at the time of the incident, the defendants knew or should have known that their dog had a propensity to bite or cause injury.[86]

The trial court denied the motion, finding fact questions on the negligence claim remained as to causation, foreseeability, and whether the practice of confining the dog around guests and the dog's behavior of jumping and barking as people passed the front door amounted to a dangerous propensity.[87] The trial court also found summary judgment inappropriate for the negligence *per se* claim because the defendants failed to show that they did *not* have a legal duty established by statute or ordinance to vaccinate their dog to prevent rabies or rabies exposure.[88] The trial court also supported its denial with the plaintiffs' argument that a showing of dangerous propensity was not required in this case because the damages—the costs

76. *Id.* at *3.
77. *Id.*
78. *Id.*
79. 850 S.E.2d 469 (Ga. Ct. App. 2020).
80. *Id.* at 469–70.
81. *Id.* at 470.
82. *Id.*
83. *Id.* at 470 n.1.The defendants asserted that the plaintiffs' son had left their home then returned later without knocking or receiving permission to enter, at which point the dog slid into him, causing injury.
84. *Id.* at 470.
85. *Id.*
86. *Id.*
87. *Id.* at 470–71.
88. *Id.* at 470.

of the rabies treatment—arose from the defendants' failure to vaccinate.[89] The defendants appealed.[90]

The court of appeals reversed the trial court, holding that Georgia law requires a showing that the defendants had knowledge of a dangerous propensity prior to the imposition of liability because dogs are presumed to be harmless otherwise.[91] Further, a dangerous propensity showing is required even if a failure to vaccinate pursuant to rabies statute or ordinance could be used to show liability.[92] And in this case, the court concluded, there was no showing.[93] The mere fact that the dog barked at the front door was insufficient because prior case law holds that barking alone does not show a vicious propensity and mere crating without an explanation of why the dog is crated, as was the case here, is not evidence of any predisposition.[94]

4. Statutory Presumptions

In *S&S Towing & Recovery, Ltd. v. Charnota*,[95] the Georgia Supreme Court was faced with an issue of first impression regarding its dog bite statute.[96] The Georgia statute provides:

> A person who owns or keeps a vicious or dangerous animal of any kind and who, by careless management or by allowing the animal to go at liberty, causes injury to another person who does not provoke the injury by his own act may be liable in damages to the person so injured. In proving vicious propensity, it shall be sufficient to show that the animal was required to be at heel or on a leash by an ordinance of a city, county, or consolidated government, and the said animal was at the time of the occurrence not at heel or on a leash.[97]

The facts of the case involved physical injuries to the plaintiff caused by a dog that had escaped from the defendants-owners' business premises and was neither leashed nor under anyone's control.[98] Plaintiff sued the both the owners and the business on several causes of action including the dog bite statute.[99] Defendant-business challenged the dog bite statute, alleging that it violated due process because it created an irrebuttable presumption of vicious propensity.[100]

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89. *Id.*
90. *Id.*
91. *Id.* at 470–72 (citing Steagald v. Eason, 797 S.E.2d 838, 840 (Ga. 2017)).
92. *Dilfield*, 850 S.E.2d at 471–72.
93. *Id.* at 472.
94. *Id.*
95. 844 S.E.2d 730 (Ga. 2020).
96. *S&S Towing & Recovery, Ltd.*, 844 S.E.2d at 731. The statute is actually broader than a simple dog bite statute because it applies regardless of the type of animal. *Id.* at 732.
97. Ga. Code Ann. § 51–2–7 (2019) (emphasis omitted).
98. *S&S Towing & Recovery, Ltd.*, 844 S.E.2d at 732.
99. *Id.*
100. *Id.* at 731–32.

In reviewing the presumption set out in the statute, the Supreme Court noted that irrebuttable presumptions violate due process.[101] However, a rebuttable presumption does not deny due process if there is a "'a rational connection between what is proved and what is to be inferred.'"[102] Examining the history of the statute, the court noted that the first sentence, which establishes liability, was enacted in 1863 and was merely a codification of common law, which required proof that the dog owner knew of a vicious or dangerous propensity.[103] The second sentence, which the defendants argue sets out the presumption, was adopted in 1985.[104] However, the court states, neither sentence actually refers to the owner's *knowledge* of the dog's propensity. Instead, that requirement arises from the common law, which was necessary because dogs were presumed harmless.[105] Therefore, the court explained, the second sentence supplants the presumption of harmlessness only if the locality has a leash law and the dog was not restrained at the time of the harm, but it does *not* eliminate the necessity to show the owner had knowledge of the vicious or dangerous propensity, which the plaintiff can show either by knowledge of the actual vicious or dangerous behavior *or* knowledge that the animal was unrestrained.[106] The statute's terms also make it clear that the plaintiff must show, in addition to causation, that the defendant either permitted the dog to run at large or carelessly managed the animal and the plaintiff did not provoke the injury.[107]

As for whether the statute violated procedural due process, the court found that it did not because the second sentence created no more than a rebuttable presumption that has a rational basis in limiting the need to litigate vicious behavior.[108] Further, because the statute required proof other than just the presumption, the defendant had an opportunity to be heard, and the defendant was on constructive notice of the second sentence since it had been on the books since 1985.[109]

B. *Ownership*

In *Zephier v. Agate*,[110] a Minnesota Court of Appeals reviewed whether the state's abandonment statute for personal property abrogated common law

101. *Id.* at 733.
102. *Id.* (quoting Cobb Cnty. Sch. Dist. v. Barker, 518 S.E.2d 126, 129 (Ga. 1999)).
103. *S&S Towing & Recovery, Ltd.*, 844 S.E.2d at 734 (citing Harvey v. Buchanan, 49 S.E. 281 (Ga. 1904)).
104. *Id.*
105. *Id.* (citing Steagald v. Eason, 797 S.E.2d 838, 840 (Ga. 2017)).
106. *S&S Towing & Recovery, Ltd.*, 844 S.E.2d at 734–35.
107. *Id.* at 735.
108. *Id.* at 735–36.
109. *Id.* at 735.
110. 942 N.W.2d 380 (Minn. Ct. App. 2020), *review granted*, June 30, 2020.

abandonment.[111] In the case, the plaintiff and defendant lived together for several years.[112] The plaintiff was the original owner of two dogs, but was unable to take the dogs with her when she moved to California for school.[113] The defendant agreed to care for the dogs, but the agreement was informal and did not indicate when the plaintiff would take the dogs back.[114] The two communicated frequently and the plaintiff visited the dogs.[115] Eventually the plaintiff took the smaller dog with her to California, but left the larger dog with the defendant.[116] About a year later, the plaintiff sought to visit the dog with the defendant, but the defendant refused.[117] The plaintiff reported the dog stolen to the police, but they refused to intervene.[118] The plaintiff then sued in small claims court, which held for the defendant and ordered the defendant to pay plaintiff for the dog.[119] The plaintiff then removed the case to district court, which vacated the lower court's judgment.[120] The plaintiff received a bench trial, and the district court then denied the plaintiff recovery, finding that she had abandoned the dog.[121]

On appeal, the Court of Appeals began its analysis by reviewing the requirements of both common law and statutory abandonment.[122] Common law abandonment requires a showing of intent to abandon, some action showing abandonment, and other evidence showing "facts and circumstances of the owner's relationship with the property."[123] Minnesota's abandonment statute, by contrast, specifies that tangible personal property is considered abandoned if it has not been removed from a person's possession within six months, and title will transfer to the person in possession if that person gives thirty days' notice to the prior owner of the pending transfer by personal service or certified mail.[124] The court then turned to a determination of whether the common law was supplanted by the statute, even though the statute did not indicate abrogation by its terms.[125] Relying on the statute's notice provision, the court stated that the statute did supersede the common law by necessary implication because otherwise

111. *Id.* at 381.
112. *Id.* at 382.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 383.
123. *Id.* (citing *In re* Application of Berman, 247 N.W.2d 405, 408 (Minn. 1976)).
124. *Id.* at 383–84 (citing Minn. Stat. Ann. § 345.75 (2018)).
125. *Id.* at 384.

the notice provision would be rendered superfluous.[126] The court further supported its decision by noting the statute's role as part of a complete regulatory system of unclaimed personal property.[127] The statutory provision at issue here, explained the court, regulates tangible personal property and is merely one portion of the overall regulation.[128] Other provisions, by contrast, regulate intangible personal property.[129] Because generally the enactment of an overall scheme of regulation supplants the common law, the common law of abandonment no longer applies.[130] Turning to the case at hand, the court concluded that the plaintiff had not abandoned the dog under the statute because the defendant had failed to give proper notice.[131]

C. *Products Liability*

In *Pankey v. Petco Animal Supplies, Inc.*,[132] a California Court of Appeals reviewed the issue of whether an unaltered live animal could constitute a design defect in a products liability action.[133] At issue was a pet rat purchased at a pet store by a grandmother for her grandson.[134] After handling the rat, the grandson became feverish and lethargic and died soon thereafter from an infection caused by *streptobacillus moniliformis*, a bacteria carried by the rat acquired from the pet store.[135] The child's parents[136] sued the pet store, Petco, and Petco's rat supplier, Barney's Pets, alleging negligence and strict products liability.[137]

At trial, the plaintiff's expert explained how breeding rats without the pathogen was "fairly simple," but the vice president of operations for Barney's Pets testified, based on his own experience, that breeding pathogen-free rats was not always successful.[138] Further testimony indicated that Petco periodically made unannounced inspections of its suppliers and required that the rats supplied not contain the *streptobacillus moniliformis*

126. *Id.*
127. *Id.* at 384–85.
128. *Id.*
129. *Id.* at 385.
130. *Id.* at 384–85. The court rejected the argument that the use of the word "may" in the first sentence of the provision meant the common law continued to run concurrently with the statute. Instead, the court found that the word "may" merely referred to the fact that the possessor of the property could transfer title to herself at her choosing if she has met the statutory requirements. *Id.* at 385–86.
131. *Id.* at 386–87.
132. 264 Cal. Rptr. 3d 644 (Ct. App. 2020), *reh'g denied*, July 14, 2020 (unpublished).
133. *Id.* at 649.
134. *Id.*
135. *Id.* at 649–50. The bacterial infection is commonly known as Rat Bite Fever. *See id.* at 650.
136. *Id.* at 649. The child's mother settled and dismissed her claims. The father's claims are the subject of this lawsuit.
137. *Id.* at 650.
138. *Id.* at 650–51.

bacteria.[139] Petco warns buyers of potential bacterial transmission through signs and rat care sheets posted by the store's rat habitats and with a "companion animal purchase card," which buyers were required to sign indicating that they have been warned that rats may carry the bacteria.[140] Petco provides buyers testing for the bacteria, if requested, and will test if a rat bites someone.[141] If the rat tests positive for the bacteria, the rat is euthanized, other purchasers of rats from the same batch are informed of the positive test, and Petco stops selling rats from that batch.[142]

The trial court instructed the jury on two negligence theories (ordinary negligence and failure to warn) and three products liability claims (failure to warn, manufacturing defect, and design defect under a risk-benefit test).[143] The trial court refused to instruct the jury on the "consumer expectations test" for establishing a design defect because "it would be 'too much' to expect a consumer to form minimum safety assumptions about a pet rat."[144]

The jury found for the defendants on all counts.[145] As to the rat having a defect, the jury found no manufacturing defect at the time the rat left defendants' possession and that the risk of the pet's design did not outweigh the benefits of its design.[146] The plaintiff appealed, arguing the trial court erred by not instructing the jury on the consumer expectations test.[147] Petco argued, among other things,[148] that (1) a pet rat is not a product for purposes of strict products liability; and (2) the design defect alleged by plaintiff could not be resolved by the consumer expectations test because it involved "novel and complex scientific matters."[149]

Reviewing Petco's argument that a pet rat is not a product, the Court of Appeals acknowledged that the trial court had denied summary judgment on that same issue because the issue of whether an animal can constitute a product had not been addressed in California.[150] In reviewing the issue *de novo*, the court looked to the *Restatement* (*Third*) *of Torts*, which defined

139. *Id.*

140. *Id.* at 651.

141. *Id.*

142. *Id.*

143. *Id.* at 649. Under the risk–benefit test, the jury must determine whether the product's design was the proximate cause of the injury and, if so, whether the defendant has shown that the benefit of the product outweighs the risks inherit in the design. *Id.* at 652.

144. *Id.* at 652.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 653–54. Barney's Pets settled with the plaintiff after judgment issued. *Id.* Based on that, Petco argued that the plaintiff's appeal was moot because it did not also appeal the judgment against Barney's and that mootness precluded relitigation of the same issues against Petco. The Court of Appeals rejected these arguments. *Id.*

149. *Id.* at 653.

150. *Id.*

"product" for purposes of product liability as "'tangible personal property distributed commercially for use or consumption,' excluding human blood and tissue."[151] Comment b to the section, though, states that "when a living animal is sold commercially in a diseased condition and causes harm to other property or to persons, the animal constitutes a product."[152] However, the court indicated, comment b also states that, whereas "diseased animals that are themselves harmed are not eligible for recovery under the *Third Restatement*," animals that are in a "'diseased condition' that cause harm to other property or to persons are products for which damages are available."[153]

Although the plaintiff argued that "diseased condition" should refer to the human condition after contracting the infection, the court disagreed, relying on a dictionary definition of the term "diseased" and stating the issue as "whether a rat carrying *streptobacillus moniliformis* is in a diseased condition, i.e., affected with a disease or lacking in health or soundness."[154] Reviewing testimony of the plaintiff's expert showing that the bacterial infection "is a disease of humans, not of rats," the court determined that "where an animal (i.e., the rat) coexists with an organism (*streptobacillus moniliformis* bacteria) and that organism causes no harm to the animal, the animal itself is not diseased and is therefore not a product."[155]

Because California courts had not officially adopted the *Third Restatement*, the court then turned to an analysis of cases interpreting the *Second Restatement*, which does not address the issue of whether strict products liability applies to living animals.[156] Although finding that courts conflicted on whether diseased animals or animals with "dangerous personalities" were products,[157] the court ultimately concluded:

Pet rats in their natural state, even carrying the bacteria, are neither diseased nor designed. Rats are susceptible to their environment because nothing prevents a rat from contracting the bacteria from other rats or the environment where the bacteria is found. To hold the seller responsible under the design defect theory would make the seller an absolute insurer of the rat's health, biological condition, and even behavior, even though those things are affected by factors beyond the scope of the seller's control. . . . Additionally, even accepting that retailers and manufacturers are in the best position to bear the cost of injuries resulting from the goods they

151. *Id.* at 656 (quoting Restatement (Third) of Torts, Products Liability, § 19(a), (c)).
152. *Pankey*, 264 Cal. Rptr. 3d at 656 (quoting Restatement (Third) of Torts, Products Liability, *supra* note 151, § 19(b)).
153. *Id.*
154. *Id.* at 656–57.
155. *Id.* at 657.
156. *Id.*
157. *Id.* at 657–59.

sell . . . , we do not foreclose equitable cost spreading or the apportionment of losses with our conclusion here that rats are not products for purposes of design defect theory. Those goals can be achieved through warning and manufacturing claims.[158]

Although acknowledging that it had resolved the case by determining that the rat was not a product, the court nevertheless turned to an analysis of whether it was appropriate for the trial court to fail to instruct the jury on the consumer expectations test.[159] After reviewing the elements of the test and when it is normally used,[160] the court determined that the complexity of the alleged defect falls outside a consumer's normal experience, so use of the consumer expectations test would be inappropriate,[161] but even if it were appropriate, failure to give the instruction in this case was not prejudicial to the plaintiff's claims.[162]

One justice dissented, challenging both findings of the court. As to the rat not being a product, the dissenter rejected the majority's focus on "diseased" and argued that the rat was a product because it fell within the *Third Restatement*'s view of a product as "'tangible personal property distributed commercially for use or consumption.'"[163] The dissenting opinion also rejected the majority's view that an ordinary consumer could not form expectations in this case. In the dissenting justice's view, "ordinary retail pet store customers can form reasonable safety expectations about their purchases, including that a pet rat will not kill their child,"[164] and the trial court's failure to instruct the jury on the consumer expectations test was not harmless error.[165]

D. *Equine-Related Personal Injury*

1. Claims Limited (or Not) by Equine Activity Liability Acts

In *Waak v. Rodriguez*,[166] a 6-2 decision, the Texas Supreme Court affirmed that an employer cannot avoid workers' injury claims by relying on the Texas Farm Animal Activity Act (FAAA),[167] which applies to all farm animal activities and not just equine activities.[168] Much like the typical Equine Activity Liability Act, the FAAA limits liability for injury to a participant

158. *Id.* at 659 (citations omitted).
159. *Id.* at 661–62.
160. *Id.*
161. *Id.* at 663–64.
162. *Id.* at 664–68.
163. *Id.* at 669 (Dato, J., dissenting) (quoting Restatement (Third) of Torts, Products Liability, *supra* note 151, § 19(b)).
164. *Pankey*, 264 Cal. Rptr. 3d at 669.
165. *Id.* at 676.
166. 603 S.W.3d 103 (Tex. 2020).
167. Tex. Civ. Prac. & Rem. Code §§ 87.001–87.005 (2015).
168. *Waak*, 603 S.W.3d at 112.

in a farm animal activity that results from an "inherent risk" of those activities.[169] But as the Texas Supreme Court explained here, the FAAA does not apply to ranchers and ranch hands.[170] The tragic facts here involved a full-time ranch hand found dead from blunt force and crush injuries that appeared to be the result of trampling by a 2,000 pound bull.[171] His family sued the ranch owners on common law wrongful death and survival claims, because the owners had opted out of Texas's voluntary workers' compensation system and in turn were subject to common law claims.[172] In defense, the owners asserted that the recently amended FAAA barred the claims on the basis that the ranch hand was engaged in a farm animal activity under the statute.

Reviewing the state workers' compensation system and the FAAA together, and evaluating in detail the history and purpose of the FAAA, the Texas Supreme Court rejected a statutory interpretation that would leave a ranch employee with absolutely no remedy for work-related injury or death just because he happened to work for an employer that opted out of the compensation benefits system.[173] Noting the constitutional implications of this deprivation of remedy, the majority could not countenance a contrary decision that would "single out ranch hands and deny them, alone of all employees in the state, any right of recovery whatsoever for certain accidental injuries . . . while working for nonsubscribing employers."[174] Unpersuaded, and noting that the application of the FAAA does not necessarily absolve an employer of liability, the dissent criticized the majority's reasoning for undermining "normal rules of English grammar" and adding to the FAAA limitations and exceptions that do not exist.[175]

The Missouri case of *Rosales v. Benjamin Equestrian Center, LLC*[176] reaffirms the notion that equine activity sponsors cannot wholly abdicate duties of care and hide behind Equine Activities Liability Acts (EALAs) seeking blanket immunity. There, a first-time racing spectator with no horse experience entered a racetrack's trailer unloading area after passing through an unmonitored open gate.[177] She was asked to move while a horse was being loaded, and after unloading, the horse reared up, fell on the spectator, and fractured her pelvis.[178] She prevailed at a jury trial on her claim

169. *Id.* at 104.
170. *Id.*
171. *Id.* at 105.
172. *Id.*
173. *Id.* at 109–11.
174. *Id.* at 111.
175. *Id.* at 112–18 (Blacklock, J., dissenting).
176. 597 S.W.3d 669 (Mo. Ct. App. 2019).
177. *Id.* at 672.
178. *Id.* at 673.

for negligence.[179] The issues on appeal revolved around Missouri's EALA which, again, as is typical, provides limited immunity to equine activity sponsors for injury resulting from the inherent risks of equine activities.[180] Among the several exceptions to immunity under Missouri's EALA is when the sponsor commits ordinary negligence.[181] It is that exception that resulted in liability here.[182]

The Missouri Court of Appeals rejected the racetrack's argument that this negligence exception swallowed the rule of immunity, explaining that immunity extends only to true inherent risks of equine activities, and not to risks created, enhanced, or reasonably within the control of the activity sponsor.[183] While the risk of a horse rearing and falling is an inherent risk of equine activities, there was sufficient evidence to demonstrate that the track's negligence enhanced the risk of injury to the spectator by negligently permitting people to enter and stay in the horse unloading area "near an inherent risk."[184] The track's posted signage (which complied with the statutory warning requirements) was irrelevant to the analysis of statutory immunity because any claimed immunity "was extinguished by [the track's] ordinary negligence."[185] Similarly, the assumption of risk doctrine was inapplicable because, even if by statute, a participant assumes the risk of injury from an inherent risk, a participant does not assume the risk of injury caused by a statutory exception to immunity, such as negligence.[186] In sum, EALAs provide only *limited* immunity, and activity sponsors must still exercise due care to minimize the risk of injury and future liability.[187]

Neary v. American Competitive Trail Horse Ass'n,[188] is a companion case to one highlighted in the last survey period,[189] this one relevantly involving application of an exception to immunity for willful and wanton conduct under Georgia's EALA.[190] In this tort case, a then-seven-year-old boy 'fired' a toy gun—with a noise similar to a real gun—during the Association's horse-riding competition, causing the plaintiff's horse, which was

179. *Id.*

180. *Id.* at 673–74 (quoting Mo. Rev. Stat. Ann. § 537.325.4 (2015)).

181. *Id.* at 675 (quoting Mo. Rev. Stat. Ann. § 537.325.4 (2015)). Not all similar state EALAs contain this negligence exception.

182. *Rosales*, 597 S.W.3d at 675.

183. *Id.*

184. *Id.* 676.

185. *Id.* at 677, 680.

186. *Id.* at 678.

187. *Id.* at 673.

188. 2020 WL 3268904 (M.D. Ga. Mar. 12, 2020).

189. Neary v. Am. Competitive Trail Horse Ass'n, CIVIL ACTION NO. 1:17-CV-04380-LMM, 2019 WL 3505453 (N.D. Ga. Mar. 11, 2019) (in garnishment action, confirming the absence of insurance coverage for the claim against the Association), surveyed in Margrit Lent Parker & Francesca Ortiz, *Recent Developments in Animal Tort and Insurance Law*, 55 Tort Trial & Ins. Prac. L.J. 133, 158–59 (2020).

190. *Neary*, 2020 WL 3268904, at *1–2 (quoting Ga. Code Ann. § 4–12–3 (2017)).

fifteen yards in front of the child, to spook, fall, and injure the plaintiff's leg.[191] Prior to the incident, the child played with the toy gun in front of his parents, one of whom was a competition judge and the other a participant in the competition.[192] They admonished him not to play with the gun for fear of spooking horses, but they still allowed him to carry it around the property.[193] As small children might, once out of their presence, the child obviously did not follow their instruction.[194]

Georgia's EALA is typical in that it does not protect a defendant from liability for willful or wanton disregard for the safety of a participant.[195] Given the circumstances, the federal trial court denied summary judgment and allowed the claim to proceed in light of the statutory exception to immunity.[196] The court noted that the parents were clearly aware of the dangers and that they consciously disregarded what "every parent should know": that a seven-year-old boy with a toy gun would be tempted to fire it.[197] Thus, a genuine factual dispute existed for trial.[198]

2. Assumption of Risk / Sports Injury Liability

The Indiana case of *Burdick v. Romano*[199] involved questions of the appropriate burden of proof and the associated jury instructions to give at trial in the context of sports injury liability and assumption of risk.[200] In *Burdick*, two horse riders provided wildly different accounts of the events leading up to the incident and injury. The defendant was riding her mare, which was known to be aggressive and known to kick other horses, while the plaintiff was riding a gelding considered to be laid back and lazy.[201] According to the plaintiff, after the defendant dismounted her mare just twelve feet in front of the plaintiff and walked away to adjust obstacles, the mare suddenly spooked and backed up toward the plaintiff, who was on her horse, and kicked her under her chin, causing her to black out.[202] By contrast, according to the defendant, she never let go of her mare's reins and walked the mare with her to the obstacle in question, while the plaintiff was riding about 40 feet away and simply fell off after her own horse abruptly

191. *Id.* at *1–2.
192. *Id.* at *1.
193. *Id.*
194. *Id.*
195. *Id.* at *2 (citing Ga. Code Ann. § 4–12–3(b)(3) (2017)).
196. *Id.*
197. *Id.*
198. *Id.* at *3.
199. 148 N.E.3d 335 (Ind. Ct. App. 2020), *transfer denied*, 152 N.E.3d 1061 (Ind. 2020).
200. *Id.* at 343–44.
201. *Id.* at 338.
202. *Id.*

stopped.[203] Regardless, the plaintiff suffered a brain injury and a broken shoulder.[204]

The plaintiff asserted claims for negligence, gross negligence, and recklessness in the care and control of the horse.[205] As with other EALAs, Indiana's EALA provides immunity, with exceptions, for injuries resulting from the inherent risk of equine activities.[206] Nevertheless, the trial court denied the defendant's summary judgment motions for reasons not stated in the published opinion, and instead allowed the case to proceed to jury trial. In a battle of jury instructions, the plaintiff attempted to characterize this case like a simple dog-bite case with a negligence burden of proof, while the defendant argued this was a sporting activity case with the higher burden of proof of recklessness and involving the principle of incurred risk (assumption of risk).[207] Winning that battle, the defendant prevailed at trial.[208]

On appeal, the Indiana Court of Appeals affirmed the jury instruction rulings. As the court explained, under Indiana law, the parties were indeed engaged in a "sporting activity" within the meaning of the state's EALA, distinguishing another equine case that involved plaintiffs who were not sports participants or spectators.[209] This in turn meant that the plaintiff was saddled with the higher burden of proof applicable to sporting activity cases of establishing reckless conduct, not the lesser burden of proving negligence.[210] The court of appeals also affirmed the jury instruction on inherent risk of equine activities as an accurate statement of the state's EALA, even though it omitted the statute's use of the word "negligent."[211] Finally the court confirmed that the evidence supported the instruction on incurred risk since the plaintiff testified that she knew of the horse's tendencies and that getting kicked was a risk of the sport.[212]

The setting of the New Hampshire case, *Soule v. Bergeron*,[213] was a horse pulling[214] competition in which the injured plaintiff herself was a horse owner and competitor.[215] During the course of a competition in which she

203. *Id.* at 339.
204. *Id.*
205. *Id.*
206. Ind. Code Ann. § 34–31–5–1, –2 (2018).
207. *Id.* at 339–40, 343.
208. *Id.* at 340. The jury found the plaintiff sixty-five percent at fault and the defendant thirty-five percent at fault. *Id.* at 340 n.2.
209. *Id.* at 341–42.
210. *Id.* at 343.
211. *Id.* at 344.
212. *Id.* at 345.
213. Case No. 2019-0364, 2020 WL 974226 (N.H. Jan. 31, 2020).
214. In horse pulling, a harnessed horse pulls a weighted sled, competing in different weight classes. *Horse Pulling*, Wikipedia, https://en.wikipedia.org/wiki/Horse_pulling (last visited Nov. 25, 2020).
215. *Soule*, 2020 WL 974226, at *1 (N.H. Jan. 31, 2020).

was not competing, rather than sit in bleachers outside of the arena, she and others opted to sit in the middle of the arena between the teams waiting to compete on one end and the competition taking place on the other.[216] The team that injured the plaintiff was participating in the competition, but the horses took off before the weight was secured to them, resulting in their driver falling and losing the reins.[217] The horses ran toward the waiting area on the other side of the arena and collided with the plaintiff in the middle.[218]

On these facts, the New Hampshire Supreme Court affirmed summary judgment in favor of the defendant.[219] The court first concluded as a matter of law that the doctrine of primary assumption of risk applied here to this sporting activity because the plaintiff, though she was a spectator, voluntarily chose to enter the arena knowing of the obvious and inherent risk that pulling horses could break loose and cause injury.[220] As a result, the defendant did not owe a duty to protect her against that risk, only the duty not to unreasonably increase that risk or create a new risk not ordinarily anticipated.[221]

The court next concluded that even a favorable review of the facts did not evidence that the defendant increased the risk that his team would run off.[222] Although the defendant had had a single beer five hours before the competition, even plaintiff's expert—who conveniently also was a witness sitting next to the plaintiff at the time of the incident—could not say that the defendant was drunk at the time of the incident and could not opine that consumption of alcohol was tied to the incident.[223] Further, the defendant was not liable to the plaintiff for any ordinary negligence (if any) in how he drove his horses, i.e. conduct that is within the ordinary range of risks at pulling competitions, because he had no duty to her given that she assumed the risk of harm at this sporting event.[224] Given the result, the court did not need to address the question of whether New Hampshire's EALA applied to limit the defendant's liability.[225]

216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at *1–2.
221. *Id.* at *1.
222. *Id.* at *3.
223. *Id.*
224. *Id.*
225. *Id.* (citing N.H. Rev. Stat. § 508:19 (2010)).

3. Liability Waivers

In *Martz-Alvarado v. Truax*,[226] the plaintiff, who was injured while dismounting her horse after a guided trail ride, unsuccessfully attempted to defeat the enforceability of the liability waivers she had signed.[227] Although the waivers held up, the case is a good reminder about the importance of having accurate and updated liability waivers.[228] The business operating the trail ride was identified as "Grand View Horse Tours," but the liability waiver that the plaintiff signed through a third-party online reservation website identified the business as "Las Vegas Trail Riding."[229] The online waiver also included a release of any claims against land owners.[230] Then, at the start of the ride, the plaintiff was asked to sign a different waiver form releasing yet another business name, "Vegas Horse Tours."[231] The second release contained language releasing the stable and its agents from liability for any negligent conduct, and it also stated that under Nevada law, the business was not liable for injury resulting from inherent risks of equine activities.[232]

The plaintiff sued the trail ride operator, who was acting as a sole proprietor, as well as the landowner.[233] The trial court granted summary judgment for both in light of the waivers.[234] On appeal, the Nevada court of appeals rejected the argument that the waivers with different business names created an ambiguity to be resolved by a jury.[235] While there were different business names, there was no dispute that the operator was the sole proprietor and that she was subject to suit in her individual capacity regardless of the different names.[236] The court also reaffirmed that in Nevada, parties *can* contract to prospectively waive ordinary negligence claims, as occurred here.[237] It is also notable that the court rejected on the facts the plaintiff's argument that the waiver wasn't specific enough as to the risks being assumed and conduct covered by the waiver[238]—another good reminder the importance of specificity in drafting these contracts. Finally, the court

226. 462 P.3d 1237 (Nev. Ct. App. 2020) (unpublished).
227. *Id.* at *1.
228. *Id.* at *3.
229. *Id.* at *1.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.* at *2.
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.* at *3 n.3.

rejected the plaintiff's argument that the validity of a waiver is a question for the jury.[239] It thus affirmed summary judgment.[240]

E. *Large Animal Escape and Trespass*

Hawaii is a "fence-in" state, meaning that it follows the common law rule that livestock owners have the duty to fence in their livestock and bear responsibility for accidental trespass and damage on another's property.[241] In *Jijun Yin v. Aguiar*,[242] a farmer sued a cattle rancher for trespass by cattle that damaged the farmer's sweet potato crop.[243] The trial court granted summary judgment for the rancher, concluding that the state's trespass law did not protect the farmer because he had failed to properly fence the property (based on a statutory definition of proper fencing), and also that the farmer's property lease agreement was enforceable even though it assigned the farmer the responsibility for keeping the cattle off his property.[244]

Although the Hawaii Intermediate Court of Appeals affirmed the ruling, the Hawaii Supreme Court reversed, finding that the statute did apply here even if the property was not properly fenced, and finding that the lease was void as against public policy because it absolved the rancher of liability for damage, contrary to state statute.[245] A plain reading of the statute—which the lower courts applied—creates the odd result that livestock owners are not liable for trespass on property that is fenced but improperly so, while at the same time they could be held liable for trespass on wholly unfenced property.[246] Concluding the statute was thus ambiguous, the court looked to the state's legislative history for the true legislative intent.[247] After a painstaking review, the court concluded that Hawaii state law and policy was designed to protect *all* cultivated land, rather than exempt ranchers from liability based on the status of the fence.[248] Thus, here, whether the farmer's fence was proper or not had no impact on the rancher's liability. Turning to the property lease, the court concluded that the exculpatory clause shifting responsibility to the farmer and absolving the rancher of statutory liability for livestock trespass was indeed contrary to Hawaii public policy and thus unenforceable.[249] Thus, the court reinstated the farmer's claims.[250]

239. *Id.* at *3.
240. *Id.*
241. *See* Haw. Rev. Stat. §§ 142–63, 142–64 (2011).
242. 463 P.3d 911 (Haw. 2020).
243. *Id.* at 912.
244. *Id.*
245. *Id.* at 912–13, 915–16.
246. *Id.* at 916.
247. *Id.* at 916–17.
248. *Id.* at 916–26.
249. *Id.* at 926–28.
250. *Id.* at 928.

Pruski v. Garcia[251] was another livestock case, this time out of Texas and involving a bull that escaped its enclosure, ended up loose on a Texas highway, and hit the plaintiff driver.[252] In contrast to Hawaii, Texas is a 'fence-out' state that favors livestock owners, meaning that they are generally free to let their livestock roam at large, with no duty to limit their movement.[253] The state's livestock laws do however prohibit a livestock owner from *knowingly* allowing livestock to roam freely on a highway.[254] They also permit counties to establish even more restrictive "stock laws" that prohibit allowing livestock to run at large in the county, as the county in this case did.[255] The question here, therefore, was which of those two laws applied on a highway, since the application of the former would place a higher burden of proof on the plaintiff to prove that the livestock owner acted "knowingly" in permitting livestock to run at large.[256] In other words, the two laws were in conflict in this factual circumstance of bull vs. car on a highway.[257] After review of legislative context and legislative history, the Texas Supreme Court held that the state statute prevailed over the conflicting county stock law, thus requiring the additional proof of a knowing mental state.[258] The court reversed the court of appeals and reinstated summary judgment for the livestock owner.[259]

III. ANIMAL INSURANCE LAW

A. *Coverage for Injury to Property*

In the bad faith and breach of insurance contract case of *Robinson v. Liberty Mutual Insurance Co.*,[260] the Eleventh Circuit held that an insured's homeowner's policy exclusion for damage from "insects or vermin" included brown recluse spiders, and thus excluded coverage for damage caused by them.[261] This is because under Alabama law, the ordinary, and not the technical or scientific, meaning of the terms of an insurance policy guides the contract's interpretation.[262] The disturbing facts of the case involved new homeowners who discovered an infestation of the venomous brown recluse spider, which they attempted to eradicate.[263] Their subsequently obtained

251. 594 S.W.3d 322 (Tex. 2020).
252. *Id.* at 324.
253. *Id.* at 323.
254. *Id.* at 323, 325.
255. *Id.* at 323.
256. *Id.* at 324, 328.
257. *Id.* at 328.
258. *Id.* at 324, 328–30.
259. *Id.*
260. 958 F.3d 1137 (11th Cir. 2020).
261. *Id.* at 1139.
262. *Id.*
263. *Id.*

homeowners insurance policy insured against direct physical loss to property but excluded coverage for loss caused by "[b]irds, vermin, rodents, or insects."[264] Further attempts to eradicate the spider infestation failed, and the homeowners filed a claim.[265] The insurer denied coverage citing the exclusion, resulting in this lawsuit which alleged that the spiders were not insects or vermin under the policy and could not be eradicated, rendering the home unsafe for occupancy, and thus triggering the insurance policy.[266] The federal district court disagreed, concluded that the exclusion applied, and dismissed the case.[267]

On appeal, the Eleventh Circuit affirmed based on an analysis of the definitions of "insect" and "vermin."[268] The court explained the Alabama law gives terms the meaning that a reasonably prudent person applying for insurance would have understood them to mean, and that this does not include defining those terms in a strict technical or scientific sense.[269] While courts construe exceptions to coverage narrowly to maximize coverage, this does not give license to re-write policies to provide coverage the parties did not intend.[270] Here, the court noted that while technically spiders are not insects, dictionaries commonly include spiders as an example of an insect and even note the popular use of 'insect' as a descriptor even though spiders are not in fact insects.[271] Thus, the ordinary person would understand the term to include spiders.[272] The court also reasoned that brown recluse spiders also fall within the ordinary meaning of the word 'vermin,' which is defined as "small common harmful or objectionable animals . . . that are difficult to control."[273] The brown recluse spiders in this case easily fit this description.[274] And, the unfortunate homeowners were thus out of luck.

B. *Equine Mortality Insurance*

Greenbank v. Great Am. Assurance Co.[275] involved an equine mortality insurance policy and claims by the insured horse owner for breach of contract and bad faith, among many other claims.[276] A $500,000 American Saddlebred show horse was insured for its full value under an equine mortality

264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.* at 1140.
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.* at 1141.
273. *Id.* at (quoting Merriam–Webster's Collegiate Dictionary (11th ed. 2007)).
274. *Id.* at 1141–42.
275. No. 3:18-cv-00239-SEB-MPB, 2020 WL 1556022 (S.D. Ind. Mar. 31, 2020).
276. *Id.* at *1.

insurance policy, with a guaranteed renewal endorsement.[277] Death or authorized humane destruction of the horse was a qualified covered loss provided that the owner complied with certain conditions precedent.[278]

At risk of oversimplification of the facts, the horse was initially treated by the local equine vet for severe pneumonia, among other significant health issues, in February and March 2018, resulting in significant weight loss and cellulitis in all four legs.[279] April brought some improvement with a return of appetite and weaning off of medication by the end of the month, though the extent of improvement was disputed by the parties.[280] The owner did not report the pneumonia to the insurer until the end of April and never informed the insurer of the significant other health issues.[281] The horse's health continued to waver up and down, but by early June 2018, the local vet concluded that the pneumonia had returned and the horse was having difficulty getting up and down.[282] The vet contacted the insurer's adjuster and gave his opinion that the horse probably needed to be euthanized.[283]

With this, the insurer retained its own veterinary expert who recommended that he take over care of the horse, at which point the insurer assumed control over the horse's care pursuant to the policy.[284] The horse, now at the lowest body condition score of 1, was diagnosed with a deep lung abscess and laminitis, and the new vets criticized the delay and inadequacy of prior care.[285] Significant disagreement developed about appropriate next steps for care, with the owner criticizing the insurer for agreeing to treatment options that arguably would end his show career, without considering whether it was reasonable to euthanize the horse instead.[286] The dilemma for the owner of course was that euthanasia would have triggered payment under the policy for the horse's value as a show horse, and saving his life but ending his show career in the process would render him essentially valueless and result in a significant financial loss to the owner.

At the heart of the issues of this long and complex ruling on summary judgment is the basic question of whether the insurer breached the contract by failing to pay a covered mortality loss.[287] The short answer was "no." There was no covered loss because the horse did not die.[288] Since

277. *Id.* at *2.
278. *Id.* at *2–3.
279. *Id.* at *3.
280. *Id.* at *4.
281. *Id.*
282. *Id.* at *5.
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.* at *6.
287. *Id.* at *12.
288. *Id.* at *14–15.

there was no breach of contract, there also was no bad faith denial of coverage.[289] Addressing the owner's contention that the insurer unreasonably withheld approval of euthanasia and disregarded veterinary recommendations, the court flatly rejected this based on the evidence.[290] Moreover, in the absence of a "loss of use" policy, which the owner had not purchased, it was not relevant to the question of coverage whether the horse would be able to return to his intended use as a show horse.[291]

Ultimately, while the trial court entered summary judgment on most of the claims in favor of the insurer, it allowed to proceed some claims that were not fully addressed by the summary judgment motions.[292]

289. *Id.* at *18.
290. *Id.* at *15–16.
291. *Id.* at *17.
292. *Id.* at *20–25.

RECENT DEVELOPMENTS IN BUSINESS LITIGATION

Dennis J. Wall, Peter J. Biging, Niall A. Paul, Victoria L. Creta, and Amy C. Gross[*]

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This article highlights significant business litigation cases decided from October 1, 2019, through September 30, 2020 (and occasionally into October 2020), addressing the following: (1) remedies and business income losses in the COVID-19 pandemic; (2) the impact of COVID-19 on securities litigation; (3) negotiation class certification; and (4) defenses to breach of contract claims arising out of COVID-19.

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I. REMEDIES IN BUSINESS LITIGATION: UPDATE ON BUSINESS INCOME LOSSES IN THE CORONAVIRUS PANDEMIC

Disruption of business operations began and grew in 2020 as the coronavirus pandemic progressed. Remedies were hard to find. The remedy addressed in this update concerns claims to reimburse losses of business income caused by the pandemic.

The reported success rate of these claims was not great in 2020. The full story is not so bleak, however, because the final rules are not yet written.

A. *Business Interruption Coverage*

Most claims resulting from the coronavirus pandemic in 2020 addressed standard "Business Interruption" (BI) Insurance Coverage.[1] Most standard BI claims have been denied by the Courts, which is also true of claims under other coverages written on standard insurance policy forms in general use in the insurance industry. Those policy forms unambiguously require that the loss be an "accidental direct physical loss to Covered Property," or words to that same effect.[2]

The results of the cases decided in 2020 teach that pandemic insurance claims will likely fail if those claims depend on standard insurance policy provisions that require physical damage. To find for plaintiffs on such claims, courts have required tangible, physical alteration to the property itself.[3] Many insurance companies that employ edited versions of the standard forms in their own policies retain the requirement of direct physical

1. Both this article section and the author, Dennis Wall, benefitted greatly from interviews with Robert H. Jerry, II, Dean Emeritus and Professor Emeritus of Law, University of Florida School of Law, and Professor Emeritus of Law, University of Missouri School of Law, and Professors Tom Baker, University of Pennsylvania School of Law, and Daniel Schwarcz, University of Minnesota School of Law, all of whom generously and graciously shared their time and expertise. Each of them, Dean Jerry in particular, provided research leads that proved to be invaluable. All errors are my own.

2. The "direct damage to property" requirement may be phrased in different words in particular coverage provisions, such as Extra Expense Coverage, but the "direct damage to property" requirement is the same in effect. Similarly, some insurance coverages require that *someone's* property be physically damaged, such as Civil Authority Coverage for losses incurred as a result of orders issued by civil authorities.

3. Telephone interview with Robert H. Jerry, II, Dean and Professor Emeritus of Law, University of Florida School of Law, and Professor Emeritus of Law, University of Missouri School of Law (Oct. 14, 2020) [hereinafter Jerry Interview]. At the time of this writing, the most recent example is perhaps the decision in the case of *Raymond H Nahmad DDS PA v. Hartford Casualty Insurance Co.*, No. 1:20-cv-22833-BLOOM/Louis, 2020 WL 6392841, at *8 (S.D. Fla. Nov. 2, 2020), in which the court granted a motion to dismiss for several reasons, the most prominent of which was that the BI claimants in that case alleged no accompanying physical harm to covered property.

loss, and the results are the same under those policies: COVID-19 coverage claims under policies with such a requirement are generally denied.[4]

Although many of these claims involve similar or same policy wording, the Courts have held that they do not necessarily present common questions of law or fact which dominate the discussion. This is one reason, for example, that the Multi-District Panel of federal judges has mostly declined to centralize BI Coverage cases related to the pandemic.[5] The few cases that have been centralized for federal Multi-District Litigation involved either individual local insurers or specialty insurance carriers which have the same policy wording at issue in multiple similar cases.[6] Similarly, only one State Court proceeding has been located in which a State Court consolidated pandemic-related Business Interruption Coverage cases.[7]

The decided cases prove the point that individual insurance claims in the coronavirus pandemic largely depend on individual policy language. As a result, policyholders and insurance carriers alike must review the language in their own policies in order to determine the chances of success in presenting or defending each particular individual insurance claim.

Urogynecology Specialist of Florida LLC v. Sentinel Insurance Co.,[8] decided in late September 2020, exemplifies in particular the fact that the final rules of insurance coverage for pandemic claims are not yet written. It is significant that there was no dispute in *Urogynecology Specialist* over coverages that require physical damage; those coverages were not contested.

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4. *See*, *e.g*., Oral Surgeons, P.C. v. Cincinnati Ins. Co., 491 F. Supp. 3d 455, 456 (S.D. Iowa 2020), *aff'd*, 2021 WL 2753874 (8th Cir. July 2, 2021); 10E, LLC v. Travelers Indem. Co. of Conn., 483 F. Supp. 3d 828, 835–37 (C.D. Cal. 2020). Moreover, interviews with nationally recognized experts on insurance coverage and regulation confirmed both the general rule that standard insurance policy language requiring direct physical loss is given effect by most courts, and the existence of different results nationwide in the case law depending on different facts including different policy language. Jerry Interview, *supra* note 3; telephone interview with Daniel Schwarcz, Professor of Law, University of Minnesota Law School (Oct. 14, 2020).

5. *See In re* COVID-19 Bus. Interruption Prot. Ins. Litig., 482 F. Supp. 3d 1360, 1362 (J.P.M.L. 2020).

6. *See*, *e.g*., *In re:* Society Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig., 492 F. Supp. 3d 1359, 1361–62 (J.P.M.L. 2020) (centralization of lawsuits filed against regional insurance carrier involving common policy language); *In re:* Nat'l Ski Pass Ins. Litig., 492 F. Supp. 3d 1352, 1354 (J.P.M.L. 2020) (centralization of lawsuits against specialty insurance company).

7. Joseph Tambellini, Inc. v. Erie Ins. Exch., Nos. GD-20-005137 and GD-20-006901, (Pa. Ct. Common Pleas, Allegheny Cnty. July 23, 2020) (order granting joint motion for coordination).

8. Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., 489 F. Supp. 3d 1297 (M.D. Fla. 2020).

Instead, the policyholder actually presented its claim *based on* coverages that require physical damage.[9] The insurance carrier moved to dismiss for failure to state a claim because of a virus exclusion in its policy which, the carrier contended, barred the policyholder's claim "for loss or damage caused directly or indirectly" by the "[p]resence, growth, proliferation, spread or any activity" of virus.[10] The court denied Sentinel's motion.

The reasons that the court denied Sentinel's motion to dismiss all flow from twin rules of Florida coverage law. First, an insurance policy must be construed in favor of coverage if it is ambiguous, and second, an insurance policy is ambiguous if it is susceptible to more than one reasonable interpretation, at least one of which favors coverage.[11] "Here, several arguably ambiguous aspects of the Policy make determination of coverage inappropriate at this stage," the court held.[12]

The court found that the policy was "arguably ambiguous" because the policy was not complete. As with other virus exclusion forms,[13] the virus exclusion in *Urogynecology Specialist* was added to the policy by an endorsement which modified several other coverage forms, but "[t]hose forms are not provided in the Policy itself, nor were they provided to the Court."[14] The insurance carrier filed a certified copy of the policy,[15] as carriers do in many cases , but the copy of the policy was incomplete. When the policy is incomplete, the court may declare an ambiguity in favor of coverage, or, as the court did here, rely on the ambiguity to deny the insurer's motion to dismiss.

The court in the *Urogynecology Specialist* case further found that the policy was ambiguous because the policy's virus exclusion was in a "grouping . . . with other pollutants."[16]

That was the only reference in the court's opinion to "pollutants." However, the court cited to the virus exclusion form contained in the record in "Doc. 5-1," or Document 5-1. A review of the Court file via PACER or "Public Access to Court Electronic Records" reveals that that document is the certified copy of the insurance policy filed by the insurance carrier.

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9. *See id.* at 1299–1300.
10. *Id.* at 1301.
11. *Id.* at 1302.
12. *Id.*
13. *See, e.g.*, Insurance Services Office (ISO), Form CP 01 40 07 06, *Exclusion of Loss Due to Virus or Bacteria*, https://generalliabilityinsure.com/documents/CP01400706EXCLUSIONOFLOSSDUETOVIRUSORBACTERIA.pdf.
14. Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., 489 F. Supp. 3d 1297, 1302 (M.D. Fla. 2020).
15. Notice of Filing a Certified Copy of Insurance Policy, *Urogynecology Specialist*, No. 6:20-cv-1174-Orl-22EJK (M.D. Fla. July 8, 2020), ECF No. 5-1.
16. *Urogynecology Specialist*, 489 F. Supp. 3d at 1302.

The virus exclusion in it is labelled as adding an Exclusion i to the Special Property Coverage form, among other forms.[17]

There is already an Exclusion i in the Special Property Coverage form in the policy issued by Sentinel, and it is a pollution exclusion.[18] When the court referred to "Doc. 5-1," it had Exclusion i in front of it. Sentinel's endorsement effectively added the virus exclusion to the pollution exclusion previously written in the policy, thus making the policy ambiguous for this additional reason.

It must be distinctly understood that unlike the virus exclusion endorsement modified by Sentinel and issued in its policy to Urogynecology Specialist, the standard virus exclusion endorsement does not label or "group" viruses with pollutants, nor does it group the virus exclusion with any other exclusions, including pollution exclusions. Lawyers, carriers, and policyholders will therefore be unlikely to rely successfully on the decision in this case for legal precedent on interpreting the standard virus exclusion.

With respect, that is not the point. These distinctions illustrate that each case or claim of coverage for losses allegedly caused by the pandemic is different from the others. Different policies, different policyholders, and different insurers all contribute to this great variety of claims, issues, and legal rulings.[19]

In the end, the holding in *Urogynecology Specialist* is not simply denial of a motion to dismiss because of ambiguities in an insurance policy. Rather, the decision stands apart from most other COVID-19 coverage cases because the court found that the motion to dismiss is too early a stage of litigation to refuse to entertain insurance claims in a pandemic the likes of which we have never before experienced:

> Importantly, none of the cases [cited for dismissal] dealt with the unique circumstances of the effect COVID-19 has had on our society—a distinction this Court considers significant. Thus, without any binding case law on the issue of the effects of COVID-19 on insurance contracts virus exclusions, this Court finds that Plaintiff has stated a plausible claim at this juncture.[20]

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17. Sentinel's "Limited Fungi, Bacteria or Virus Coverage" endorsement is located at pages numbered 141–43 in the policy, which are renumbered as pages 142–44 in Notice of Filing a Certified Copy of Insurance Policy, *Urogynecology Specialist*, No. 6:20-cv-1174-Orl-22EJK (July 8, 2020), ECF No. 5-1.

18. Exclusion i, titled "**Pollution**" (boldface in the insurance policy) is located at pages numbered 52–53 in the Sentinel insurance policy, which are renumbered as pages 53–54 in *id*.

19. In this connection, it is worth noting that the federal judge who decided another case under Florida law under the same virus exclusion was careful to point out that, unlike the *Urogynecology Specialist* court, the court in the later case had the benefit of the complete policy before it to construe. Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co., 499 F. Supp. 3d 1178, 1189 n.4 (S.D. Fla. Nov. 2, 2020).

20. Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., 489 F. Supp. 3d 1297, 1302-03 (M.D. Fla. 2020).

Illustrating the importance of unique insurance policy language, another federal judge in another case granted the carrier's motion to dismiss based on the same exclusion, in *Founder Institute, Inc. v. Hartford Fire Insurance Co.*[21] Based on a record that presumably included a complete insurance policy, the court diagnosed the Sentinel "Limited Fungi, Bacteria or Virus Coverage" endorsement at issue in that case as being the same unique exclusion that was at issue in *Urogynecology Specialist*. After construing the policy, the court in *Founder Institute* found no ambiguity and ultimately granted the insurance carrier's motion to dismiss based on the virus exclusion at bar.[22]

The court in *Founder Institute* and the cases it cited in favor of dismissal did not raise or address possible ambiguity arising from combining an exclusion of virus with a pollution exclusion.[23]

Even in cases with virus exclusions, a closer look at the litigation results are enlightening. Professor Tom Baker of the University of Pennsylvania has assembled a team of researchers who have together compiled the COVID Coverage Litigation Tracker or CCLT.[24] This is an ongoing compilation of results in insurance cases involving coverage claims for coronavirus-related losses. An analysis of the results in cases deciding motions to dismiss as of October 7, 2020 concluded that insurance companies are prevailing "overwhelmingly" on motions to dismiss in COVID-19 coverage cases "when their policies have virus exclusions," but the results are much less favorable to the carriers "when their policies do not have virus exclusions."[25]

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21. Founder Institute, Inc. v. Hartford Fire Ins. Co., 497 F. Supp. 3d 678 (N.D. Cal. 2020). Subsequently, the court entered a final order granting the motion to dismiss, No. 20-cv-04466-VC, 2021 WL 896937 (N.D. Cal. Feb. 12, 2021), app. docketed, No. 21-15404 (9th Cir. March 8, 2021).

22. *Founder Institute*, 2021 WL 896937, at *1.

23. The *Founder Institute* judge favorably cited three decisions in granting the motion to dismiss in that case. Two of the three cases also had the same "Limited Fungi, Bacteria or Virus Coverage" endorsement which was at issue in the *Urogynecology Specialist* and *Founder Institute* cases, confirmed by review of the court files on PACER, and in these cases the courts also said there was no ambiguity based on interpretation of complete policies. *See, e.g.*, Wilson v. Hartford Cas. Co., 492 F. Supp. 3d 417, 426–28 (E.D. Pa. 2020), appeal docketed, No. 20-3124 (3d Cir. Oct. 19, 2020); Franklin EWC, Inc. v. Hartford Fin. Serv's Grp., Inc., 488 F. Supp. 3d 904, 907 (N.D. Cal. 2020). The third case cited for dismissal in *Founder Institute* likewise found no ambiguity based on interpretation of apparently complete policy provisions, in part here pertinent. Diesel Barbershop, LLC v. State Farm Lloyds, 479 F. Supp. 3d 353, 360–62 (W.D. Tex. 2020).

None of these cases including *Founder Institute* raised or addressed possible ambiguity arising from combining an exclusion for virus with a pollution exclusion.

24. *Covid Coverage Litigation Tracker*, Penn Law (2021), https://cclt.law.upenn.edu.

25. Tom Baker, *Insurers Without Virus Exclusions are Losing Their Motions to Dismiss*, CCLT (Oct. 7, 2020), https://cclt.law.upenn.edu/2020/10/07/insurers-without-virus-exclusions-are-losing-their-motions-to-dismiss. This was updated eight days later. Tom Baker, *Updated Motion to Dismiss and Virus Exclusion Box Score*, CCLT (Oct. 15, 2020), https://cclt.law.upenn.edu/2020/10/15/updated-motion-to-dismiss-and-virus-exclusion-box-score.

In an interview for this article, Professor Baker clarified that this is what the author would call a "forensic" analysis cataloguing all the provisions contained in the insurance policies involved in these cases, including virus exclusions, regardless of whether any particular provision was a basis for decision by any Court. In other words, this analysis does ***not*** mean that virus exclusions were the focus of any of these cases, or that the lawyers argued them for or against dismissal, but merely that virus exclusions were written in the policies. Rather, in Professor Baker's view, the existence of a virus exclusion affects the arguments that are made. The idea is that policyholders' lawyers are reluctant to argue a virus exclusion and so perhaps subconsciously shift their arguments to other policy provisions.[26]

Subtle shifts in emphasis affect the rulings in these cases as well. That is why the *Urogynecology Specialist* case is worthy of attention, even if all the other features of that case did not exist: It is one of the few decisions which have addressed a virus exclusion as the insurance carrier's only available basis for denying coverage and, in that case, the insurer failed to convince the Court to dismiss its policyholder's coverage claim.

B. "*Public Options*"

Besides possible remedies afforded by commercial insurance policies, other possible remedies were floated in 2020 in response to the pandemic. Some of these offered what might be called "public options," but none of them moved beyond the proposal stage in 2020.

One "public option" proposed in 2020 was called the Pandemic Risk Insurance Act,[27] a pandemic insurance version of the Terrorism Relief Insurance Act that Congress enacted after the September 11, 2001 terrorist attacks that provided a limited federal reinsurance backstop for claims related to terrorism.[28] Another proposal advanced in 2020, called the Business Continuity Protection Program or BCPP,[29] was for a program similar to the National Flood Insurance Program or NFIP,[30] in which Congress would provide the funding for pandemic-related claims which would be administered by insurance companies. Another proposal in 2020 centered around the concept of "parametric" insurance, which apparently has not been offered as an insurance product. Not strictly a "public option" because it does not necessarily contemplate the use of public funds to pay claims,

26. Telephone Interview with Tom Baker, Professor of Law, University of Pennsylvania School of Law (Oct. 15, 2020).

27. *See Insurers, Agents Propose Pandemic Business Relief Plan; Plaintiffs Offer BIG Compromise*, Ins. J. (May 22, 2020), https://www.insurancejournal.com/news/national/2020/05/22/569611.htm?print.

28. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (2002).

29. *See Insurers, Agents Propose Pandemic Business Relief Plan*, *supra* note 27.

30. The National Flood Insurance Program first came into existence in 1968. It has been modified many times since. Its current iteration can be found at 42 U.S.C. § 4001 *et seq*.

the concept of parametric insurance is discussed mostly in the context of coverage for catastrophic events. It involves providing a layer of coverage similar to Valued Property Insurance in which carriers pay for values stated—in this case, in the policy itself—once a trigger point or "point of interest" (such as a hurricane of a certain intensity or a certain point in a stock market index) is reached, subject to a policy limit, rather than indemnifying for the actual loss an insured incurs.[31] Such coverage might, for example, permit insureds to recover for pandemic-related losses without satisfying the factual intricacies of a particular property damage requirement or virus exclusion pertaining to their own property.

There were also insurance proposals advanced in 2020 that would require carriers to pay for pandemic-related losses regardless of what their policies might say.[32] None of these went beyond the proposal stage in 2020.

Finally, there is the possibility of outright grants to claimants with pandemic-related monetary losses, especially when the losses are a total loss of income, or income partially interrupted by the pandemic even if not a total loss. As of the end of October 2020, it does not appear likely that Congress will pass any additional legislation of this kind after already passing the Coronavirus Aid, Relief, and Economic Security—or CARES—Act, payments under which are loans, at least theoretically, which would be forgiven if the recipients ostensibly use the money to keep employees on the payroll.[33] In conclusion, the most significant 2020 update on remedies for pandemic-related losses is that the available remedy depends on the wording of the applicable insurance policies.

II. IMPACT OF COVID-19 ON SECURITIES LITIGATION

The impact of the COVID-19 pandemic on securities litigation has been relatively limited to this point. However, there have, in fact, been a number of securities fraud cases brought as a result of the pandemic, as well as several shareholder derivative suits. At the time of this writing, there have not been any reported decisions or verdicts, but a review of the cases evidences some interesting early trends.

31. *See, e.g.*, Daniel Brettler & Timothy Goshear, *Parametric Insurance Fills Gaps Where Traditional Insurance Falls Short*, Ins. J. (Jan. 9, 2020), https://www.insurancejournal.com/news/international/2020/01/09/553850.htm; Bethan Moorcraft, *What Is Parametric Insurance?*, Ins. Bus. (Oct. 29, 2018), https://www.insurancebusinessmag.com/us/news/breaking-news/what-is-parametric-insurance-114901.aspx.

32. *See Insurers, Agents Propose Pandemic Business Relief Plan*, *supra* note 27 (noting that a hearing held in May 2020 by a subcommittee of the U.S. House of Representatives Small Business Committee "gave the insurance industry another opportunity to push back against moves to have insurers pay business interruption losses even where policies exclude such coverage involving a virus").

33. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, 134 Stat. 281 (2020).

A. *The Initial Suits*

The initial class action securities fraud suits brought that arose from the pandemic involved allegations of misrepresentations either as to the impact of the pandemic upon operations or allegations of misrepresentations with regard to the development of a vaccine. Examples of these early cases include *Douglas v. Norwegian Cruise Lines*[34] (*Douglas*), *Service Lamp Corp. Profit Sharing Plan v. Carnival Corp.*[35] (*Service Lamp Corp.*), and *McDermid v. Inovio Pharma, Inc.*[36] (*McDermid*).

In *Douglas*, the allegation was that Norwegian Cruise Lines had violated the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 promulgated thereunder by touting the company's positive financial outlook in spite of the pandemic in a press release accompanying the filing of Norwegian's Form 8-K with the Securities Exchange Commission (SEC) on February 20, 2020, as well as Norwegian's focus placed on ensuring the health and safety of passengers and the ship's crew, discussed in Norwegian's 2019 10-K filed on February 27, 2020. Asserting their claims on behalf of a purported class of investors who had purchased shares in Norwegian during the period February 20, 2020 through March 12, 2020, Plaintiffs alleged that these statements were false and misleading because: "(1) the Company was employing sales tactics of providing customers with unproven and/or blatantly false statements about COVID-19 to entice customers to purchase cruises, thus endangering the lives of both their customers and crew members; and (2) as a result, Defendants' statements regarding the Company's business and operations were materially false and misleading and/or lacked a reasonable basis at all relevant times."[37]

When, it was alleged, the truth was revealed in a *Miami New Times* article on March 11, 2020 that, in fact sales staff were being encouraged to make false representations about the coronavirus and pressure customers to book trips, and that sales were dropping precipitously, the shares of Norwegian's stock allegedly fell 26.7%.[38] Further, it was alleged that when the *Washington Post* published an article titled "Norwegian Cruise Line managers urged salespeople to spread falsehoods about coronavirus" on March 12, 2020, Norwegian's share price fell an additional 35.8 %.[39]

34. *See* Class Action Complaint for Violations of the Federal Securities Laws, Douglas v. Norwegian Cruise Lines, Case No. 1:20-cv-21107 (S.D. Fla. Mar. 12, 2020), ECF No. 1.

35. *See* Complaint for Violation of the Federal Securities Laws, Service Lamp Corp. Profit Sharing Plan v. Carnival Corp., Case No. 1:20-cv-12202 (S.D. Fla. May 27, 2020), ECF No. 1.

36. *See* Class Action Complaint for Violation of the Federal Securities Laws, Case No. 2:20-cv-01402 (E.D. Pa. Mar. 12, 2020), ECF No. 1.

37. *See Douglas* Complaint, *supra* note 34, ¶ 21.

38. *Id.* ¶¶ 22–24.

39. *Id.* ¶¶ 25–27.

Similarly, in *Service Lamp Corp.*, a class action was brought on behalf of investors in Carnival Cruise Lines stock during the period January 28, 2020 through May 1, 2020, asserting violations of the Exchange Act based on allegations that "Carnival and several of the officers of the Company made a series of false and misleading statements and concealed material information relating to the Company's adherence to its health and safety protocols in the wake of the COVID-19 pandemic, Carnival's role in facilitating the transmission of the virus, and the Company's violation of port-of-call regulations."[40] As a result of these alleged false and misleading statements, the plaintiff alleged that Carnival common stock and securities traded at inflated prices.[41]

The plaintiff in *McDermid* made a much different set of allegations. In that case, the plaintiff alleged that Inovio and its Chief Executive Officer, J. Joseph Kim, made false and misleading statements in violation of Sections 10(b) and 20(a) of the Exchange Act with regard to Inovio's alleged development of a vaccine for COVID-19. Noting that Inovio represents itself to be a "biotechnology company focused on rapidly bringing to market precisely designed DNA medicines designed to treat, cure and/or protect people from . . . infectious diseases,"[42] the plaintiff alleged that Kim had "capitalized on widespread COVID-19 fears by falsely claiming that Inovio had developed a vaccine for COVID-19."[43] The plaintiff alleged that Kim had made these false statements on Fox Business during an interview with Neal Cavuto on February 14, 2020, and again on March 2, 2020, following a well-publicized meeting Kim had with President Trump to discuss the COVID-19 outbreak.[44] As a result, plaintiff alleged that the per share price of Inovio's stock had more than quadrupled between February 28, 2020, and March 9, 2020.[45] However, when news came out that, in fact, Inovio had not developed a COVID-19 vaccine, but had only "designed a vaccine construct" or "precursor to a vaccine," the stock dropped 71% over the two day period of March 9–10, 2020.[46]

B. *The Second Wave of Suits*

In the second wave of COVID-19-related securities suits, allegations were centered on alleged misrepresentations regarding company business, operational, and compliance policies, and/or insufficient disclosures of the risks to company operational and financial prospects as a result of the

40. *Service Lamp Corp.* Complaint, *supra* note 35, ¶ 3.
41. *Id.*
42. *See McDermid* Complaint, *supra* note 36, ¶ 4.
43. *Id.*
44. *Id.* ¶¶ 4–5.
45. *Id.* ¶ 5.
46. *Id.* ¶ 6.

COVID-19 pandemic. Such cases include *Hartel v. GEO Group, Inc.*[47] (*Hartel*); *Arbitrage Fund v. Forescout Technologies, Inc.*[48] (*Forescout Technologies*); and *Di Scala v. Proshares Ultra Bloomberg Crude Oil*[49] (*Di Scala*).

In *Hartel*, a class action was brought on behalf of investors in a real estate investment trust (REIT), alleging violation of Sections 10(b) and 20(a) of the Exchange Act based on, among other things, alleged misrepresentations in the 10K filed by the company operating the trust on February 27, 2020 with respect to the REIT's "Quality of Operations," "Corporate Social Responsibility," and "Competitive Strengths."[50] Additionally, plaintiffs alleged that misrepresentations were made with regard to the Company's COVID-19 response procedures during an earnings call with investors and analysts to discuss the Company's financial and operating results for the first quarter of 2020, and in a Quarterly Report on Form 10Q filed with the SEC with respect to "Health and Safety" and the steps implemented at the outset of the pandemic.[51] According to the allegations, the Company owned and/or managed halfway houses in the United States, and despite the Company's representations regarding their focus on safety, a newspaper article in June 2020 reported that a halfway house operated by the Company was one of the hardest hit halfway houses in the country by COVID-19, and that the virus appeared to have been spread not in spite of the facility's efforts to contain it, but because of these efforts, leading to a drop of 7.8% in the REIT's share price.[52]

In *Forescout Technologies*, the plaintiffs have alleged that Forescout (a company described in the Complaint as providing software that enables agencies and enterprises to gain improved situational awareness of their technological environment—*i.e.*, devices on their networks—and thereby orchestrate actions to reduce cyber and operational risk) had failed to disclose to investors that a planned merger with another company would likely not proceed due, in part, to a dramatic and undisclosed downturn in Forescout's business in Asia and Japan caused by the COVID-19 pandemic.[53]

In *Di Scala*, the allegations are that an exchange traded fund, its sponsor, and several of the executive officers of the sponsor of the ETF failed to disclose and/or misrepresented "the concrete harms and/or acute risks

47. *See* Class Action Complaint, Hartel v. GEO Grp., Inc., 9:20-cv-81063 (S.D. Fla. July 7, 2020), ECF No. 1.

48. *See* Class Action Complaint, Arbitrage Fund v. Forescout Techns., Inc., Case No. 3:20-cv-03819 (N.D. Cal. June 10, 2020), ECF No. 1.

49. *See* Class Action Complaint for Violation of the Federal Securities Law, Di Scala v. Proshares Ultra Bloomberg Crude Oil, Case No. 1:20-cv-05865 (S.D.N.Y. July 28, 2020), ECF. No. 1.

50. *Hartel* Complaint, *supra* note 47, ¶¶ 21–23.

51. *Id.* ¶¶ 26–29.

52. Id. ¶¶ 3, 5–6.

53. *Forescout* Complaint, *supra* note 48, ¶¶ 3–4.

to the Fund posed by the COVID-19 pandemic," amongst other issues, in a Registration Statement accompanying a public offering of shares in the Fund.[54] The Fund was designed to reflect the performance of crude oil as measured by the price of West Texas Intermediate sweet, light crude oil futures contracts traded on the New York Mercantile Exchange, and the Complaint alleges that, due to a confluence of factors, including the onset of the COVID-19 pandemic, the fund suffered billions of dollars in losses.[55]

C. *Shareholder Derivative Suits*

Plaintiffs have, more recently, brought shareholder derivative suits based on alleged breach of fiduciary duties owed by corporate officers and directors in connection with the COVID-19 pandemic. To this point, they have been limited to cases associated with related securities fraud class actions, including some of the actions discussed above. *See*, *e.g.*, Complaint, *Fettig v. Kim*, Case No. 2:20-cv-03316 (E.D. Pa., July 7, 2020), ECF No. 1 (seeking redress on behalf of the company for the alleged misconduct by members of Inovio's Board of Directors and upper management in making misrepresentations or material omissions concerning a COVID-19 vaccine); Verified Shareholder Derivative Complaint, *Aguilera v. Egan*, Case No. 2:20-cv-00654 (D. Utah, Sept. 17, 2020), ECF No. 2 (alleging breach of fiduciary duties by CEO and CFO in failing to correct alleged misrepresentations as to the 100% accuracy of a COVID-19 diagnostic test that had been developed by Co-Diagnostics); Complaint, *Stachowski v. Boyd*, Case No. 4:20-cv-06525 (N.D. Cal., Sept. 17, 2020), ECF No. 1 (alleging Vaxart's directors and CEOs had the Company falsely tout that a COVID-19 vaccine Vaxart was working on had been selected to be part of the country's Operation Warp Speed program to develop a vaccine on an accelerated basis, and that they personally profited from the resulting increase in the price of Vaxart's shares). However, while the bar for proving a corporate board has failed to exercise good faith oversight of the company's operations is generally considered to be extremely high in light of the standard set in *In re Caremark International Derivative Litigation*,[56] the recent decisions in *Marchand v. Barnhill*,[57] and *In re Clovis Oncology, Inc. Derivative Litigation*,[58] suggest that plaintiffs pursuing claims based on alleged failure to exercise appropriate oversight of "mission critical" operations could have a path to successful breach of fiduciary duty claims to the extent those claims are based on alleged failures to oversee efforts to protect employees and the public from the risks presented by the pandemic.

54. *Di Scala* Complaint, *supra* note 49, ¶ 9.
55. *Id.* ¶¶ 10, 27, 29, 37.
56. 698 A.2d 959, 967 (Del. Ch. 1996).
57. 212 A.3d 805 (Del. 2019).
58. Consolidated C.A. No. 2017-0222-JRS, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019).

D. *Conclusion*

There has hardly been a deluge of securities fraud and shareholder derivative litigation spawned to date by the COVID-19 pandemic, but there have been and continue to be claims arising out of the unique circumstances presented by the impact the pandemic is having on society at large, and the actions being taken to address it. It is still relatively early days in regards to these types of claims, but how this all evolves will bear close watching going forward.

III. THE NEGOTIATION CLASS CERTIFICATION: SHOULD COURTS ENCOURAGE OR EXTERMINATE INNOVATION?

The "Opioid Crisis" multidistrict litigation, consolidated in the Northern District of Ohio, consists of over 1,300 public-entity-led lawsuits. Is it possible to secure a just, speedy, and inexpensive resolution of these suits? A recent 2-1 decision by the Sixth Circuit of the United States Court of Appeals[59] in effect prohibits creativity by district court judges under Rule 23 of the Federal Rules of Civil Procedure to aid in the management of cases and the facilitation of settlements in multidistrict litigation. Should courts be in the business of encouraging or exterminating innovation? In her dissent, Judge Karen Nelson Moore argued the former.

The Sixth Circuit opinion reversed a September 11, 2019, order[60] issued by Judge Dan Aaron Polster of the Northern District of Ohio's Eastern Division which certified an unprecedented "negotiation class." A negotiation class empowers designated counsel to enter into negotiations on behalf of the entire class while individual cases continue along their respective litigation paths. In this instance it required a supermajority approval of the settlement and it also permitted members of the class to opt out of the negotiations prior to their commencement, with these "opt out" matters proceeding separately.

The Sixth Circuit majority opinion, written by Judge Eric L. Clay and joined by Judge David W. McKeague, stated that the primary problem with the certification of a negotiation class is that it is not authorized by the structure, framework, and language of Rule 23:

> However innovative and effective the addition of negotiation classes would be to the resolution of mass tort claims—particularly those of grave social consequence—we are to be "mindful that the Rule as now composed sets the requirements [courts] are bound to enforce," and we "are not free to amend a rule outside the process Congress ordered."[61]

59. *See In Re:* Nat'l Prescription Opiate Litig., 976 F.3d 664 (6th Cir. 2020).
60. *See In Re:* Nat'l Prescription Opiate Litig., 332 F.R.D. 532 (N.D. Ohio 2019).
61. *In Re: Nat'l Prescription Opiate Litig.*, 976 F.3d at 676 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997)).

The strict textualists of the Sixth Circuit majority stated:

> Rule 23 is replete with references to litigation and settlement classes . . . . Notably, the Rule does not mention certification for purposes of the "negotiation" or anything along those lines. While negotiation may lead to settlement, there is no discussion in Rule 23 identifying negotiation as a separate category of certification distinct from settlement.[62]

The court considered the negotiation class a new and novel form of class certification which was not expressly created by Rule 23. Between not finding language endorsing or prohibiting a negotiation class the court ruled the district court could not certify a negotiation class because of the absence of an explicit prohibition in the statute:

> What Plaintiffs fail to appreciate is that a new form of class action, wholly untethered from Rule 23, may not be employed by a court. The Supreme Court has specifically cautioned that "a mere negative inference does not in our view suffice to establish a disposition that has no basis in the Rule's text." [*Wal-Mart Stores, Inc. v.*] *Dukes*, 564 U.S. [338,] 363 [(2011)] . . . The Supreme Court has also emphasized that we are to be "mindful that the Rule as now composed sets the requirements [courts] are bound to enforce," that the Rule "limits judicial inventiveness," and that "[c]ourts are not free to amend a rule outside the process Congress ordered." *Amchem*, 521 U.S. at 620. . . .[63]

The Sixth Circuit found that the now common practice of certifying a settlement class did not provide a foundation for negotiation classes. The history of settlement classes cannot be relied on to justify the expansion of Rule 23 to include negotiation classes:

> Unlike settlement classes under the pre-2018 Rule, there is no textual basis in this subsection—or any other—for the existence of a negotiation class. The class formed in the present case is not being formed for the purposes of litigation or "for purposes of settlement," but rather for the purposes of negotiation. At most, the class is being formed, pursuant to a set of rules outside the parameters of Rule 23, to explore the possibility of negotiating a settlement. But the Rule contemplates settlement classes that are formed after a deal has been reached and the parties wish to formalize their arrangement.[64]

For now, the decision in effect extinguishes the novel concept of a negotiation class before it catches any traction. However, Judge Karen Nelson Moore reserves hope for the future of the negotiation class. In her dissent, Judge Moore criticized the majority's suffocation of Judge Polster's inventiveness with textual piety. She stated:

62. *Id.* at 672.
63. *Id.*
64. *Id.* at 673.

> The district court has breathed life into a novel concept—a class certified for negotiation purposes—to aid in its Promethean duty to secure the just, speedy, and inexpensive resolution of this byzantine multidistrict litigation. *We should be in the business of encouraging, not exterminating, such resourcefulness.* Certifying a negotiation class honors the Rules' equitable heritage, complements the settlement class's history, hews to Federal Rule of Civil Procedure 23's textual requisites, and stirs no constitutional or policy qualms.[65]

Courts are necessarily vested with the power to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.[66] Courts understand this principle and have interpreted the Federal Rules of Civil Procedure to promote efficient litigation and react to modern litigation trends. Examples include the recognition of the work-product doctrine in Rule 26 and the plausibility standard in Rule 8.[67] Given the peculiar properties in multidistrict litigation, Judge Moore encourages a continued liberal construction: "We should respect that every multidistrict litigation is unorthodox. Courts overseeing multidistrict litigation are adept at replicating and refining procedures over time in true common-law fashion. . . . We should encourage liberal constructions of the Federal Rules of Civil Procedure that abet, rather than constrict this process."[68]

Judge Moore further criticized the majority's restrictions on class categorization and its failure to find a textual basis for negotiation classes within Rule 23:

> The world of class actions is neither constituted in entirety nor cleft in two by the rigid categories of litigation classes and settlement classes. I find not one textual reference to the phrases "litigation class" or "settlement class" in the Rules. . . . But, as a matter of logic, negotiation is part and parcel of any class certified for settlement purposes. And the Rules' language does not separate the concept of negotiation from "settlement" or "compromise," nor did the Rules Advisory Committee rip negotiation out of "issues related to settlement." Thus, the district court's finding that Rule 23 permits certification for negotiation purposes is no "mere negative inference," *Dukes*, 564 U.S. at 363 . . . ; such a reading is a permissible, and encouraged, contemplation of the Rule's plain text.[69]

Lastly, she argued the history of the settlement class *does* justify the expansion of Rule 23 to include negotiation classes, stating: "This emergence of a negotiation class simply follows the incremental development of settlement class actions."[70]

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65. *Id.* at 677 (emphasis added).
66. *Id.* at 678.
67. *Id.* at 677–79.
68. *Id.* at 680 (internal citations omitted).
69. *Id.* at 681 (internal citations omitted).
70. *Id.* at 684.

Specifically, Rule 23 included no references to "settlement" or settlement classes until 2003.[71] The framers of Rule 23 drafted it as a "trial-ready" rule and settlement was not part of the discussion.[72] Despite the absence of clear textual authorization for settlement classes, district courts began certifying classes for settlements as early as 1970. As court dockets flooded with settlement class actions, district courts struggled to reconcile them with Rule 23's plain text.[73] Courts did this by noting Rule 23 did not specifically preclude settlement class certifications.[74]

By way of negative inference, district courts were liberated to recognize that settlement classes had "utility,"[75] "afforded considerable economies to both the litigants and the judiciary, and are also fully consistent with the flexibility integral to Rule 23."[76] Finally, in 2003, Rule 23 was revised to include settlement class actions. Judge Moore states: "[E]quity practice bore and nurtured Rule 23," and, true to form, history recurs with the rise of the negotiation class.

The rise of the negotiation class parallels that of the settlement class. Judge Moore encourages the same liberal construction of Rule 23 and freedom to experiment with negotiation classes:

> The parallel between the settlement class and the negotiation class is unmistakable; by certifying a novel negotiation class via a series of new-fashioned procedures, the district court here embraces Rule 23's equitable heritage and the developments of district courts past. We ought not disturb the relationship between innovative experiments of district courts and the subsequent codification of those developments in the revisions of the class action rule."[77]

In conclusion, Judge Moore argued neither text nor precedent contravene the certification of a negotiation class. Given the absence of language prohibiting the district court from distilling "negotiation" from "settlement" or "compromise," in Judge Moore's view, the district court's certifying a negotiation class is a permissible exercise to secure efficiently a just, speedy, and inexpensive resolution to multidistrict litigation.

The future of negotiation class certification is far from certain. Proponents in the Opiate Litigation have requested an *en banc* review of the Sixth Circuit decision. To date, no other attempts have been made to certify a negotiation class. Although the Sixth Circuit decision may effectively end the ephemeral life of the negotiation class, Judge Moore's dissent sets forth

71. *Id.*
72. *Id.* at 683.
73. *Id.*
74. *Id.* at 683–84.
75. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 618 (1997).
76. Gen. Motors Corp. Pick-Up Truck Fuel Tanks Prods. Liab. Litig., 55 F.3d 768, 794 (3d Cir. 1995).
77. *In Re:* Nat'l Prescription Opiate Litig., 976 F.3d 664, 685 (6th Cir. 2020).

the framework proponents can replicate to preserve the district court's discretion in utilizing creative methods for certifying a class. Innovative techniques to secure just, speedy, inexpensive resolutions in complex, multidistrict litigation can serve to benefit both parties and the court system. Courts should be in the business of that encouragement.

IV. COVID-19 AND DEFENSES TO BREACH OF CONTRACT

As individuals and businesses have grappled with COVID-19's impact on lives and livelihoods over the past year, the courts have been asked to confront force majeure and related defenses in breach of contract litigation arising from the pandemic. While litigants seeking to excuse their contract performance due to COVID-related interference have met with only limited success, outcomes often hinge on: (1) whether a non-performing party can show that COVID-19 or related governmental orders directly caused the non-performance; (2) whether the proximate cause of the non-performance was COVID-19 itself, rather than a lack of funds potentially caused by the pandemic; or (3) whether the hardships caused by COVID-19 could have been anticipated at the time of contracting.

In confronting COVID-19-related force majeure defenses, courts generally have hewn closely to traditional notions of contract interpretation, including giving effect to the plain meaning of the parties' agreement and requiring that a defendant offer allegations sufficient to support its various defenses. Such was the case when the Southern District of Florida considered a commercial lease dispute in *Palm Springs Mile Associates, Ltd. v. Kirkland's Stores, Inc.*[78] In that case, a shopping center tenant in Hialeah, Florida, stopped making rent payments for several months, starting in April 2020, pointing as an excuse to the pandemic in general, and county regulations restricting non-essential activities and business operations in particular.[79] In denying defendant's motion to dismiss, the court observed that the defendant "fail[ed] to explain how the governmental regulations it describes as a force majeure event *resulted in* its inability to pay its rent," that in order to prevail on the defense, the defendant had to show that the restrictions on non-essential activities and business operations directly affected its ability to pay its rent, and that, in any event, "even if [the defendant] had properly linked the force majeure event to an inability to pay its rent, the issue of the applicability of the force majeure clause to this case is a factual question that cannot be determined on a motion to dismiss."[80]

78. Palm Springs Mile Assocs., Ltd. v. Kirkland Stores, Inc., Case No. 20-21724-Civ-Scola, 2020 WL 5411353 (S.D. Fla. Sept. 9, 2020).
79. *Id.* at *1–2.
80. *Id.* at *2.

In a pair of decisions from the District of Hawaii in the case *NetOne, Inc. v. Panache Destination Management, Inc.*,[81] the court similarly found that plaintiff was not entitled to a refund on deposits it made for an event that it canceled due to the pandemic. In December 2019, Plaintiff NetOne, Inc. (NetOne) entered into a "Services Contract" with defendant Panache Destination Management, Inc. (Panache) for services related to an event NetOne planned to host on the Big Island for approximately 500 people, most of whom would be traveling to the event from elsewhere, on March 22–26, 2020.[82] NetOne paid Panache a deposit of 90% of the estimated value of that contract on January 6, 2020.[83] On March 10, 2020, NetOne and Panache entered into a "Décor Contract," under which Panache agreed to provide certain services for the event, and NetOne provided a deposit to Panache of 90% of the estimated value of the Décor Contract on March 13, 2020.[84] The Centers for Disease Control shortly thereafter recommended that all events of 50 or more people be cancelled over the next eight weeks, and advised against nonessential travel.[85] On March 13, 2020, NetOne advised Panache it was cancelling the event, and on March 19, 2020, NetOne advised Panache it was cancelling the Services Contract, and went on to seek return of both deposits under both contracts' force majeure provisions.[86]

In *NetOne I*, considering NetOne's motion for summary judgment, the district court explained that, regardless of whether plaintiff had appropriately invoked the contracts' force majeure provisions, there was nothing in the contract itself providing for the return of the deposits in the event of a force majeure.[87] The district court reiterated this point in granting Panache's motion for judgment on the pleadings on NetOne's breach of contract claim several months later, though it left open the possibility that NetOne might recover some amount in unjust enrichment, observing: "Sometimes, events, such as a pandemic, create situations that cause disparate impacts. That might be why the law recognizes a cause of action sounding in unjust enrichment. And if NetOne is to recover any portion of its deposits, that is its remaining theory to which it will need to turn."[88]

81. NetOne, Inc. v. Panache Destination Mgmt., Inc., Case No. 20-cv-00150-DKW-WRP, 2020 WL 3037072 (D. Haw. June 5, 2020) (*NetOne I*); NetOne, Inc. v. Panache Destination Mgmt., Inc., Case No. 20-cv-00150-DKW-WRP, 2020 WL 6325704 (D. Haw. Oct. 28, 2020) (*NetOne II*).
82. *NetOne I*, 2020 WL 3037072, at *1–2.
83. *Id.* at *1.
84. *Id.* at *2–3.
85. *Id.* at *3.
86. *Id.* at *3–4.
87. *Id.* at *5.
88. *NetOne II*, Case No. 20-cv-00150-DKW-WRP, 2020 WL 6325704, at *4 (D. Haw. Oct. 28, 2020).

In another case closely tied to the remedies provided in the contract itself, *Zhao v. CIEE, Inc.*,[89] the District of Maine took up the case of a student who sought a full refund when her Spring 2020 study abroad program in the Netherlands was suspended and pivoted to online learning less than two months into the program. In finding that the student had alleged no material breach of her contract with the defendants, the court found that one paragraph providing for refunds if the program was cancelled "due to low enrollment or any other reason," had to be read in conjunction with another provision stating that:

> [w]ithout limitation, CIEE is not responsible for any injury, loss, or damage to person or property, death, delay, or inconvenience in connection with the provision of any goods or services occasioned by or resulting from, but not limited to, acts of God, force majeure, acts of government [. . .] *epidemics or the threat thereof*, [and] disease [. . .].[90]

The court also pointed to a paragraph providing that the plaintiff had agreed to "assume all risk of any such problems which could result from," "perceived or actual epidemics (such as, but not limited to, H1N1, Ebola, SARS, bird flu, or Zika)" which could "delay, disrupt, interrupt or cancel programs," which, the court explained, applied to an "actual epidemic" such as COVID-19.[91] Even if the plaintiff were entitled to a full refund under the paragraph she relied upon, the court ruled, that provision had to be read together with the other, epidemic-specific terms in the contract, which, the court found, foreclosed any claim for lost value of the canceled semester abroad.[92]

In other cases, however, courts have enforced force majeure provisions in whole or in part in response to COVID-19-related failures to perform. In *In re Hitz Restaurant Group*,[93] the Bankruptcy Court of the Northern District of Illinois considered the case of a commercial landlord seeking to enforce a debtor-in-possession's obligation to pay rent timely on its restaurant space post-petition. The force majeure clause in the debtor's lease stated that:

> Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as performance of any of its obligations are prevented or delayed, retarded or hindered

89. Zhao v. CIEE, Inc., Case No. 2:20-cv-00240-LEW, 2020 WL 5171438 (D. Me. Aug. 31, 2020), *appeal docketed*, No. 20-1878 (1st Cir. Sept. 25, 2020).
90. *Id.* at *3 (emphasis added by court).
91. *Id.* at *4.
92. *Id.*
93. *In Re:* Hitz Rest. Grp., 616 B.R. 374 (Bankr. N.D. Ill. 2020).

> by . . . laws, governmental action or inaction, orders of government. . . . Lack of money shall not be grounds for Force Majeure.[94]

The debtor asserted that the governor's executive order restricting restaurants to delivery, drive-through, and pick-up services triggered the force majeure clause.[95]

Reasoning that, under Illinois law, performance will only be excused by a force majeure clause where the triggering event was in fact the proximate cause of the non-performance,[96] the court found that the governor's executive order "unambiguously" triggered the force majeure clause because it "hindered" the debtor's ability to perform under the lease.[97] The court found that the executive order was "unquestionably the proximate cause of Debtor's inability to pay rent, at least in part, because it prevented Debtor from operating normally and restricted its business to take-out, curbside pick-up, and delivery."[98] In response to an argument from the creditor that what debtor was really arguing was a lack of money, which the force majeure clause specifically stated was not grounds for force majeure, the court instead maintained that what debtor was arguing was that the executive order shutting down on premises consumption at Illinois restaurants was "the proximate cause of its inability to generate revenue and pay rent," and the court found that sufficient to trigger the force majeure clause, at least in part.[99] The court also rejected as wholly without support the creditor's argument that debtor could not enforce the force majeure clause because it could have, but did not, seek to borrow money to pay its rent.[100]

However, the court did not apply the force majeure clause to entirely excuse debtor's rent obligation. Instead, observing that the executive order still did permit debtor to sell food for off-premises consumption, and that the restaurant's kitchen (unlike the dining area and bar) could still be used under the executive order, the court found that the debtor still owed at least twenty-five percent of the monthly rent to the creditor, as the kitchen comprised about twenty-five percent of the restaurant's square footage.[101]

The Eastern District of Louisiana was also sympathetic to a tenant defaulting on its rental payments in *Richards Clearview, LLC v. Bed Bath & Beyond, Inc.*[102] In that case, the landlord of a Bed Bath & Beyond (BB&B)

94. *Id.* at 376–77.
95. *Id.* at 377.
96. *Id.* (citing N. Ill. Gas. Co. v. Energy Coop., Inc., 461 N.E.2d 1049, 1058 (Ill. App. Ct. 1984)).
97. *Id.* at 377.
98. *Id.* at 377–78.
99. *Id.* at 378.
100. *Id.*
101. *Id.* at 379.
102. Richards Clearview, LLC v. Bed Bath & Beyond, Inc., Civil Action No. 20-1709, 2020 WL 5229494 (E.D. La. Sept. 2, 2020).

store at a shopping mall in Louisiana sought to evict BB&B for failure to pay some of its rent for April 2020 and all of its rent for May 2020, during which time BB&B believed the lease's force majeure clause excused it from paying rent.[103] After receiving the landlord's notice of default on June 1, 2020, BB&B paid the back rent.[104]

On March 22, 2020, the Governor of Louisiana had issued an emergency proclamation, under which all malls were closed to the public, "except for stores in a mall that have a direct outdoor entrance and exits that provide essential services and products as provided by CISA guidelines."[105] Although BB&B had a direct outdoor entrance and sold several essential products, including soap, first aid equipment, and hand sanitizer, the store closed from March 23, 2020 until June 5, 2020, although starting May 1, 2020, the store did begin limited curbside pick-up services.[106] The court deemed this closure voluntary, as the emergency proclamation's terms allowed it to remain open, but that was not the end of the story.[107] In deciding the eviction application, the court observed that, due to provisions in the lease regarding the amount of rent due based on the vacancy of certain other stores in the mall, the parties had a genuine dispute regarding whether or not BB&B had failed to pay required rent.[108] In any event, the court found, even if BB&B had had a rent deficiency and had failed to cure it timely, Louisiana law required those facts be considered under the totality of circumstances at the time.[109] BB&B's potential late payment had come only eight days after the cure period expired.[110] The court ruled that this, coupled with processing issues caused in part by the landlord and a lack of demonstrable harm caused to landlord by the delay, could not justify evicting BB&B and closing down the store, resulting in 65 employees losing their jobs in an uncertain economy and the local community losing a store that it depended upon for essential needs during the pandemic.[111]

Courts have also begun to grapple with defenses in the COVID-19 context that litigants often raise in similar fact patterns to those raised in force majeure cases, including impossibility and frustration of purpose. In *Belk v. Le Chaperon Rouge Co.*,[112] plaintiffs in a Fair Labor Standards Act case moved to enforce a settlement agreement reach on the record after a

103. *Id.* at *1.
104. *Id.*
105. *Id.* at *4.
106. *Id.*
107. *Id.* at *6.
108. *Id.*
109. *Id.* at *7.
110. *Id.*
111. *Id.* at *8.
112. Belk v. Le Chaperon Rouge Co., Case No. Case No. 1:18cv1954, 2020 WL 3642880 (N.D. Ohio July 6, 2020).

mediation before a Magistrate Judge on March 12, 2020. The defendants ran multiple child care centers and a private elementary school.[113] On the same day that the parties put their settlement on the record, the Governor of Ohio ordered all kindergarten through twelfth grade schools to close for several weeks, and ordered all day care centers closed absent a temporary pandemic day care license.[114] Thirteen days after that, Ohio ordered all child day care centers to close for a period of time.[115] When the plaintiffs thereafter sought to finalize a written settlement agreement by the deadline to move for joint approval on April 10, 2020, the defendants stated that they could not meet the timeline due to the COVID-19 shutdown.[116] The plaintiffs thereafter moved to enforce the settlement, and the defendants argued, among other things, that the settlement was not enforceable due to impossibility of performance.[117] Even though day care centers had since been permitted to reopen, the defendants asserted that new regulations had "wreaked havoc" on their ability to pay the settlement.[118]

The court found that, under Ohio law, an inability to pay due to financial difficulty would not establish impossibility, since parties generally assumed the risk of their financial ability to perform when entering into a contract.[119] Moreover, impossibility of performance under Ohio law "occurs where, after the contract is entered into, an unforeseen event arises rendering impossible the performance of one of the contracting parties."[120] Mere difficulty or burden in performing is not enough; "[r]ather, the performance must be rendered impossible without fault of the party asserting the defense and where the difficulties could not have been reasonably foreseen."[121] In addition to finding that defendants did not establish that they could not fund the settlement payment, the court found that defendants had not demonstrated that their financial difficulties caused by COVID-19 could

113. *Id.* at *1.
114. *Id.* at *2 n.2.
115. *Id.* at *9.
116. *Id.* at *3.
117. *Id.* at *4.
118. *Id.* at *9.
119. *Id.* at *10; *see also* Lantino v. Clay LLC, 1:18-cv-12247 (SDA), 2020 WL 2239957, at *2 (S.D.N.Y. May 8, 2020) (finding that entry of consent judgment in Fair Labor Standards Act case could not be averted due to impossibility of performance based on defendants' claim that they could not fund the settlement as a result of the COVID-19 pandemic and governor's orders to close down certain businesses); Shin v. Yoon, Case No. 1:17-CV-01371-AWI-SKO, 2020 WL 6044086, at *6 (E.D. Cal. Oct. 13, 2020) (finding that, even if contract defenses were available to avoid obligations under stipulated judgment, defendants had not shown impossibility of performance, as even if COVID-19 had rendered defendants themselves unable to raise the funds to pay the settlement, defendants had not shown, as they must under California law, that COVID-19 had likewise rendered other persons unable to make payments in that same amount—that is, that performance was objectively, rather than subjectively, impossible).
120. *Belk*, 2020 WL 3642880, at *10.
121. *Id.*

not have been reasonably foreseen at the time of the March 12, 2020 settlement.[122] The defendants admitted that they were aware at the time of the settlement that the governor had ordered public schools to be closed, and that order "directly impacted" the defendants' own school.[123] The court found that that should have caused the defendants, "at the very least, . . . to consider the possibility that its child day care centers could also soon be negatively impacted by the COVID-19 pandemic as well."[124] The court further noted that, in light of the developments defendants knew about on March 12, 2020, they could have delayed the settlement proceedings, tried to include a force majeure clause in the settlement, or otherwise tried to provide for the risks posed by COVID-19 in the agreement's terms, but chose not to do so.[125]

A bankruptcy court in Manhattan also pointed to the parties' agreement at a time when they knew of the pandemic in declining to extend the closing date of a hotel purchase agreement due to frustration of purpose, failure of consideration, or impossibility.[126] In *In Re Condado Plaza Acquisition LLC*, the parties had entered into a purchase agreement for a hotel in Puerto Rico, signing the initial agreement on November 20, 2019, with the purchase initially set to close by December 31, 2019.[127] The parties later agreed to several extensions of that closing date, including a second amendment to the purchase agreement on March 5, 2020, extending the closing date to March 17, 2020.[128] On March 11, 2020, the Governor of Puerto Rico declared a state of emergency due to COVID-19, and on March 15, 2020, the governor issued an order requiring closure of all government operations not related to essential services.[129] The parties nevertheless entered into a third amendment to the purchase agreement on March 17, 2020, with recitals stating that in light of government actions in response to COVID-19, the closing would not occur on March 17, 2020, but would instead take place on the later of April 17, 2020 or the date that is five business days following the government permitting the operations of the Registry of Property, law firm offices and notary public in San Juan, Puerto Rico, but in no event later than July 31, 2020.[130] The parties also ratified all other terms of the purchase agreement.[131] As events developed and various offices reopened, a closing date was set for May 11, 2020, but

122. *Id.* at *10–11.
123. *Id.*
124. *Id.* at *11.
125. *Id.* at *11 n.7.
126. *In Re:* Condado Plaza Acquisition LLC, 620 B.R. 820 (Bankr. S.D.N.Y. 2020).
127. *Id.* at 825.
128. *Id.* at 830.
129. *Id.*
130. *Id.*at 831
131. *Id.*

the purchaser did not appear, apparently wishing for more time to determine whether it wanted to and could complete the purchase.[132]

The court refused, citing the agreement's time is of the essence provision, and also roundly rejected the purchaser's attempts to extend its time to perform by pointing to purported failure of consideration, commercial impracticability, and frustration of purpose. The court found none of those doctrines applicable to postpone the closing date.[133] To support frustration of purpose, the court found, the purchaser had to show that the reasons for performance ceased to exist due to an unforeseeable event which destroyed the reasons for performance—it was not enough to merely argue that the transaction would no longer be profitable for purchaser.[134] Moreover, the court was skeptical that the purchaser could show the effects of COVID-19 on the hotel's operations were unforeseeable, given the parties' reaffirmation of the purchase after the first shutdown orders issued, rendering both the frustration of purpose and impossibility arguments dubious.[135] In any event, the court found that neither these defenses, nor failure of consideration (which also did not apply, as the hotel, despite the shutdown, still retained some value) could be invoked to extend a time is of the essence closing date.[136]

As the longer-term effects of the COVID-19 pandemic continue to manifest in the commercial sector, the year ahead will doubtless see additional contract disputes related to its impacts, and defendants can be expected to continue to test the limits of force majeure, impossibility, and related defenses in an attempt to mitigate their liability for difficulties in performance.

132. *Id.* at 831, 837.
133. *Id.* at 839–40.
134. *Id.*
135. *Id.* at 840.
136. *Id.*

RECENT DEVELOPMENTS IN CYBERSECURITY AND DATA PRIVACY

Mailise R. Marks, Daniel Cotter, Ariane Janz, Kenneth Williams, and Anthony E. Sinapi[*]

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This survey reviews recent statutory developments and court decisions in the area of cybersecurity and data privacy law from October 1, 2019, through September 30, 2020. The first part discusses significant state data privacy and security statutes that were enacted, became effective, or are the most significant to practitioners during the survey period. The second part discusses significant court decisions exploring insurance coverage for silent cyber coverage, biometric privacy, and the right to privacy.

I. STATUTORY IMPROVEMENTS IN CONSUMER AND DATA BREACH NOTIFICATION LAWS

All fifty states and most of the territories in the United States have enacted data-breach notification laws. Due to disruptions caused by the COVID-19 pandemic, much of 2020 has been spent working remotely. This shift to remote work led to the California Consumer Privacy Act and the New York SHIELD Act's enforcement provisions to come front and center as the Zoom application replaced the conference room. Additionally, data-breach notification statutes came into effect, giving residents additional protections by way of including more categories of "personal information" such as the inclusion of tax identification numbers and greater protection over medical records. The amendments also tended to provide more transparency to consumers and Attorney Generals' Offices by increasing the amount of information in the notices issued.

A. *National Enforcement Examples from the California Consumer Privacy Act, the New York "SHIELD" Act, and Zoom*

The new decade brought with it many new twists and turns in the field of data privacy and cyber security. While the California Consumer Privacy Act (CCPA)[1] and New York's "Stop Hacks and Improve Electronic Data Security Act" (SHIELD Act)[2] were much discussed at the outset of 2020 as formidable enforcement and investigation tools, no one could have anticipated that these two pieces of legislation would be tested so quickly by a little known video conference program known as Zoom.[3] On January 1, 2020, the majority of the CCPA went into effect, including the private

1. *See* Cal. Civ. Code §§ 1798.100–1798.199.
2. *See* N.Y. Gen. Bus. Law §§ 899-aa, 899-bb.
3. Zoom refers to Zoom Video Communications, Inc.

right of action and the enforcement action provisions.[4] The SHIELD Act went into force several months later on March 21, 2020.

Zoom is a video conference platform that became ubiquitous in homes across the United States as the COVID-19 pandemic required many companies to institute remote work policies intended to slow the spread of the virus. However, Zoom's surge in usage and popularity brought scrutiny from the New York Attorney General's Office under the SHIELD Act and with private actions asserted in California under the CCPA. The issue was simple: for all its convenience, the program had a lackluster cybersecurity system. The most obvious issue was so-called "zoom-bombing"—hackers entering purportedly private video conference rooms and engaging in offensive behaviors.[5]

In New York, the Attorney General's office issued a letter to Zoom's offices, which, according to the *New York Times*, requested information regarding the measures Zoom had implemented to protect the increased traffic and to detect hackers.[6] Further, the letter purportedly expressed numerous concerns with security flaws that permitted "malicious third-parties" to "surreptitiously access consumer webcams."[7] The Attorney General further sought more information about "whether Zoom has undertaken a broader review of its security practices."[8] The letter also referenced contemporaneous reports of Zoom sharing user data with other entities like Facebook and requested that Zoom provide information regarding the categories of data that it collected from users.[9] On May 7, 2020, Zoom and the New York Attorney General's Office came to a Letter Agreement that provided:

> Zoom shall comply with Executive Law § 63(12) and GBL §§ 349 and 350, and shall not misrepresent the collection . . . and safeguarding of consumers' personal information and regulation of abusive activity on its platform. . . . Zoom shall comply with the Children's Online Privacy Protection Act ("COPPA") Rule, 16 C.F.R. Part 312. . . . Zoom shall comply with New York Education Law § 2-d and implementing regulations, 8 N.Y.C.R.R. Part 121, and related regulations.[10]

4. *See* Cal. Civ. Code §§ 1798.150, 1798.155(b).
5. Kristen Setera, *FBI Warns of Teleconferencing and Online Classroom Hijacking During COVID-19 Pandemic*, FBI Boston (Mar. 30, 2020), https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-of-teleconferencing-and-online-classroom-hijacking-during-covid-19-pandemic.
6. Danny Hakim & Natasha Singer, *New York Attorney General Looks into Zoom's Privacy Practices*, N.Y. Times (Mar. 30, 2020), https://www.nytimes.com/2020/03/30/technology/new-york-attorney-general-zoom-privacy.html.
7. *Id.*
8. *Id.*
9. *Id.*
10. Kim A. Burger, Chief Bureau of Internet and Technology New York State Attorney General, Letter Agreement Between Zoom and the NYAG (May 7, 2020).

However, the same reports asserting that Zoom inappropriately shared user data with Facebook and then, later, other third-party entities, became the basis of the class action suit styled as *In Re: Zoom Video Communications, Inc. Privacy Litigation*, Case No. 5:20-CV-02155-LHK (N.D. Cal. San Jose Division July 7, 2020). The amended class action complaint alleges data mining from well-known online entities like LinkedIn and Facebook.[11] It also alleges violations of the Children's Online Privacy Protection Act, which were allegedly addressed in the Letter Agreement with the New York Attorney General's Office.[12] Additionally, it alleges seven causes of action against Zoom: invasion of privacy and violation of the California Constitution, Art. 1 § 1 (which also references the CCPA); negligence; breach of implied contract; breach of implied covenant of good faith and fair dealing; unjust enrichment; violation of Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq*.); violation of the California Consumer Legal Remedies Act (Cal. Civ. Code § 1750 *et seq*.); violation of Comprehensive Data Access and Fraud Act; and deceit by concealment (Cal. Civ. Code § 1710(3).[13] The ultimate result of this class action is still pending and will be watched.

B. *Other Updated Data Breach Notification Statutes*

As of this writing, all fifty states in the United States, the District of Columbia, Guam, Puerto Rico, and the United States Virgin Islands, have enacted legislation requiring data custodians to advise the residents of those jurisdictions when their personal data is the subject or potential subject of a data breach. During 2020, several jurisdictions updated and further modified their data breach notification statutes as set forth below.

1. Oregon

As of January 1, 2020, Oregon's data breach notification law, restyled as "Oregon Consumer Information Protection Act" (OCIPA) went into full force. Aside from the refreshing new acronym, the revision follows the general global trend in expanding the definition of *data breach* and *personal information* and adding definitions for *covered entity* and *vendor*.[14] The amendment also created several additional obligations.

OCIPA broadens the definition of "data breach" to include "unauthorized acquisition of computerized data that materially compromises the security, confidentiality or integrity of personal information that a person maintains

11. In Re: Zoom Video Communications, Inc. Privacy Litigation, Case No. 5:20-CV-02155-LHK (N.D. Cal. San Jose Division), Consolidated Amended Class Action Compl. ¶¶ 93–98, 144.
12. *Id.* ¶¶ 152–157.
13. *See id.*
14. *See* Ore. Rev. Stat. § 646A.602.

or possesses."[15] Further, the definition now specifically includes user name or other information with which to access the consumer's account.[16] The statute contains a new definition for *covered entity* to mean any person that "owns, licenses, maintains, stores, manages, collects, processes, acquires or otherwise possesses personal information in the course of the person's business, vocation, occupation or volunteer activities," but specifically does not include vendors.[17] As a result, "covered entities" are obligated to send notices of such to consumers where a data breach occurs.[18]

While the provision for covered entities specifically excludes vendors, entities who contract with covered entities and only access or use the data on behalf of the covered entity, the statute was expanded to provide such entities with their own guidelines.[19] The statute places notification obligation upon vendors to notify the covered entities "as soon as practicable but no later than 10 days after the discovery of the breach in security or having a reason to believe that the breach of security occurred."[20] Similarly, the vendor must provide written notice of a breach to the Attorney General when more than 250 consumers are affected or where the number of consumers affected is not determinable.[21] Also continuing with the current trends, OCIPA specifies that those covered entities and vendors who are subject to and comply with HIPAA or the GBLA are entitled to assert compliance with those Acts as an affirmative defense.[22]

2. Texas

On January 1, 2020, amendments to the Texas Consumer Privacy Act, Tex. Bus. & Com. Code § 521.053, went into effect following the enactment of H.B. 4390. The Act now requires persons conducting business within the state of Texas to disclose a breach within sixty days of discovering the breach.[23] Additionally, the Act now mandates that the Attorney General must also be notified within sixty days after discovering the breach if it involves more than 250 Texas residents.[24] The bill also created the Texas Privacy Protection Advisory Council, which is "tasked with studying laws governing privacy and protection of information linked to a specific individual, technological device, or household and to make recommendations to the Legislature by September 1, 2020, concerning privacy and

15. *Id.* § 646A.602(1)(a) (emphasis added).
16. *See id.* § 646A.602(12)(a)(B).
17. *Id.* § 646A.602(5)(a), (b).
18. *See id.* § 646A.604.
19. *See id.* § 646A.602(19).
20. *Id.* § 646A.604(2)(a).
21. *See id.* § 646A.604(2)(c).
22. *See id.* § 646A.622.
23. *See* Tex. Bus. & Com. Code § 521.053(b).
24. *See id.* § 521.053(i).

protection of Texans' information."[25] The seventeen-page report produced by that Council provides a concise overview of Texas data privacy, other state laws, federal laws, and international laws as well as six proposals.[26] The report also recommends several additional areas of inquiry, from duties and responsibilities of third-party vendors, to Fourth Amendment protections.[27] At the time of writing, it is unclear whether the Texas legislature will take any steps included in the report.

3. Illinois

On January 1, 2020, an amendment to the Illinois Person Information Protection Act (PIPA) went into effect.[28] The amendment revamped the notification mandate so that an entity subject to the Act (defined as a "data collector") must notify the Illinois Attorney General where a single data breach affects more than 500 Illinois residents.[29] The data collector must provide, "in the most expedient time possible," a description of the breach, the number of residents affected, and any plans or steps taken, or to be taken, regarding the breach.[30] This information may ultimately be published by the Illinois Attorney General.[31] This notice provision largely comports with other mandatory notices to the state Attorney General's office, but does not require as much information as jurisdictions like Massachusetts and Washington.[32]

4. Washington

Since 2016, the state of Washington has continued to be a leader in data breach response by producing annual data breach reports. The reports summarize trends in data breaches and provide recommendations to the state legislature based on those trends. Based on the reports, effective March 1, 2020, Washington reduced the notification timeline to the Attorney General from forty-five days to thirty days, one of the shortest in the United States.[33] Further, the amendment broadened the definition of *personal information* to include one or more of the following: full date of birth; private authentication key to access a user record; identification numbers

25. Texas Privacy Protection Advisory Council Report (Sept. 2020), https://www.house.texas.gov/_media/pdf/committees/Texas-Privacy-Protection-Advisory-Council-Report.pdf.
26. *See id.*
27. *See id.*
28. *See* 815 Ill. Comp. Stat. § 530 *et seq.*
29. *See id.* § 530/10(e).
30. *See id.* § 530/10(e)(2).
31. *See id.*
32. *See* Mass. Gen. Laws ch. 93H, § 3; *see also* Wash. Rev. Code § 19.255.010(7).
33. *See* Wash. Rev. Code § 19.255.010–.020.

(student, military, or passport); any information about the consumer's medical history (mental or physical); and biometric information.[34] It also includes a consumer's username or email address in combination with another element that would permit access to a resident's online account.[35]

5. Vermont

Vermont's amended Security Breach Notice Act went into effect on July 1, 2020, along with the new Student Data Privacy law.[36] The amended breach notification statute provides an expanded definition for *personally identifiable information* (PII) to include, in combination with the individual's first name or initial, last name, and one or more of the following data points: a government-issued identification number (such as a tax, passport, or military identification number); biometric information; genetic information; and health information.[37] Importantly, the definition of a security breach was also amended to include those instances where an individual's login credentials (such as for an online account) are compromised.[38] A data breach consisting of login credentials triggers a fourteen-day notice requirement for the Vermont Attorney General's Office or Department of Financial Regulation under Title 8, but not where the login credentials are from the data breach of another entity and not the data collector or its agent.[39] The Act also modified the provisions permitting substituted service to include email service where the lowest cost would exceed $10,000, double the prior threshold of $5,000.[40] This substituted service is also permitted where the only information compromised is login credentials.[41] Data collectors are subject to the Vermont Data Breach Notification Act where the entity complies with HIPAA and HITECH.[42]

Vermont also enacted the Student Data Privacy law which generally prohibits certain online entities, referred to as "operators," from providing targeted advertising derived from information gleaned through the use of the operator's site or application, when that application or site is used for an educational purpose in conjunction with a preK–12 school.[43]

34. *See id.* § 19.255.005.
35. *See id.*
36. *See* Vt. Stat. Ann. tit. 9, §§ 2430, 2435.
37. *See id.* § 2430(10)(A).
38. *See id.* § 2435(b).
39. *See id.* §§ 2435(b)(1), (3)(D).
40. *See id.* § 2435(b)(6)(B).
41. *See id.* § 2435(d)(3).
42. *See id.* § 2435(e).
43. *See id.* § 2443(a).

6. Virginia

As of July 1, 2020, the definition of personal information included the first initial and last name in combination with, or otherwise linked to, a resident's passport number or military identification number.[44] Virginia, much like Vermont, requires notice to the consumer and the Attorney General's office whenever the personal information of *any* resident of the Commonwealth is "acquired by an unauthorized person and causes, or the individual or entity reasonably believes has caused or will cause, identity theft or another fraud. . . ."[45]

7. Washington, D.C.

As of May 19, 2020, D.C. also has a broader definition of personal information to include many of the same data points as the newly revamped Washington and Vermont laws. Specifically, the definition now includes government-issued identification numbers (including taxpayer, passport, or military identification numbers); account number (such as a credit card that would permit access to the consumer's financial accounts); medical information; genetic information and DNA profile; health insurance information, including a policy number, subscriber information number, or any unique identifier used by a health insurer that permits access to an individual's health and billing information; biometric data; and any combination of data elements listed above, that would enable a person to commit identity theft without reference to the individual's name.[46]

The definition also includes a resident's "user name or e-mail address in combination with a password, security question and answer, or other means of authentication, or any combination of data elements . . . [from the above list] that permits access to an individual's e-mail account."[47] The amendment broadens the amount of information required in the consumer notices to include information about the personal information lost, a free security freeze, a right to certain identity theft services for a period of eighteen months, and contact information for the appropriate reporting entity, such as the Attorney General's office.[48] Where the subject breach involves more than fifty D.C. residents, a notice must be filed with the Attorney General's office with a description of the breach, the information compromised, and the remedial action.[49] Conforming with many other data breach notification laws, the amendment provided a partial exemption for those entities which are subject to and comply with the breach notification rules

44. *See* Va. Code Ann. § 18.2(A).
45. *See id.* § 18.2(B).
46. D.C. Code § 28-3851(3)(A)(i).
47. *Id.* § 28-3851(3)(A)(ii).
48. *See id.* § 28-3852(A)(a-1); *see also id.* §28-3852b.
49. *See id.* § 28-3852(B)(b-1).

contained in the GLBA, HIPAA, and HITECH, but still requires notice to be provided to the Attorney General's office.[50] Lastly, the amendment modifies the damages section of the statute and deems a violation of the chapter to be an unfair or deceptive trade practice.[51]

II. CASE LAW DEVELOPMENTS

A. *Insurance Coverage Cases*

The area of cyber coverage is rapidly evolving. However, like a shadow, "silent cyber" coverage lurks. While there are policies designed to cover such events as ransomware attacks and data breaches expressly, courts will sometimes find the same coverage in a Commercial General Liability policy, Business Owner's Policy, or Director's and Officer's policies. Because insurance is the predominate method of managing risk, we include a summary of the most recent developments in the insurance market to help guide the assessment and management of emerging risks. The highlights are set forth below.

1. Silent Cyber Coverage

A Brief Background. Silent cyber refers to potential cyber-related losses stemming from traditional property and liability policies that were not specifically designed to cover cyber risk. "Silent cyber," also known as "unintended" or "non-affirmative" cyber, refers to the unknown or unquantified exposures originating from cyber perils that may trigger traditional property and liability insurance policies.[52] Silent cyber situations can arise in different insurance coverage areas. In fact, issues can arise wherever technology is present. Traditional liability or property policies were not designed with cyber exposures in mind and, therefore, do not expressly include coverage for cyber risks.[53] The coverage risk to an insured with a traditional property or other casualty liability policy can result in a silent cyber scenario. With people online now more than ever, many companies have elected to procure policies to protect their vulnerable data as people work remotely. Many companies still operate under the belief that a general liability policy will cover this risk and that they do not need a standalone cyber policy.

50. *See id.* § 28-3852(B)(b-2); *see also id.* § 28-3852a(d).

51. *See id.* § 28-3852c(b).

52. Guy Carpenter, *Affirmative vs. Silent Cyber: An Overview*, Marsh & McLennan Cos. (Oct. 2018), http://www.guycarp.com/content/dam/guycarp/en/documents/library/2019/Affirmative%20vs.%20Silent%20Cyber%20An%20Overview.pdf.

53. *The Problem of Silent Cyber Risk Accumulation*, Willis Towers Watson (Feb. 25, 2020), https://www.willistowerswatson.com/en-US/Insights/2020/02/the-problem-of-silent-cyber-risk-accumulation.

Mark Synott of Willis Towers Watson, posited "under property forms, does data constitute 'property' and does an unattributed malware attack trigger the War Exclusion?"[54] As illustrative of this conundrum, Synott proffers one of the most well-known cyber-attacks in history, the 2017 NotPetya attack.[55] The NotPetya attack ravaged a range of businesses from shipping ports and supermarkets to ad agencies and law firms, by encrypting their master files and demanding a Bitcoin ransom to restore access to those files.[56] Most victims were based in Ukraine, but several global corporations were also infected, including shipping giant Maersk, "responsible for 76 ports on all sides of the earth and nearly 800 seafaring vessels, including container ships carrying tens of millions of tons of cargo, representing close to a fifth of the entire world's shipping capacity, was dead in the water."[57] The losses stemming from the NotPetya attack "resulted in silent cyber losses on non-cyber lines of business for various insurers."[58] So, while "silent cyber" was a known risk in the insurance circle, the NotPetya attack and its immediate predecessor, WannaCry, appeared to inspire global insurers to start to address the issue of liability.[59]

Attempts to remediate silent cyber: Starting in 2019, the insurer Allianz advised that its Global Corporate and Specialty unit would update "coverage in 2019 to provide clarity so that physical damage and bodily injury arising from cyber events would generally continue to be covered under corporate, commercial and specialty policies whereas cyber-related 'pure financial loss' without physical damage or injury would be covered under specific cyber policies only."[60] Caroline Dunn, Head of Class of Business, Performance Management, at Lloyd's of London, stated the following in a July 4, 2019, *Market Bulletin* to provide clarity for Lloyd's customers for cyber exposures:

> Lloyd's view is that it is in the best interests of customers, brokers and syndicates for all policies to be clear on whether coverage is provided for losses caused by a cyber event. This clarity should be provided either by excluding coverage or by providing affirmative coverage in the (re)insurance policy. For the avoidance of doubt, Lloyd's view policies where no exclusion exists and there is no express grant of cyber coverage as 'non-affirmative'. In all these

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54. *Id.*
55. *See id.*
56. Andy Greenberg, *The Untold Story of NotPetya, the Most Devastating Cyberattack in History*, Wired.com (Aug. 22, 2018), https://www.wired.com/story/notpetya-cyberattack-ukraine-russia-code-crashed-the-world.
57. *Id.*
58. Bethan Moorcraft, *What Is Silent Cyber Risk?*, Ins. Bus. Am. (Nov. 26, 2018), https://www.insurancebusinessmag.com/us/guides/what-is-silent-cyber-risk-117150.aspx.
59. *The Problem of Silent Cyber Risk Accumulation*, *supra* note 53.
60. *Id.*

cases action should be taken to provide clarity of coverage for customers to comply with this requirement.[61]

According to a subsequent *Lloyd's Bulletin*, issued on January 28, 2020, the underwriters were required to use "clear language to affirm or exclude cyber cover for all [first-party property] policies incepting on or after 1 January 2020."[62] Indeed, according to the proffered four-phase timeline, all Lloyd's polices will contain clear language regarding cyber coverage by July 1, 2021.[63] The success of these policies and efforts remains to be seen and will continue to be tested against prior insurance policies, as claims may arise from offsite work on personal devices where the COVID-19 pandemic has forced people to work from home.

2. *National Ink and Stitch, LLC v. State Auto Property & Casualty Insurance Co.*

A pre-pandemic case that illustrates these concerns comes from the District Court for the District of Maryland's decision in *National Ink and Stitch, LLC, v. State Auto Property and Casualty Insurance Company*, which addressed the silent cyber scenario when addressing a policy's interpretation of data loss versus property loss.[64]

Plaintiff, National Ink & Stitch, LLC (National Ink), asserted an action against State Auto Property and Casualty Insurance Company (State Auto), its businessowner's insurance carrier, seeking coverage for damage alleged to have been sustained to its computer system in a ransomware attack.[65] National Ink obtained the policy to cover its embroidery and screen printing business.[66] National Ink stored most, if not all, facets of its business on the servers for both the creative and administrative aspects (e.g., art, logos, designs for its business, graphic arts software, shop management software, embroidery software, and webstore management software).[67]

The facts of the matter are simple. In December 2016, a ransomware attack rendered the server virtually inaccessible and unusable, except for the embroidery software.[68] After producing the ransomware payment, the

61. Caroline Dunn, *Providing Clarity for Lloyd's Customers on Coverage for Cyber Exposures*, Lloyd's of London Market Bull. (July 4, 2019), https://www.lloyds.com/~/media/files/the-market/communications/market-bulletins/2019/07/y5258.pdf.

62. Caroline Dunn, *Update—Providing Clarity for Lloyd's Customers on Coverage for Cyber Exposures*, Lloyd's of London Market Bull. (Jan. 29, 2020), https://www.lloyds.com/~/media/files/the-market/communications/market-bulletins/2020/1/y5277-update--providing-clarity-for-lloyds-customers-on-coverage-for-cyber-exposures.pdf.

63. *See id.*

64. *See* Nat'l Ink & Stitch, LLC v. State Auto. Prop. & Cas. Ins. Co., 435 F. Supp. 3d 679, 680 (D. Md. 2020).

65. *See id.*

66. *See id.*

67. *See id.*

68. *See id.*

server was restored.[69] However, even after a computer security company cleared the server and reinstalled the software and protective software, the system was noticeably slower and less efficient, and it likely concealed remnants of the ransomware virus.[70] Additionally, all the designs stored on the server, the data, were lost.[71] National Ink sought replacement costs for its hardware and software—in other words, its entire computer system.[72]

State Auto denied the claim to reimburse National Ink for a new computer system, finding that the ransomware attack did not constitute a physical loss eligible for reimbursement from the policy, as the loss was "only lost data, an intangible asset, and National Ink could still use its computer system to operate its business."[73] The court disagreed and found that National Ink could seek reimbursement under either "(1) the loss of data and software in its computer system, or (2) the loss of functionality to the computer system itself."[74]

"Maryland follows the law of objective contract interpretation"[75] and "the written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the intent of the parties at the time they entered the contract."[76] The court found that because the policy included items such as "software" and "data" as a definition for "Electronic Media" as "Covered Property," the policy covered National Ink's lost software and data and was not limited to only tangible property.[77] Similarly, the court determined that the terms of the policy did not limit coverage to only those instances where the computer was rendered entirely unusable.[78] Rather, it found that because the definition was compensation for "direct physical loss *or damage*," the lost or decreased functionality would be covered.[79]

The effects of the COVID-19 Pandemic and anticipated increase of silent cyber risks. According to Willis Towers Watson's Report, fifty-seven percent of respondents believe that the COVID-19 pandemic has increased

69. *See id.*
70. *See id.* at 680–81.
71. *See id.*
72. *See id.*
73. *Id.* at 682. The policy provided that "State Auto . . . will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." And the "Computer Coverage endorsement expressly defines 'Covered Property' to include 'Electronic Media and Records (Including Software),' and defines 'Electronic Media and Records' to include: (a) Electronic data processing, recording or storage media such as films, tapes, discs, drums or cells; (b) Data stored on such media. . . ." *Id.* at 681.
74. *Id.* at 682.
75. Sy-Lene of Wash., Inc. v. Starwood Urb. Retail II, LLC, 829 A.2d 540 (Md. 2003).
76. Long v. State, 807 A.2d 1 (Md. 2002).
77. *Nat'l Ink & Stitch, LLC*, 435 F. Supp. 3d at 683–84.
78. *See id.* at 685–86.
79. *See id.* (emphasis added).

silent cyber risks.[80] As stated above, Lloyd's approach is to redress this global problem in the property and casualty market internally: insurers are exposed to silent cyber risks because the presentation of such claims under traditional policies may result in the affirmation of coverage if the policy language is not explicit as to cyber events. Others believe that silent cyber risks can be mitigated by taking such steps as "[i]dentifying classes of business and policy types that are particularly vulnerable to residual silent cyber loss leakage . . . [and] [d]eveloping approaches to pricing and capital setting for silent cyber risk."[81] Jeremy Barnett of Tokio Marine, HCC, stated in October 2019, "We have seen a 6x increase in ransomware attacks over the last four years, and that's mostly small business, and the costs of responding to those ransomware attacks are up almost tenfold over the last two years."[82] While these are the first small steps in managing silent cyber risk, it is reasonable to expect that the leaps to come will be commensurate with the as yet unidentified risks until insurance coverage more firmly focused on cybersecurity and data privacy takes hold.

B. *Biometric Privacy*

The last survey period has been a busy one for the topic of the Illinois Biometric Information Privacy Act (Illinois BIPA).[83] While several other states have biometric privacy acts in place, the Illinois law is the only one that permits a private right of action. Two cases in particular are of note.

1. Federal Jurisdiction

In *Bryant v. Compass Group U.S.A., Inc.*,[84] plaintiff Christine Bryant provided her fingerprint data to Compass Group USA to use the vending machines in the office. Section 15(b) of the Illinois BIPA provides that a person, including employees and customers, must knowingly provide consent for any party to collect and use biometric identifiers and information.[85] The Seventh Circuit held that the plaintiff's informed consent claim alleged more than a mere procedural violation against the defendant, who allegedly collected and distributed plaintiff's biometric information in violation of Section 15(b). The Seventh Circuit explained that depriving a plaintiff's ability to choose whether or not to consent to this use of her biometric information constituted a "concrete and particularized injury-in-fact" that

80. *COVID-19 Has Changed How We Think About Cyber Risk*, Willis Towers Watson (Sept. 23, 2020), https://www.willistowerswatson.com/en-US/Insights/2020/09/covid-19-has-changed-how-we-think-about-cyber-risk.

81. Guy Carpenter, *Silent Cyber No Longer Silent? Part One*, MarshMcLennan (July 22, 2020), https://www.gccapitalideas.com/2020/07/22/silent-cyber-no-longer-silent.

82. *The Problem of Silent Cyber Risk Accumulation*, *supra* note 53.

83. Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14.

84. Bryant v. Compass Grp. USA, Inc., 958 F.3d 617 (7th Cir. 2020).

85. 740 Ill. Comp. Stat. 14/15(b).

was sufficient to confer Article III standing for the Section 15(b) claim.[86] The Seventh Circuit held that the plaintiff did not have Article III standing to pursue her claim under Section 15(a),[87] which requires a private entity to develop a written policy concerning the retention and destruction of biometric data and identifiers. In a clarification opinion issued in June 2020,[88] the Seventh Circuit clarified that 15(a) claims are separate from 15(b) claims and that its opinion was limited to 15(a), as plaintiff alleged a claim under part of 15(a), which requires the "development of a written policy, made available to the public," rather than a claim under a subsequent part of 15(a), "requiring compliance with the established retention schedule and destruction guidelines."[89] For now, the case clarifies what kinds of injuries supply Article III standing for Illinois BIPA claims brought in federal court.

2. Workers' Compensation Issues

In a second case of importance with respect to the Illinois BIPA, an Illinois appellate court investigated the issue of whether Workers' Compensation was the sole remedy for an employee who alleged violations of the Illinois BIPA. In *McDonald v Symphony Bronzeville Park LLC*,[90] the court held that the exclusive remedy of Workers' Compensation does not prohibit employees from bringing an action against an employer for allegedly violating the Illinois BIPA. While acknowledging that the Illinois Supreme Court "has indicated that the [Compensation Act] generally provides the exclusive means by which an employee can recover against an employer for a work-related injury,"[91] the court found that the exception for "not compensable" under the Workers' Compensation Act provided the out for the plaintiff in this case, holding:

> In light of the above discussion, we fail to see how a claim by an employee against an employer for liquidated damages under the Privacy Act—available without any further compensable actual damages being alleged or sustained and designed in part to have a preventative and deterrent effect—represents the type of injury that categorically fits within the purview of the Compensation Act, which is a remedial statute designed to provide financial protection for workers that have sustained an actual injury. As such, we conclude that the exclusivity provisions of the Compensation Act do not bar a claim for

86. *Bryant*, 958 F.3d at 620–21.
87. 740 Ill. Comp. Stat. 14/15(a).
88. Bryant v. Compass Grp. USA, Inc., 2020 WL 6534581 (7th Cir. June 30, 2020).
89. *Id.* at *1.
90. McDonald v Symphony Bronzeville Park LLC, No. 1-19-2398, 2020 WL 5592607, ¶ 14 (Sept. 18, 2020).
91. *Id.* ¶ 18.

statutory, liquidated damages, where an employer is alleged to have violated an employee's statutory privacy rights under the Privacy Act, as such a claim is simply not compensable under the Compensation Act.[92]

3. Conclusion

The Illinois BIPA in recent years has increasingly been the subject of review by the federal and state courts and will continue to be a hot topic in the coming years.

C. *Right to Privacy*

The debate over digital privacy is constantly evolving in the United States. One area that shows this evolution is the employment field, especially when related to criminal proceedings. The evolving intricacies and nuances of digital privacy law can pose a pitfall to the unwary, even over seemingly minor details.

1. *Walker v. Coffey*, No. 19-1067 (3d Cir. 2020).

In *Walker v. Coffey*, the Third Circuit dismissed the plaintiff's claims that the defendants violated 18 U.S.C. Chapter 121, §§ 2701–2712, collectively known as the Stored Communications Act (SCA).[93] The plaintiff had argued that the defendants—two government employees from the Pennsylvania Office of the Attorney General (OAG) that had been conducting a criminal investigation relating to the plaintiff's husband and his company—had "violated provisions of the" SCA "by inducing her employer, Pennsylvania State University (Penn State), to disclose her work emails with a facially invalid subpoena."[94]

Penn State had refused to produce plaintiff's work emails to the defendants without a subpoena.[95] The defendants subsequently presented a subpoena to Penn State; however, as later conceded by the OAG, the "subpoena was incomplete and therefore unenforceable."[96] In response to the subpoena, "Penn State's Assistant General Counsel 'instructed an employee in her office to assist with the production of [her] emails,' choosing to cooperate 'rather than contest the validity of the subpoena or otherwise limit any search.'"[97] A panel of the Third Circuit had previously

92. *Id.* ¶ 27.
93. Walker v. Coffey, 956 F.3d 163, 171 (3d Cir. 2020).
94. *Id.* at 164.
95. *Id.*
96. *Id.* at 165. A panel of the Third Circuit also ruled previously that the subpoena was facially invalid. Walker v. Coffey, 905 F.3d 138, 150 (3d Cir. 2018).
97. *Coffey*, 956 F.3d at 170 (quoting *Coffey*, 905 F.3d at 149–50).

ruled that this action amounted to a voluntary disclosure,[98] rather than one "under coercion resulting from the invalid subpoena,"[99] and as a result was "law of the case."[100] Despite acknowledging that voluntarily disclosing the emails "independent[] of the illegal subpoena [wa]s fatal to her claim," the plaintiff made no attempt to even allege that the disclosure was the result of receipt of the subpoena.[101]

2. *United States v. Moore-Bush*, 963 F.3d 29 (1st Cir. 2020) and *United States v. Yang*, 958 F.3d 851 (9th Cir. 2020)

In 2020, two cases—one from either coast—tested the limits of the right to privacy under the Fourth Amendment as set forth in 2018 by the Supreme Court in *Carpenter v. United States*.[102] *Carpenter* involved the continued monitoring of an individual's movements through cellphone tracking.[103] *United States v. Moore-Bush* involves installing an unwarranted pole camera outside the defendant's home to take constant silent video.[104] The pole camera remained in place for approximately eight months. It was fixed

98. *But see* Theofel v. Farey-Jones, 359 F.3d 1066, 1074–75 (9th Cir. 2004) ("Fighting a subpoena in court is not cheap, and many may be cowed into compliance with even overbroad subpoenas, especially if they are not represented by counsel or have no personal interest at stake. Because defendants procured consent by exploiting a mistake of which they had constructive knowledge, the district court erred by dismissing based on that consent."); Crow v. Uintah Basin Elec. Telecomm., No. 2:09–CV–1010, 2010 WL 5069852, at *3–4 (D. Utah Dec. 6, 2010) (finding that plaintiff stated SCA claim by pleading that defendant obtained consent of communication service provider to access text messages through fraud); Pietrylo v. Hillstone Rest. Grp., No. 06–5754, 2008 WL 6085437, at *4 (D.N.J. July 25, 2008) (denying summary judgment to employer where employee alleged that she provided private social networking site password to employer under fear of adverse employment action, noting that, "[i]f her consent was only given under duress, then the [d]efendants were not 'authorized' under the [SCA]").

99. *Coffey*, 956 F.3d at 165.

100. *Id.* at 170 (quoting *In re* City of Phila. Litig., 158 F.3d 711, 717 (3d Cir. 1998)) ("The law of the case doctrine dictates that 'one panel of an appellate court generally will not reconsider questions that another panel has decided on a prior appeal in the same case.'").

101. *Id.*; *see also* Garcia v. Haskett, No. C 05–3754 CW, 2006 WL 1821232, at *5 (N.D. Cal. June 30, 2006) (holding that, although defendant may have illegally accessed the facility of third-party non-defendant ISP by accessing plaintiff's e-mail account, plaintiff nonetheless failed to state SCA claim because she did not allege that defendant's access of her stored e-mails "was conduct unauthorized by" the ISP); Oce N. Am., Inc. v. MCS Servs., Inc., 748 F. Supp. 2d 481, 487 (D. Md. 2010) (noting that plaintiff failed to state claim under Computer Fraud and Abuse Act (CFAA) where no allegation that "person with the requisite authority . . . denied access such that [d]efendants' access was unauthorized or in excess of its authorization").

102. Carpenter v. United States, 138 S. Ct. 2206 (2018).

103. *See id.* at 2217 (2018) ("[With] the ability to chronicle a person's past movements through the record of his cell phone signals . . . we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through . . . [a cell phone tracking device].").

104. United States v. Moore-Bush, 963 F.3d 29, 33 (1st Cir. 2020).

outside the home and could not record any sound or any information that was inside the house or beyond the capability of an average passerby.[105] The First Circuit found that "[p]ole cameras are a conventional surveillance technique and are easily thought to be a species of surveillance security cameras."[106] As such, pole cameras "are conventional, not new, technology [and] are the exact kind of conventional surveillance technique" permitted in *Carpenter*.[107] Further, the First Circuit found that while the "unrelenting" surveillance existed, it did not infringe a privacy right, as "[a]ny home located on a busy public street is subject to the unrelenting gaze of passersby, yet '[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.'"[108]

In *United States v. Yang*, the issue was whether a right to privacy prohibited photographing and tracking a vehicle with an Automatic License Plate Recognition (ALPR) technology.[109] The defendant was "observed on surveillance cameras driving a rented GMC Yukon and stealing mail out of collection boxes" in Las Vegas, Nevada.[110] The Yukon was rented from a third-party company, and the rental company had attempted to repossess the Yukon as it was several days overdue.[111] The Postal Inspector used ALPR to search a database of license plate photos captured by camera-mounted vehicles to try and track the defendant down using his historical location data.[112] The Ninth Circuit concluded that "Yang has failed to establish that he has a reasonable expectation of privacy in the historical location information of the Yukon, . . . [and t]here is no evidence in the record that Prestige Motors had a policy or practice of allowing lessees to keep cars beyond the rental period and Prestige had made affirmative attempts to repossess the vehicle by activating the GPS unit to locate and disable the vehicle."[113] Of note, the majority opinion does not address whether such historical tracking through a near real-time license plate database would be an invasion of the right to privacy or if it would violate a right to privacy if the database was the target of a hack and bad actors had used it. Rather, the

105. *See id.* 33–35.
106. *Id.* at 31.
107. *Id.* at 40 (internal citations omitted).
108. *Id.* at 42 (quoting California v. Ciraolo, 476 U.S. 207, 213, (1986)).
109. United States v. Yang, 958 F.3d 851, 853 (9th Cir. 2020).
110. *Id.* at 852.
111. *See id.*
112. *See id.*
113. *Id. at* 859 ("In so holding, we find instructive our decisions in *United States v. Dorais*, 241 F.3d 1124, 1129 (9th Cir. 2001) and *United States v. Henderson*, 241 F.3d 638 (9th Cir. 2000) which both analyze a lessee's expectation of privacy in rental property after the expiration of the rental period.").

court relied on the breach of the contractual relationship between the lessor and lessee to determine the right to privacy and avoid the broader issue.

Carpenter can be read to permit certain collection activities that could amount to such a pervasive intrusion as to violate the reasonable expectation of privacy, but courts appear to be resistant to addressing this issue. Both *Moore-Bush* and *Yang* explore this issue solely in the criminal context; it would be interesting to see how the right to privacy fares when these law enforcement practices are subjected to a breach from a hacker.

RECENT DEVELOPMENTS IN EMPLOYMENT AND LABOR LAW

Kate Bally, Adam D. Fuller, Brian C. Miller, Veronica Weinstein, Matthew B. Schiff, Kathryn C. Nadro, and Meredith L. McDonald[*]

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I. INTRODUCTION

The year 2020 has proven to be an eventful year, with the country roiled by a pandemic, and faced with evolving economic and political uncertainty. Developments in employment and labor law, although taking a quieter back seat to these dramatic, country-wide events, have also been significant. Federal and state court decisions, along changes in rules enacted by the U.S. Department of Labor and National Relations Board, continue to shape the practice of employment and labor law.

Following on various federal circuit court and state court decisions, the U.S. Supreme Court extended the protections of Title VII of the Civil Rights Act of 1964 to members of the LGBTQ+ community, holding that discrimination based on sexual orientation and gender identity is discrimination on the basis of sex, and is, therefore, unlawful. Further, the U.S. Department of Labor and the National Labor Relations Board have enacted rules once again narrowing the applicability of the joint employer doctrine. The U.S. Supreme Court has also clarified the issues of causation, sufficiency of pleadings, and limitation of judicial powers in the context of civil-rights complaints, a decision that will likely have broad impact on employment litigation moving forward. Finally, state and federal courts have continued to develop fiduciary law in the areas of recognizing an independent tort of breach of fiduciary duty, determining the appropriate

characterization of shareholder fiduciary claims in an employment context, and the minimum pleading standards for ERISA claims against a university.

II. *BOSTOCK*: SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION

Any assessment of notable employment decisions from the prior year must include a mention of *Bostock v. Clayton County, Georgia*.[1] *Bostock* is a vindication for the LGBTQ+ community pressing for legal recognition under federal law. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination on the basis of race, color, religion, sex, and national origin. The text of Title VII does not specifically enumerate sexual orientation or gender identity as part of "sex," and historically, many courts were unwelcoming to that interpretation.

Many states and local jurisdictions stepped in, offering additional protections on the basis of sexual orientation and gender identity. In addition, a number of circuits and the Equal Employment Opportunities Commission (EEOC) had interpreted Title VII more inclusively. However, there had never been a decisive pronouncement on this issue under federal law. Before this decision, being fired due to sexual orientation or gender identity was permissible under Title VII. *Bostock* changed that.

A. Bostock *Background*

Although it stands as a singular decision, *Bostock* is actually a grouping of three independent claims. The lead plaintiff, Gerald Bostock, was employed by Clayton County, Georgia as a child welfare advocate. During his tenure, the county received national awards for top performance. However, when Mr. Bostock joined up with a gay recreational softball team, the community began to complain, and he was fired for "unbecoming" conduct.[2] The Eleventh Circuit sided with the defense, holding that Title VII did not prohibit discrimination on the basis of sexual orientation.[3]

Over 900 miles away in Calverton, New York, the Altitude Express skydiving school terminated instructor, Donald Zarda, shortly after he mentioned that he was gay. Unlike Mr. Bostock's case, the Second Circuit in Mr. Zarda's case held that Title VII prohibits sexual orientation discrimination.[4]

1. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).
2. *Bostock*, 140 S. Ct. at 1738.
3. Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 F. App'x 964 (11th Cir. 2018), *cert. granted sub nom.* Bostock v. Clayton Cnty., 139 S. Ct. 1599 (2019), *and rev'd and remanded sub nom.* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).
4. Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018), *cert. granted sub nom.* Altitude Exp., Inc. v. Zarda, 139 S. Ct. 1599 (2019), *and aff'd sub nom.* Bostock v. Clayton Cnty.,140 S. Ct. 1731 (2020).

Finally, stretching west about 700 miles to Garden City, Michigan, the R.G. & G.R. Harris Funeral Home terminated the employment of Aimee Stephens after she let them know that although she was born a male, she would be living as a woman. Her employer responded simply, "this is not going to work out," and terminated her employment.[5] The Sixth Circuit held that Title VII prohibits employment discrimination on the basis of transgender status.[6]

Sadly, neither Mr. Zarda nor Ms. Stephens survived to see the U.S. Supreme Court rule on their cases, but on June 15, 2020, the Court reached its decision:

> An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.[7]

The U.S. Supreme Court held that sexual orientation and gender identity discrimination are sex discrimination and unlawful under federal law.

B. *The Winding Road to Recognition*

Although the *Bostock* decision represents a sea change, it was not a conclusion the Court arrived at easily or quickly. A better understanding of the context behind the decision requires consideration of a number of legal arenas.

1. State Law

Leading up to *Bostock*, just over twenty states and a few municipalities prohibited discrimination on the basis of LGBTQ+ identity, but most states offered no employment protections. In other words, in most of the United States prior to June 15, 2020, an employee terminated in the private sector for being gay or transsexual had no legal recourse.

2. Federal Circuit Court Decisions

Some Federal Circuit Courts had previously ruled on the question of whether sex under Title VII includes sexual orientation in the affirmative, including, for example, the Second Circuit in *Zarda v. Altitude Express*[8] (as mentioned) and the Seventh Circuit in *Hively v. Ivy Tech Comm. Coll. of*

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5. *Bostock*, 140 S. Ct. at 1738.

6. Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *cert. granted in part sub nom.* R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019), *aff'd sub nom.* Bostock v. Clayton Cnty., 140 S. Ct. 1731, (2020).

7. *Bostock*, 140 S. Ct. at 1737.

8. Zarda v. Altitude Express, 883 F.3d 100 (2d Cir. 2018) affirmed sub nom. Bostock 2020 WL 3146686.

Ind.[9] In addition, a number of decisions reached a similar conclusion when either the plaintiff linked the adverse employment decision to gender stereotyping, long recognized as a cognizable claim under *Price Waterhouse v. Hopkins*,[10] or alleged that the company took the employee's sex into consideration when reaching the adverse employment decision.[11]

3. The Federal Sector and EEOC

These issues are not isolated to the private sector, and employees within the federal government had also sought legal protection. The EEOC recognized protections on the basis of sexual orientation in a number of decisions from 2011 to 2015.[12] These decisions are consistent with the policy governing federal employees on equal employment, which protects against sexual orientation and gender identity discrimination[13] as well as legal interpretations from the Office of Special Counsel.

Even outside the federal public sector, the EEOC accepted and investigated charges of sex discrimination on the basis of sexual orientation. It did so particularly in the wake of its pronouncement on the matter in *Baldwin v. Foxx* in 2015.[14]

4. Precedent Cited in *Bostock*

In reaching its conclusion in *Bostock*, the Court looked to a number of cases establishing three general principles. First, in cases where the employer painted the discrimination with a different brush, the underlying practice nevertheless "necessarily intentionally discriminates against that individual in part because of sex."[15] Second, Title VII does not require that sex be the primary or sole motivation for the adverse employment action. Finally, comparable treatment across genders, for example firing both gay men and gay women, does not absolve the employer because the decision ultimately returns to one based on that individual's sex.

9. Hively v. Ivy Tech Comm. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017).
10. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
11. *See, e.g.*, Christiansen v. Omnicom Grp., Inc., 852 F.3d 195 (2d Cir. 2017); EEOC v. Boh Bros. Constr. Co., LLC, 731 F.3d 444, 454 (5th Cir. 2013); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285 (3d Cir. 2009); Hall v. BNSF Ry. Co., 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014); TerVeer v. Billington, 34 F. Supp. 3d 100 (D.D.C. 2014); Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002).)
12. See Baldwin v. Foxx, EEOC Doc No. 0120133080, 2015 WL 4397641 (July 15, 2015); Couch v. Dep't of Energy, EEOC Appeal No. 0120131136, 2013 WL 4499198 (Aug. 13, 2013); Culp v. Dep't of Homeland Sec., EEOC Appeal No. 0720130012, 2013 WL 2146756 (May 7, 2013); Castello v. U.S. Postal Serv., EEOC Request No. 0520110649, 2011 WL 6960810 (Dec. 20, 2011); Veretto v. U.S. Postal Serv., EEOC Appeal No. 0120110873, 2011 WL 2663401 (July 1, 2011)).
13. Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 21, 2014).
14. *Baldwin*, 2015 WL 4397641, at *5-7.
15. *Bostock*, 140 S. Ct. at 1734.

In arriving at these conclusions, the Court cited a series of decisions. First, in *Phillips v. Martin Marietta Corp.*,[16] the U.S. Supreme Court held that a defendant ran afoul of Title VII by declining to hire female candidates with young children, notwithstanding that the underlying act of discrimination depended on parenthood and that the defendant preferred hiring female candidates over male.

Second, in *Los Angeles Department of Water & Power v. Manhart*,[17] the Court held that a defendant company's policy that required female employees to make greater contributions to the pension fund than males because females, on average, live longer violated Title VII, although the policy in question regarded men and women the same as groups. Third, in *Oncale v. Sundowner Offshore Services, Inc.*,[18] the male plaintiff alleged sexual harassment perpetuated by male colleagues. The Court held that the gender of the victims and the perpetrators was irrelevant for purposes of adjudicating a sexual harassment claim under Title VII. The Title VII claim of harassment against members of the same sex were viable regardless.

These decisions together led the court to conclude that unlawful sex discrimination may exist regardless of how it is characterized. In addition, sex does not have to be the primary or sole motivation for Title VII liability. Finally, simply treating men and women in a comparable fashion is not dispositive of questions around discrimination.

C. *Practical Implications*

Bostock is groundbreaking, but for the individuals it protects, there may yet be more ground to break. The decision means that employers covered by Title VII should proactively update policies to make clear that they do not discriminate on the basis of sexual orientation and gender identity. Furthermore, training should be modified to account for this legal development.

However, employers with fewer than fifteen employees are not covered by Title VII or this new interpretation of it, creating ongoing vulnerabilities for employees of small employers. *Bostock* also hemmed in the scope of its ruling, making clear that controversial questions about gendered bathrooms remains unresolved at the federal level. Issues beyond employment, in federal law arenas like housing, education, and healthcare, are also beyond the scope of this decision.

Although *Bostock* does not change all aspects of discrimination on the basis of sexual orientation and gender identity, and questions on the topic remain, it is indisputably a landmark decision about which employers and employees must be aware.

16. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).
17. L.A. Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978).
18. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).

III. THE FLUCTUATING JOINT EMPLOYER RULES UNDER THE FLSA AND NLRA

Both the United States Department of Labor ("DOL") and the National Labor Relations Board ("NLRB") revised their joint employer rules in early 2020, narrowing the net on the joint employer doctrine. The DOL's Final Rule was immediately met with a court challenge, resulting in a portion of the DOL's Final Rule being struck down. The NLRB's Final Rule has gone unchallenged. Below is a concise overview of the joint employer doctrine, the rule changes and the current state of the joint employer rules applicable to the Fair Labor Standards Act ("FLSA") and National Labor Relations Act ("NLRA").

A. *The Joint Employer Doctrine*

Under the joint employer doctrine, more than one employer can simultaneously employ an employee if the potential joint employer exercises sufficient control over the terms and conditions of the employee's employment. In these circumstances, the primary employer and potential joint employer are deemed joint employers that are jointly and severally liable for wrongful employment acts, and are jointly responsible for compliance with employment and labor laws.

The joint employer doctrine arises most frequently where the primary employer utilizes contractors, staffing agencies or professional employer organizations ("PEO's"), but can also arise between parent companies and their subsidiaries and franchisors and franchisees.

Application of the joint employer doctrine varies by jurisdiction, but most jurisdictions look to facts bearing on the amount of control the potential joint employer exercises over the employees at issue, the economic realities of the relationship between the primary employer and the potential joint employer, and/or a combination of these facts looking at the totality of the circumstances.

B. *Joint Employment Under the Fair Labor Standards Act*

The FLSA contains expansive definitions of the terms "employer" and "employ."[19] The U.S. Supreme Court took note of this in 1973 when it first explicitly recognized joint employer liability under the FLSA.[20] Over the years, Circuit Courts and the DOL have issued varying interpretations of what it means to be a "joint employer" under the FLSA.

19. *See* 29 U.S.C. § 203(d), (g).
20. *See* Falk v. Brennan, 414 U.S. 190, 195 (1973).

1. The DOL's Final Rule

The DOL's Final Rule, effective March 16, 2020, is meant to narrow and clarify the DOL's interpretation of what it means to be a joint employer under the FLSA.[21] The Final Rule categorizes joint employment in two ways: horizontal joint employment and vertical joint employment.[22] Horizontal joint employment occurs when multiple employers employ an employee to work separate sets of hours in the same workweek.[23] Vertical joint employment, the most common scenario, occurs when one employer employs an employee to work but the potential joint employer concurrently benefits from that work.[24]

The DOL's Final Rule did not substantially change the horizontal joint employment rules. If the employers are disassociated, each employer may disregard all work performed by the employee for the other employer in determining its liability under the FLSA.[25] However, if the employers are sufficiently associated, they are joint employers and must aggregate the hours worked for each for purposes of determining their liability.[26] Employers will generally be sufficiently associated if there is an arrangement between them to share the employee's services, the potential joint employer is acting directly or indirectly in the interest of the primary employer in relation to the employee, or they share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.[27]

The DOL's Final Rule did substantially change the vertical joint employment rules. The Final Rule adopted a four-factor balancing test derived from *Bonnette v. California Health & Welfare Agency*[28] to determine whether the potential joint employer is directly or indirectly controlling the employee, assessing whether the potential joint employer:

1) hires or fires the employee;
2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree;

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21. The DOL's Final Rule can be found at https://www.federalregister.gov/documents/2020/01/16/2019-28343/joint-employer-status-under-the-fair-labor-standards-act.

22. While the DOL does not expressly use the terms "horizontal" and "vertical" in discussing its scenarios in the Final Rule, it recognizes these terms, as used by the courts. *See* Fed. Reg., Joint Employer Status Under the Fair Labor Standards Act (Jan. 16, 2020), https://www.federalregister.gov/d/2019-28343/p-111. For clarity, I use the terms "horizontal" and "vertical" herein.

23. *Id.*

24. *Id.*

25. *See* 29 C.F.R. § 791.2(e); Fact Sheet: Final Rule on Joint Employer Status Under the Fair Labor Standards Act (Jan. 2020), https://www.dol.gov/agencies/whd/flsa/2020-joint-employment/fact-sheet.

26. *See id.*

27. *See id.*

28. 704 F.2d 1465 (9th Cir. 1983).

3) determines the employee's rate and method of payment; and
4) maintains the employee's employment records.[29]

No single factor is dispositive in determining joint employer status under the Final Rule, and additional factors may be considered if they bear on the control exercised by the employer.[30] However, a potential joint employer must actually exercise—directly or indirectly—one or more of the four control factors to become a joint employer under the Final Rule.[31]

Indirect control can be sufficient for joint employer status, but only if the potential joint employer is mandating directions to the primary employer directly controlling the employee.[32] Requests, recommendations or suggestions do not constitute indirect control.[33]

The Final Rule clarifies that economic dependence is not relevant to the determination of vertical joint employer status.[34] It also identifies certain economic realities as irrelevant to the joint employer analysis, including:

1) operating as a franchisor or entering into a brand and supply agreement, or using a similar business model;
2) the potential joint employer's contractual agreements with the primary employer requiring the potential joint employer to meet certain standards to protect the health or safety of the primary's employees or the public or to provide sexual harassment training or policies;
3) the potential joint employer's contractual agreements with the primary employer requiring quality control standards to ensure the consistent quality of the work product, brand, or business reputation; and
4) the potential joint employer's practice of providing the primary employer with a sample employee handbook, or other forms, allowing the potential joint employer to operate a business on its premises (including "store within a store" arrangements), offering an association health plan or association retirement plan to the primary employer or participating in such a plan with the primary employer, jointly participating in an apprenticeship program with the primary employer, or any other similar business practice.[35]

29. 29 C.F.R. § 791.2(a)(1)(i)–(iv).
30. *Id.* § 791.2(a)(3)(i); 791.2(b).
31. 85 Fed. Reg. 2820, 2821 (Jan. 16, 2020) (codified at 29 C.F.R. §§ 791.1–.3).
32. 29 C.F.R. § 791.2(a)(3)(ii).
33. *Id.*
34. *Id.* § 791.2(c).
35. *Id.* § 791(d)(2)–(5).

2. The Final Rule's Vertical Joint Employment Rule Is Vacated

On February 26, 2020 a coalition of state attorneys general filed a complaint for declaratory and injunctive relief in the Southern District of New York challenging the DOL's Final Rule.[36]

On September 8, 2020, Judge Gregory H. Woods, in *New York v. Scalia*, vacated the Final Rule's standard for vertical joint employer liability, finding it "flawed in just about every respect," but upholding the Final Rule's changes to the horizontal joint employer rules.[37]

The Court reasoned that the control-based balancing test for vertical joint employer liability was unduly narrow and contradicted Supreme Court precedent by excluding economic dependence from the analysis and making other characteristics bearing on economic realities irrelevant.[38] The Court also held that the DOL's Final Rule stumbled out of the starting gate by ignoring the broad definitions of "employer", "employee" and "employ" in the FLSA[39] and attempting to distinguish an "employer" from a "joint employer" when the FLSA does not make such a distinction.[40]

The end result of *New York v. Scalia* is that 29 C.F.R. § 791.2(e) is the only portion of 29 C.F.R. § 791.2 that remains in effect today. Thus, if faced with a vertical joint employment scenario, employers should still look to the law in their respective jurisdictions. Depending on the jurisdiction, the amount of control the potential joint employer exercises over the employees at issue, the economic realities of the relationship between the primary employer and the potential joint employer and/or a combination of these facts looking at the totality of the circumstances may be relevant.

C. *Joint Employment Under the National Labor Relations Act*

The joint employer standard under the NLRA has been in flux since the NLRB's decisions in *Browning-Ferris Industries of California, Inc.* ("*BFI*")[41] and *Hy-Brand Industrial Contractors, Ltd.* ("*Hy-Brand*").[42]

In *BFI*, the NLRB adopted an indirect control test and overturned longstanding NLRB precedent that a company's "indirect control over" or "right to control" the essential terms and conditions of employment was insufficient to establish joint employer status under the NLRA.[43] Under

36. New York v. Scalia, No. 1:20-cv-1689, 2020 WL 916967 (S.D.N.Y. Feb. 26, 2020).
37. New York v. Scalia ("Scalia II"), No. 1:20-cv-1689, 2020 WL 5370871, at *34 (S.D.N.Y. Sept. 8, 2020), *appeal docketed*, No. 20-3806 (2d Cir. Nov. 6, 2020).
38. *Id.* at *29–30.
39. *Id.* at *16–17.
40. *Id.* at *17–18.
41. 362 NLRB 1599 (Aug. 27, 2015), *aff'd in part*, *rev'd in part*, Browning-Ferris Indus. of Cal., Inc. v. NLRB, 911 F.3d 1195 (D.C. Cir. 2018).
42. 365 N.L.R.B. No. 156 (Dec. 14, 2017).
43. *See Browning-Ferris*, 362 NLRB at 1613–14.

the indirect control test, a potential joint employer's reserved authority to control and indirectly control can be relevant and determining factors in the joint-employer analysis.[44]

In 2017, *Hy-Brand* reversed course, rejecting the indirect control test and reverting to the traditional joint employer analysis that focused on whether the potential joint employer exercised direct and immediate control over employment terms and conditions.[45] *Hy-Brand* was later vacated in 2018, reinstating *BFI* and the indirect control test.[46]

D. *The NLRB's Final Rule*

On February 26, 2020, the NLRB published its Final Rule on joint employer status under the NLRA, which became effective on April 27, 2020. The Final Rule rejects *BFI's* indirect control test and adopted an approach similar, but not identical to, the DOL's joint employer rule (discussed above).

Under the NLRB's Final Rule, a potential joint employer must "'share or codetermine the employees' essential terms and conditions of employment" considering the totality of the circumstances.[47] To share or codetermine essential terms, the employer must possess and exercise "substantial direct and immediate control" over one or more essential terms and conditions of employment of the primary employer's employees.[48] This is in-line with the traditional joint employer test applied prior to *BFI*, but importantly the Final Rule now defines "substantial direct and immediate control" as "direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees. Such control is not 'substantial' if it is only exercised on a sporadic, isolated, or de minimis basis."[49]

Like the DOL's vacated Final Rule on vertical joint employment, the potential joint employer must actually exercise this direct and immediate control. Indirect control, contractually reserved rights that are not exercised, or control over mandatory subjects of bargaining that are not essential terms and conditions are alone insufficient to create a joint employer relationship.[50] These factors are now only relevant to the extent they evidence an actual exercise of control over essential terms and conditions.[51]

44. *See id.* at 1612, 1614–15.
45. *Hy-Brand*, 365 N.L.R.B. No. 156, slip op. at 1.
46. Hy-Brand Indus. Contractors, Ltd., 366 N.L.R.B. No. 26 (Feb. 26, 2018).
47. 29 C.F.R. § 103.40(a).
48. *Id.*
49. *Id.* § 103.40(d).
50. *Id.* § 103.40(a).
51. *Id.*

E. *The Joint Employer Rules Moving Forward*

The DOL continues to fight for its vertical joint employer rule and has appealed the ruling in *New York v. Scalia* to the Second Circuit Court of Appeals.[52] With an upcoming executive branch administration change, however, this appeal may not make it to ruling unless it is expedited.

The NLRA's Final Rule, by contrast, is the law of the land for the immediate future, but the administration change also injects some uncertainty into its staying power. Stay tuned.

IV. *COMCAST*: A CIVIL RIGHTS DECISION OF QUIET IMPORTANCE

This year, the U.S. Supreme Court spoke on the issues of causation, sufficiency of pleadings, and limitation of judicial powers in the context of civil-rights complaints. The vehicle for these discussions was the Court's opinion, issued on March 23, 2020, in *Comcast Corporation v. National Ass'n of African American-Owned Media.*[53]

A. *Causation: But-For Causation Is the Standard, Unless a Statute Provides Otherwise*

The first lines of *Comcast* emphasize the traditional role of but-for causation: "Few legal principles are better established than the rule requiring a plaintiff to establish causation. In the law of torts, this usually means a plaintiff must first plead and then prove that its injury would not have occurred 'but for' the defendant's unlawful conduct."[54]

The Court then considered whether 42 U.S.C. §1981 (which prohibits racial discrimination in making contracts) "departs from this traditional arrangement" by requiring a lesser standard, such as a "motivating factor" or "some role" standard.[55] Answering that question in the negative, the Court held that but-for causation applies.[56]

But-for causation, the Court explained, is an "ancient and simple" test that "supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated when creating its own new causes of action."[57] Thus, if a federal statute does not supply its own causation test, but-for causation should apply.

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52. *Scalia II*, No. 1:20-cv-1689, 2020 WL 5370871 (S.D.N.Y. Sept. 8, 2020), *appeal docketed*, No. 20-3806 (2d Cir. Nov. 6, 2020).
53. 140 S. Ct. 1009 (2020).
54. *Id.* at 1013.
55. *Id.* at 1013–14. The Court granted certiorari to review a Ninth Circuit decision that found it sufficient to "only plead facts plausibly showing that race played 'some role' in the defendant's decisionmaking process." *Id.* at 1013, *reversing* Nat'l Ass'n of African-Am. Owned Media v. Comcast Corp., 743 F. App'x 106 (9th Cir. 2018).
56. *Comcast*, 140 S. Ct. at 1013.
57. *Id.* at 1014.

The Court looked for "clues from the statute's text, its history, and our precedent" to determine whether §1981 "follows the general rule."[58]

The Court considered the statute's liability standard, which effectively compares the plaintiff's situation to "what would have happened if the plaintiff had been white."[59] This standard "fits naturally with the ordinary rule that a plaintiff must prove but-for causation."[60] Although §1981 itself does not state any causation standard, other provisions of the Civil Rights Act of 1866 (of which §1981 is part), spoke of criminal liability for discrimination "on account of" prior enslavement or "by reason of" race.[61] Those terms, the Court noted, typically indicate a but-for test.[62]

While the Court will "generally presume that Congress legislates against the backdrop of the common law,"[63] the 1866 act made that presumption explicit by stating that "the common law … shall … govern" to the extent the statutory text leaves gaps to be filled.[64] The Court added that its own precedent under §1981 was consistent with the common law's but-for standard.[65]

Thus, "the traditional tools of statutory interpretation" all supported a conclusion that §1981 requires but-for causation.[66]

B. *Pleadings: The Complaint's Factual Content Must Support the Elements of the Claim*

The pleading-sufficiency opinions in *Twombly*[67] and *Iqbal*[68] may rank among the most-cited opinions of all time. According to Westlaw's KeyCite service, over 250,000 opinions cite *Twombly*, and over 225,000 opinions cite *Iqbal*. Those opinions instruct that "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[69] But those opinions did not explicitly address whether a complaint can meet this facial-plausibility standard without alleging facts to support every element of a cause of action.

Comcast answered that question. The Court explained that "to determine what the plaintiff must plausibly allege at the outset of a lawsuit, we usually ask what the plaintiff must prove in the trial at its end."[70] This

58. *Id.*
59. *Id.* at 1015.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 1016
64. 14 Stat. 27, §3.
65. *Comcast*, 140 S. Ct. at 1016.
66. *Id*. at 1019.
67. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
68. Ashcroft v. Iqbal, 556 U.S. 662 (2009).
69. *Iqbal*, at 678 (quoting *Twombly*, 550 U.S. at 570).
70. *Comcast*, 140 S. Ct. at 1014.

requires allegations to support “the essential elements of a claim,” which “[n]ormally, … remain constant through the life of a lawsuit.”[71]

The Court rejected an invitation to apply a more-lenient causation standard to “allow some claims to proceed past the pleading stage” and into discovery.[72] That invitation asked to apply “motivating factor” causation—tracking the standard for Title VII characteristic-based discrimination claims—at the pleading stage. But the Court concluded that adopting a different causation standard “only at the pleadings stage” would be a concept “foreign even to Title VII practice.”[73] The Court also rejected the argument that the *McDonnell Douglas* burden-shifting framework supported a lesser causation standard at the pleading stage.[74] That framework, “a product of Title VII practice,” allows a plaintiff to make a prima facie case of discrimination by indirect proof, putting the burden on the defendant to produce a neutral explanation for its action, after which the plaintiff may challenge the explanation as pretextual.[75]

The Court said, “*McDonnell Douglas* can provide no basis for allowing a complaint to survive a motion to dismiss when it fails to allege essential elements of a plaintiff’s claim.”[76] The accompanying discussion does not clearly answer whether the burden-shifting framework can apply at the pleading stage, and one might ask why a complaint would need to anticipate and negate a defendant’s neutral explanation. Absent further guidance, though, the prudent measure may be to do just that or to provide other factual allegations to satisfy the applicable causation standard.

C. *Separation of Powers: The Court Is Not Interested in “Judicial Adventurism”*

Comcast recognized a “period when the Court often assumed it to be a proper judicial function to provide such remedies as are necessary to make effective a statute’s purpose.”[77] The Court added that “we have come to appreciate that, like substantive federal law itself, private rights of action to enforce federal law must be created by Congress and raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.”[78]

One could argue that these statements deserve less weight because they did not affect the outcome. But these statements nonetheless provide insight into an increased unwillingness to imply remedies from statutes

71. *Id.*
72. *Id.*
73. *Id.*at 1017.
74. *Id.* at 1019 (citing McDonnell Douglas v. Green, 411 U.S. 792 (1973)).
75. *Comcast*, 140 S. Ct. at 1019.
76. *Id.* at 1019.
77. *Id.* at 1015.
78. *Id.*

and constitutional provisions. The Court is not willing to engage in "judicial adventurism" that may "look a good deal more like amending a law than interpreting one."[79]

D. *The Effects of* Comcast *in Employment-Law Contexts*

Although *Comcast* was not an employment-law case, its key principles impact employment litigation. The plaintiff alleged that cable operator Comcast "systematically disfavored" media companies owned by African-Americans in deciding what networks to carry.[80] The elements and analytical framework for a 42 U.S.C. §1981 claim for discrimination in making contracts resembles the elements and analytical framework for other types of discrimination claims, including employment-discrimination claims.

Comcast instructs us that but-for causation is the default causation standard unless a statute's text, its history, and precedent point elsewhere.[81] The Sixth Circuit, for example, has cited *Comcast* to reinforce the application of that default standard to Title VII employment-retaliation claims.[82]

The full effect of *Comcast* on the sufficiency of employment-discrimination pleadings is yet to be determined. The Fourth Circuit's opinion in *Ali v. BC Architects Engineers P.L.C.* may suggest some confusion.[83] That court cited *Comcast* to explain that in a §1981 action, "plaintiff must allege facts making it plausible that, but for race, she would not have suffered the loss of a legally protected right under the statute."[84] Under that court's approach, the "plaintiff need not plead facts demonstrating that she satisfies the *McDonnell Douglas* framework to survive a motion to dismiss."[85]

This wording is ambiguous as to whether pleading facts within the framework would suffice or whether a complaint must more specifically address but-for causation. The circumstances of *Ali* did not require greater clarity because the complaint alleged the employer's non-discriminatory reason for rescinding a promotion and failed to allege facts to negate the reason.[86] Another Fourth Circuit opinion, decided two months earlier, concluded that *Comcast*'s discussion of but-for causation did not affect the application of *McDonnell Douglas* burden-shifting in the summary-judgment context.[87]

79. *Id.* at 1017.
80. *Id.* at 1013.
81. *Id.*
82. Khalaf v. Ford Motor Co., 973 F.3d 469, 489 (6th Cir. 2020). The Sixth Circuit's opinion did not cite *University of Texas Sw. Med. Ctr. v. Nassar*, which had reached the same conclusion. 570 U.S. 338, 362 (2013).
83. No. 19-1582, 2020 WL 6075663 (4th Cir. Oct. 16, 2020).
84. *Id.* at *2.
85. *Id.*
86. *Id.* at *2.
87. Gary v. Facebook Inc., 822 F. App'x175, 180 (4th Cir. 2020).

The Tenth Circuit has reached a similar conclusion.[88] One may deduce that facts that are sufficient at the summary-judgment stage should be sufficient at the pleading stage.

Citing *Comcast*, the Eleventh Circuit has suggested that, for retaliation claims, "§1981's pleading standard for discrimination claims is at least as, if not more, restrictive than Title VII."[89] Practitioners should be aware of arguments that differences in statutory text may result in differences in the pleading standard, even though the discussion in *Comcast* requires more than an implicit "gesture toward the possibility" that a statute imposes a stricter or more lenient pleading standard.[90]

The separation-of-powers discussion in *Comcast* provides useful material for lawyers defending employers.[91] The Supreme Court is unwilling to imply rights, remedies, and procedures that lack a sound basis in statutory text. But lawyers who represent employees can look to *Comcast*'s discussion of incorporating common-law principles as a way to supplement the statute's text when those principles do not conflict with that text.[92]

The unanimity of the decision underscores *Comcast*'s key points. The role of but-for causation as a default standard is well-settled, the *Twombly-Iqbal* pleading standard is firmly in place, and the Court is ever more unlikely to infer private remedies from federal statutes. The possibility of any of that changing over the next few years, if not decades, appears remote.

Comcast did not receive as much attention as cases deemed "blockbuster" by the mass media. But awareness and appreciation of *Comcast* is important for employment-law practitioners on both sides of the bar.

V. RECENT DEVELOPMENTS IN BREACH OF FIDUCIARY DUTY CASES

Over the past year, state and federal courts have developed fiduciary law in the areas of recognizing an independent tort of breach of fiduciary duty, determining the appropriate characterization of shareholder fiduciary claims in an employment context, and the minimum pleading standards for ERISA claims against a university.

In *Plank v. Cherneski*,[93] the Maryland Court of Appeals (Maryland's highest court) clarified twenty years of state law and recognized an independent cause of action for breach of fiduciary duty. In this case, William Plank II and Sanford Fisher, minority members of Trusox, LLC, filed an

88. Mann v. XPO Logistics Freight Inc., 819 F. App'x585, 594 (10th Cir. 2020).
89. Henderson v. City of Birmingham, 826 F. App'x736 (11th Cir. 2020).
90. *Comcast*, 140 S. Ct. at 1016.
91. *Id.* at 1015.
92. *Id.* at 1016.
93. 231 A.3d 436 (Md. 2020).

action alleging direct and derivative claims against James Cherneski, the Company's president, Chief Executive Officer, and majority member. Cherneski is a former professional soccer player who invented and patented a non-slip athletic sock. Fisher and Plank were investors in Trusox, with Cherneski retaining majority ownership and day to day control of the business. The minority members sought monetary and injunctive relief as well as an order dissolving the LLC or appointing a receiver to take over its management. A bench trial was held and resulted in judgment in favor of Cherneski on most of the minority members' claims and the claim for breach of fiduciary duty, but in favor of the minority members on other claims, and awarded Cherneski his attorneys' fees pursuant to a fee-shifting provision in the Trusox operating agreement.[94] The minority members appealed the judgment, and the Court of Appeals affirmed the judgment in its entirety, but answered a certified question raised in the Court of Special Appeals regarding whether Maryland recognizes a stand-alone breach of fiduciary duty claim.

Prior to *Plank*, Maryland law had existed in a state of confusion regarding an independent cause of action for breach of fiduciary duty due to a statement in *Kann v. Kann*, 344 Md. 689, 713, 690 A.2d 509 (1997) that "there is no universal or omnibus tort for the redress of breach of fiduciary duty by any and all fiduciaries."[95] Confusion arose from this statement and required clarification in *Plank*. The *Plank* court stated: "A breach of fiduciary duty may be actionable as an independent cause of action, but not every breach of fiduciary [duty] claim will entitle the plaintiff to damages at law, and the right to a trial by jury."[96] Instead of one single type of breach of fiduciary duty tort under Maryland law, the remedy for a breach of fiduciary duty depends "upon the type of fiduciary relationship, and the remedies provided by law, whether by statute, common law, or contract."[97] Further, the cause of action may be pleaded without limitation as to whether there is another viable cause of action to address the same conduct—a point that had caused considerable confusion prior to *Plank*, with certain lower court decisions stating no independent cause of action for breach of fiduciary duty existed, although the conduct alleged supported a breach of those duties. Having determined that Maryland law does support an independent cause of action for breach of fiduciary duty, the *Plank* court then affirmed the holding of the lower courts that insufficient evidence existed for that claim against Cherneski.

94. *Id*. at 442.
95. *Id*. at 453.
96. *Id*. at 466.
97. *Id*.

In *Robinson v. Langenbach*,[98] the Supreme Court of Missouri reaffirmed the appropriate standards of fiduciary duty for employees who also happen to be shareholders. Joan Robinson, a minority shareholder in the Perma-Jack Company, sued majority shareholders and directors John Langenbach and Judy Lanfri for breach of fiduciary duty. Robinson's claim flowed from her alleged bad-faith removal from her position as company president and her removal from all involvement in the company. Robinson did not sue for lost wages or reinstatement, but rather sued for the loss of financial benefit from her minority stock ownership.[99]

Robinson had been president and treasurer of her family business, Perma-Jack, when her siblings voted to remove her. She was excluded from the company offices and provided no salary, severance pay, benefits or dividends as a shareholder. Following her removal, Robinson sued her siblings and the company for breach of fiduciary duty to her as a shareholder and sought additional remedies such as dissolution and appointment of a receiver. Following a grant of summary judgment to the defendants, a subsequent appeal by Robinson, and on remand a grant of a motion for a jury trial on the breach of fiduciary duty claim. A jury returned a verdict of $390,000 in favor of Robinson on the breach of fiduciary duty claim, and the court in a bench trial determined the defendants committed shareholder oppression against Robinson and her removal was not in good faith.[100]

Defendants appealed, arguing they were entitled to a directed verdict or judgment notwithstanding the verdict on the breach of fiduciary duty claim because it was in actuality a claim for terminating her employment and her status as a shareholder provided no fiduciary-rooted right to continued employment.[101] Defendants asserted that to hold otherwise was an expansion of Missouri employment law for at-will employees. The appellate court affirmed. On appeal to the Missouri Supreme Court, that court affirmed, finding the defendants misunderstood the nature of Robinson's claim, which asserted breach of fiduciary duty against defendants in their roles as her fellow directors and as controlling shareholders.[102] In affirming, the Missouri Supreme Court noted that majority shareholders owe a fiduciary duty to minority shareholders, and individual actions by shareholders against corporate directors and officers are permitted if the injury was to the shareholder herself directly rather than to the corporation.[103] Despite defendants' attempt to characterize Robinson's claim as a wrongful termination claim, Robinson's alleged injury was the deprivation of

98. 599 S.W.3d 167 (Mo. 2020).
99. *Id.* at 173.
100. *Id.* at 175–76.
101. *Id.* at 176.
102. 599 S.W.3d at 176–78.
103. *Id.* at 177.

her rights as minority shareholder, including wrongful expulsion, which permitted a direct action for damages flowing from the deprivation of all financial benefit from her minority stock ownership in the company.

In one case in a series of actions against large universities for alleged mismanagement of section 403(b) retirement-savings plans, the Eighth Circuit Court of Appeals held that employees at Washington University in St. Louis adequately stated a claim for breach of fiduciary duty under the Employee Retirement Income Security Act ("ERISA") for failure to act prudently in maintaining retirement plans.[104] In *Davis v. Washington University in St. Louis*, university employees at alleged the plan was too expensive and offered too many poorly performing investment options. Due to this alleged mismanagement, Washington University breached its fiduciary duties to plan participants under ERISA.[105]

In Washington University's defined-contribution plan, participants retained the ability to select their own investments from a menu of options from two investment firms, Vanguard and Teachers Insurance and Annuity Association of America-College Retirement Equities Fund ("TIAA"). Both firms received compensation for their services through the fees they charged for investment management and for administrative or record-keeping expenses.[106] Plaintiffs alleged two separate breach of fiduciary duty claims: first, that Washington University allowed fees charged by the investment firms to grow out of control, and also that the university kept underperforming investments in the plan for too long. The district court granted Washington University's motion to dismiss both claims, and plaintiffs appealed.[107]

ERISA imposes certain duties on fiduciaries, including a statutory duty of prudence with an objective standard that focuses on the process by which decisions are made, rather than the result of those decisions.[108] A prudently made decision is not actionable even if it leads to a bad outcome. In reversing the district court's dismissal of the breach of fiduciary duty claim on the duty of prudence in permitting excessive fees, the Eighth Circuit noted that this claim was only at the pleading stage and required only enough to infer from the allegations that the process was flawed.[109] In alleging that the fees charged by the plan were too high and Washington University should have negotiated a better deal, the plaintiffs had cleared the pleading hurdle on its breach of fiduciary duty claim. Plaintiffs alleged Washington University had a large pool of assets with $3.8 billion invested and therefore it

104. 960 F.3d 478 (8th Cir. 2020).
105. *Id*. at 481.
106. *Id*. at 482.
107. *Id*.
108. *Id*.
109. *Id*. at 482–83.

had sufficient power in a competitive marketplace for retirement plans to negotiate more aggressively with investment providers. Plaintiffs alleged a "failure of effort [or] competence" in failing to attain better plans either by not negotiating sufficiently or being "asleep at the wheel."[110] The Eighth Circuit held these allegations were sufficient for meeting pleading requirements and reversed the dismissal of this claim.

As to the plaintiffs' remaining breach of fiduciary duty claim for underperforming plans, however, the Eighth Circuit affirmed the district court's dismissal. In this claim, plaintiffs alleged Washington University permitted underperforming and expensive plans to exist as investment options in violation of the duty of prudence.[111] Here, plaintiffs failed to provide a required "meaningful benchmark" for comparison of the allegedly underperforming plans. Absent such an appropriate benchmark, there was no basis to infer that a reasonably prudent fiduciary would have refused to keep these accounts as investment options.[112] The *Davis* case underscores the need for ERISA plaintiffs to ensure they have identified a meaningful benchmark for breach of fiduciary duty claims or risk having their complaints dismissed at the outset.

110. *Id*. at 483.
111. *Id*. at 484.
112. *Id*. at 484–86.

RECENT DEVELOPMENTS IN EXCESS, SURPLUS LINES, AND REINSURANCE LAW

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I. DEVELOPMENTS IN EXCESS AND SURPLUS LINES INSURANCE LAW

Case law affecting the excess and surplus lines insurance industry addressed a number of issues in the last year, including the issue of exhaustion of underlying insurance and what a policyholder must establish in order to trigger coverage for excess insurance policies and the proper allocation of damages for insurance coverage. Key decisions in each area are discussed below.

A. *Exhaustion of Underlying Insurance*

This survey period saw significant developments in a number of different states with respect to the question of the exhaustion of underlying insurance and what a policyholder must establish in order to trigger coverage for excess insurance policies.

First and perhaps most significantly, in *Montrose Chemical Corp. v. Superior Court*,[1] the California Supreme Court addressed the issue of exhaustion among excess insurers on long-tail risks, and determined that the policies at issue allowed vertical—and did not require horizontal—exhaustion. This was the third decision by the California Supreme Court in environmental contamination coverage lawsuits involving Montrose Chemical Corporation, following *Montrose Chemical Corp. v. Superior Court*[2] and *Montrose Chemical Corp. v. Admiral Insurance Co.*[3]

As background, Montrose was sued for causing continuous environmental damage between 1947 and 1982 on account of its manufacturing of the pesticide dichloro-diphenyl-trichlorethane (DDT) at its facility in California. After Montrose was sued by the state and federal governments, it entered into partial consent decrees to resolve various claims and sought reimbursement from its liability insurers. For each policy year from 1961 to 1985, Montrose had purchased primary insurance and multiple layers of excess insurance.

The issue before the California Supreme Court was what Montrose had to establish in order to trigger each layer of excess insurance coverage.[4] Montrose proposed a rule of "vertical exhaustion" or "elective stacking," whereby the insured could "go up" its insurance tower in a given policy period without exhausting lower levels of insurance coverage available in other policy periods.[5] The insurers proposed a rule of "horizontal exhaustion," meaning that Montrose could access an excess policy only after it

1. 460 P.3d 1201 (Cal. 2020) (*Montrose III*).
2. 861 P.2d 1153 (Cal. 1993).
3. 897 P.2d 1 (Cal. 1995).
4. *Montrose III*, 460 P.3d at 1203.
5. *Id.* at 1205–06.

had exhausted other policies with lower attachment points for every year in which the environmental damage occurred.[6]

Ultimately, the California Supreme Court adopted what it articulated as a "vertical exhaustion" theory at the excess level.[7] Thus, an insurer on the risk whose policy is chosen to respond to a loss must pay the full loss up to policy limits and cannot limit its payment to its pro rata share. The carrier may seek reimbursement from other insurers under a contribution or subrogation theory.[8] This allows an insured to pick a second layer excess if the first layer excess underneath it in the same policy year (and other lower layers of coverage in the same policy year) is exhausted, even though first layer excess coverage in other policy years is not exhausted.[9] This also allows an insured to recover under all layers of coverage in one policy year, while shifting from the insured to the administrative burden of seeking reimbursement from other excess insurers.[10]

The court's analysis focused on "other insurance" clauses in the policies.[11] The court first noted that the "other insurance" clauses do not mention the effect of coverage in another policy period.[12] As such, while the other insurance language could reasonably be argued to refer to other insurance in other years of coverage, it could also be read as referring only to other insurance in the same policy year. In light of this, the court found that "the plain language of these clauses is not adequate to resolve this dispute in the insurers' favor."[13]

Looking outside the policies, the court found that the traditional use of other insurance clauses was to prevent multiple recoveries. Citing to both California precedent and a comment in the Restatement of the Law of Liability Insurance, the court noted that such clauses are generally used to address allocation between overlapping concurrent policies, not the allocation of liability amongst successive insurers.[14] Moreover, the court noted that courts in most other states have reached the same conclusion when

6. *Id.* at 1206.
7. *Id.*
8. *Id.* at 1208 & n.5.
9. *Id.* at 1206, 1214.
10. *Id.* at 1214.
11. *Id.* at 1205. The court construed the concept of "other insurance" clauses broadly to include definitions of ultimate net loss and retained limit as used in insuring agreements, loss payable provisions, and limits provisions in addition to clauses more traditionally viewed as "other insurance" clauses—namely, those that are titled "Other Insurance." This functional analysis of the policy language looks to see if it acts like an "other insurance" clause, even if it calls itself something else.
12. *Id.* at 1213.
13. *Id.* at 1210.
14. *Id.* at 1211.

considering successive insurers in long-tail injury claims and the sequence in which an insured can access its insurance across several policy periods.[15]

The court also found that while the "other insurance" clauses were not clear, other language in the policies "strongly suggests that the exhaustion requirements were meant to apply to directly underlying insurance."[16] Specifically, the court noted that each policy states an attachment point, which is the amount of directly underlying coverage, not the amount of coverage in other policy years. Many of the excess policies considered here included schedules which only list one or more directly underlying policies.

Lastly, the court found that any remaining ambiguities must be resolved "to protect the objectively reasonable expectations of the insured."[17] To that end the court found that "[c]onsideration of the parties' reasonable expectations favors a rule of vertical rather than horizontal exhaustion."[18]

This decision has significant practical consequences in a large exposure matter such as a suit seeking damages for remediation of environmental contamination,[19] where an excess insurer, or a tower of excess insurers, might be selected to pay a large environmental contamination loss and then seek contribution from other excess insurers. However, the practical consequences are not as significant in a matter involving an aggregate of comparatively smaller claims such as a large number of asbestos bodily injury claims. In those mass tort cases, there will be a continual pursuit of reimbursement by the insurer selected to obtain contribution as each claim is paid, so it would be unusual for a single loss to involve more than one layer of coverage in the year in question.

Similarly, in *Pfizer, Inc. v. U.S. Specialty Insurance Co.*,[20] a Delaware court considered whether, on account of an "Exhaustion Clause" in a Directors & Officers excess insurance policy, "a settlement between an insured and an insurer in satisfaction of a policy but for less than the policy limit affects attachment of excess insurers higher in a tower."[21] After reviewing the two general approaches, the court concluded:

> Delaware recognizes no business reason for an excess insurer to care whether the payment in satisfaction of a policy below was for the policy's full dollar value, so long as the protections afforded by all underlying insurance policies

15. *Id.* at 1211–12.
16. *Id.* at 1212.
17. *Id.* at 1213.
18. *Id.*
19. In *Montrose III* the loss was approximately $200,000,000 in expenditures and anticipated future liability. *Id.* at 1204.
20. C.A. No. N18C-01-310 PRW CCLD, 2020 WL 5088075 (Del. Super. Ct., Sept. 1, 2020).
21. *Id.* at *3. The "Exhaustion Clause" at issue required that the underlying policies be "exhausted by actual payment of claims." *Id.* at *4.

> are extinguished and the excess insurer's liability begins only at its own attachment point.[22]

Accordingly, the court held that "[a]n excess carrier cannot avoid coverage under an exhaustion clause due to a settlement below unless that settlement works some additional exposure or prejudice on the excess carrier above the attachment point."[23] As such, the policyholder's settlement with a lower level excess insurer for less than that insurer's policy limit did not create a "gap" relieving the upper layer excess insurer of its payment obligations.

B. *Allocation of Damages for Insurance*

This survey period also saw a number of notable cases from different states addressing the issue how damages should be allocated for purposes of determining triggered insurance coverage.

In *Lubrizol Advanced Materials, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA*,[24] the Supreme Court of Ohio considered the following certified question from the United States District Court for the Northern District of Ohio:

> Whether an insured is permitted to seek full and complete indemnity, under a single policy providing coverage for "those sums" the insured becomes legally obligated to pay because of property damage that takes place during the policy period, when the property damage occurred over multiple policy periods.[25]

The policyholder argued that court should apply an "all sums" allocation approach outlined in prior decisions relating to insurance coverage for environmental claims.[26] The insurance carrier argued that because the policy referred to "those sums" and the harm was discrete, the "all sums" allocation was not appropriate.[27] Instead, the carrier argued for use of an "actual" or "pro rata" allocation method.[28]

As an initial matter, the Supreme Court of Ohio "refuse[d] to engage in a hypertechnical grammar analysis to determine whether the phrase 'those sums' is always more limited than 'all sums' and would always lead to a different allocation[,]" and "decline[d] to set a bright-line rule based merely on a party's use of the word 'those' instead of 'all.'"[29] Instead, the court looked to the specific facts and circumstances. Because the court found that

22. *Id.*
23. *Id.*
24. 160 N.E.3d 701 (Ohio 2020).
25. *Id.* at 703.
26. *Id.*
27. *Id.* at 704.
28. *Id.*
29. *Id.*

"the time of damage is known or knowable," it concluded that "the operative contract language is not the reference to policy coverage for 'those sums' but rather to injury or damage 'that takes place during the Policy Period.'"[30] On that basis, the court concluded that "there is no reason to allocate liability across multiple insurers and policy periods if the injury or damage for which liability coverage is sought occurred at a discernible time" and that, instead, "the insurer who provided coverage for that time period should be liable, to the extent of its coverage, for the claim."[31]

Another significant decision came from Connecticut. In *R.T. Vanderbilt Company, Inc v. Hartford Accident & Indemnity Co.*,[32] the Connecticut Supreme Court affirmed the "unavailability of insurance" exception to time-on-the-risk pro rata allocation, holding that insureds should not be responsible for paying their pro-rata share of damages for periods of no insurance where insurance against that risk was unavailable in the marketplace.[33] The court also affirmed—in what it described as a case of first impression nationally—that an "occupational disease" exclusion is not limited to claims brought by the insured's own employees, but rather can apply to claims brought by individuals who used the insured's products while working for other employers.[34]

This dispute arose from a number of underlying tort claims alleging that exposure to contaminated talc and silica mined and sold by the insured caused asbestos-related disease and bodily injury.[35] The insured brought a declaratory judgment action against 30 insurers seeking to clarify its rights and obligations under various primary and excess insurance policies issued between 1948 and 2008.[36] The trial court found that Connecticut law called for a pro rata "time on the risk" approach to apportioning long-tail liability and adopted the "continuous trigger" exposure theory.[37] The trial court also adopted the "unavailability of insurance" exception to the "time on the risk" rule, under which insureds would not bear responsibility for periods of no insurance if they could establish that insurance coverage for the alleged loss was "unavailable" to them in the market.[38] Finally the trial court ruled that the pollution exclusions at issue were ambiguous regarding their applicability to asbestos-related claims, and that the occupational

30. *Id.* at 705–06.
31. *Id.* at 706.
32. 216 A.3d 629 (Conn. 2019).
33. *Id.* at 637.
34. *Id.* at 641.
35. *Id.* at 633.
36. *Id.*
37. *Id.* at 635.
38. *Id.*

disease exclusions at issue were unambiguous, but that they applied only to claims brought by the insured's own employees.[39]

On appeal, the intermediate appellate court upheld the trial court's adoption of the continuous trigger theory and the unavailability of insurance exception, and agreed with its conclusion that the pollution exclusions were ambiguous and did not bar coverage.[40] However, the court disagreed with the trial court's ruling on the occupational disease exclusions, concluding that those exclusions unambiguously barred coverage for occupational disease claims brought by both employees and nonemployees who developed an occupational disease while using the insured's product.[41]

The Connecticut Supreme Court affirmed all aspects of the intermediate appellate court's decision. With respect to the adoption of the "continuous trigger" theory and the "unavailability of insurance" exception, the court found that the lower appellate court's "well reasoned opinion more than sufficiently addresses these certified questions" and therefore adopted those parts of the lower court's opinion as its own statement of the law.[42] In doing so the court blessed the lower court's finding that damages and defense costs should not be allocated to any period where insurance was unavailable in the market, but that the insured bears the burden of proving that it was unable to obtain coverage at times when it was generally available in the marketplace.[43] The court also adopted the lower court's recognition of the potential for an "equitable exception" to the unavailability rule.[44] In the asbestos context presented by the *Vanderbilt* matter, such an exception could arise if the insured had continued to manufacture or distribute asbestos-containing products after it knew the products were hazardous, although notably the court did not find those facts in this case.

Lastly, in *Rossello v. Zurich American Insurance Co.*,[45] the Maryland Court of Appeals rejected "all sums" allocation and adopted a "pro rata" approach to allocating damages in a long-tail case.

Rossello was exposed to asbestos at his workplace in 1974 while the insured mechanical contractor was performing construction and renovations in the same building. Rossello inhaled asbestos originating from construction products used by the insured. The asbestos installer was insured under four general liability policies from 1974 to 1977 and not thereafter. The insured ceased operations in 1976. The insurer agreed that 1985 was the last practicable year that the insured could have purchased liability

39. *Id.* at 635–36.
40. *Id.* at 636.
41. *Id.*
42. *Id.* at 637.
43. *Id.*
44. *Id.*
45. 226 A.3d 444 (Md. 2020).

insurance covering asbestos injuries. Rossello was diagnosed with mesothelioma in 2013.

Rossello obtained a $2,682,847.26 net judgment against the insured asbestos installer. The trial court issued a writ of garnishment requiring the asbestos installer's insurer to satisfy the judgment. The court stayed the garnishment, and the parties filed cross-motions for summary judgment regarding how to allocate loss among various triggered insurance policies and periods of no insurance. Rossello argued that the insurer was liable for the entirety of the judgment on an "all sums" or joint-and-several liability theory. The insurer argued for a pro rata approach with allocation to the insured for uninsured periods, alternatively through 2013 (the year of manifestation and diagnosis) or 1985 (the last year that insurance covering this type of liability could have been purchased).

The trial court held that damages must be allocated on a pro rata, time-on-the-risk basis across all insured and insurable periods triggered by the injuries—1974 to 1985. Rossello appealed, and the court of appeals agreed with the insurer and adopted the "majority rule of pro rata allocation."[46]

In reaching this decision the court first determined that a policy is "triggered" when an actual injury occurs, and that a progressive injury can thus trigger multiple policies.[47] The court's analysis acknowledged and defined the four distinct approaches to determining when coverage is triggered: "manifestation," "exposure," "continuous," and "injury-in-fact."[48] The court noted that earlier Maryland cases had "disapproved of a trigger theory based exclusively on manifestation,"[49] and had adopted "injury in fact" as the appropriate trigger in asbestos-in-building cases. The court also acknowledged that it had previously held that a continuing injury triggers coverage under all applicable policy periods.[50] Notably, the court cautioned that although its decision "referred to various trigger theories by name, we must stress that courts and litigants should be careful when referring to such delineated theories. The nomenclature and reference of specific trigger models 'can be deceiving,' because a court must apply policy language to the factual context before it."[51]

The court's next concern was how to allocate loss among the triggered policies. The claimant argued that the policies' promise to pay "'all sums which the insured became legally obligated to pay'" required an "all sums" or joint-and-several liability on the part of the insurers. The insurer urged the court to follow prior authority that had relied on policy language that

46. *Id.* at 452.
47. *Id.* at 456.
48. *Id.* at 452–53.
49. *Id.* at 454.
50. *Id.* (citing Riley v. USAA, 899 A.2d 819 (Md. 2006)).
51. *Id.* at 456 (citation omitted).

referred to bodily injury "'which occurs during the policy period'" and the insuring agreement language which limited sums to be paid for loss "'to which this insurance applies . . . .'"[52]

The court began by noting that the Maryland Special Court of Appeals had previously held that indemnity was to be prorated among all carriers based on their time on the risk.[53] The court then adopted the reasoning of that precedent, and in doing so adopted the pro rata approach to allocation for bodily injury under the general liability policies.[54] The court also rejected the insurer's argument that this precedent was distinguishable, finding that there was no meaningful difference in the policy language as it applied to property damage versus bodily injury.[55] Likewise, the court rejected the argument that "pro rata" allocation was "unfair, unworkable and causes unnecessary complication," finding that proration was easy to administer, efficient and consistent with the reasonable expectations of the contracting parties.[56]

Finally the court addressed the unavailability of insurance argument. The parties here had agreed that general liability asbestos coverage was not commercially available after 1985. A question remained for the time period 1977 to 1985. The insured presented no evidence to rebut the assumption that general liability coverage was available during that time. The court found that the insured's decision not to buy insurance does not render coverage unavailable for purposes of pro rata allocation.[57] Therefore the relevant period for allocation of the judgment was twelve years, from 1974 (date of first exposure) to 1985 (the last year the insured could have purchased insurance for asbestos-related damages), and the insurer was liable for its pro rata share of damages in its four years of coverage.[58]

II. DEVELOPMENTS IN REINSURANCE LAW

In 2020, courts continued to affirm the strong federal public policy in favor of arbitration. The law concerning the relationship among the Federal Arbitration Act,[59] the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[60] and the McCarran-Ferguson Act[61] remains

52. *Id.* at 456–59.
53. *Id.* at 456–57.
54. *Id.* at 457.
55. *Id.* at 461.
56. *Id.* at 462.
57. *Id.* at 463.
58. *Id.*
59. 9 U.S.C. §§ 1–16.
60. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517.
61. 15 U.S.C. §§ 1011–1015.

unsettled. Courts in the Second Circuit decided a pair of cases that appear to confirm that courts will continue to assess reinsurers' obligations to reimburse cedents for expenses in excess of limits and to follow their cedents' settlements consistent with the terms of the particular contracts at issue, rather than instituting a blanket rule of law concerning those issues. The courts also provided some further guidance concerning when vacatur of an arbitration award might be appropriate, affirming the arbitrator's discretion concerning the conduct of arbitration proceedings (such as the refusal to hear certain evidence) and providing further clarity on an arbitrator's disclosure obligations and the concept of "manifest disregard of the law." Finally, while 2019 heralded a potential trend toward the increased discoverability of reinsurance information, the decisions in 2020 affirmed that the scope of discoverability of reinsurance-related information by underlying policyholders remains limited.

A. *Arbitrability*

In *Nationwide Agribusiness Insurance Co. v. Hartford Steam Boiler Inspection & Insurance Co.*, the Central District of California granted the defendant's motion to compel arbitration, staying the litigation pending that arbitration.[62] The arbitration clause in the reinsurance agreement at issue contained an initial paragraph specifically directed toward disputes in which the parties agreed that reinsurance coverage existed but disagreed on the amount of that coverage and a second paragraph that provided that "all disputes or differences arising out of the interpretation" of the reinsurance agreement would be submitted to arbitration.[63] The ceding company argued that the first paragraph of the arbitration clause was a gatekeeping provision that set forth the types of claims that were arbitrable under the agreement and that the second paragraph further restricted the scope of the arbitration clause to disputes involving those claims that fell within the terms of the first paragraph *and* arose out of the interpretation of the reinsurance agreement.[64]

The court disagreed, noting that although the language of the agreement was unique, the plaintiff's interpretation would lead to an absurd result: that arbitrators would decide interpretation of law under the reinsurance agreement while the judiciary would determine issues of fact.[65] This absurdity, along with consideration of United States Supreme Court precedent

62. No. 5:19-cv-00531-JAK-KK, slip op. at 6 (C.D. Cal. Oct. 18, 2019).
63. *Id.* at 3–4.
64. *Id.* at 6–7.
65. *Id.* at 6.

that "arbitrable disputes should be determined in favor of arbitration," led the court to compel arbitration.[66] The court also stayed the litigation.[67]

PB Life & Annuity Co. v. Universal Life Insurance Co.[68] involved a dispute over whether assets in a reinsurance trust account complied with applicable insurance law. The federal district court for the Southern District of New York ordered the parties to arbitrate under the arbitration provision of the reinsurance agreement.[69]

The parties had entered into a coinsurance reinsurance agreement.[70] The credit for reinsurance article of the reinsurance agreement required that a reinsurance trust fund be established to ensure that the cedent received full credit for reinsurance. The trust fund had to comply with the laws of each party's domiciliary jurisdiction.[71] The parties entered into a reinsurance trust agreement as required by the reinsurance agreement.[72] A dispute arose over whether the assets the reinsurer placed in the trust agreement qualified under Puerto Rico law.[73] Allegedly, over sixty-five percent of the trust assets were loan obligations of the reinsurer's affiliated entities, which violated a ten percent limit on investing in assets of affiliated entities.[74]

The cedent demanded arbitration, and the reinsurer brought the court action.[75] The cedent moved to compel arbitration and the reinsurer sought an injunction precluding arbitration.[76] In granting the motion to compel and denying the injunction request, the court ultimately determined that the arbitration provision contained in the reinsurance agreement was broad enough to leave to the arbitrators the question whether disputes under the trust agreement came within its scope.[77] The arbitration provision in that agreement provided that:

> all disputes and differences between the Parties arising under or relating to this Reinsurance Agreement . . . shall be decided by arbitration . . . [and] the arbitration proceeding shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association.[78]

66. *Id.* (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 25 (1983)).
67. *Id.*
68. No. 20-cv-2284 (LJL), 2020 WL 2476170 (S.D.N.Y. May 12, 2020).
69. *Id.* at *11.
70. *Id.* at *1.
71. *Id.* at *2.
72. *Id.* at *3.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at *4.
77. *Id.* at *5.
78. *Id.* at *4–5.

The entire agreement clause in the reinsurance agreement clearly incorporated the trust agreement:

> This Reinsurance Agreement, the Reinsurance Trust Agreement and the Comfort Trust Agreement supersede all prior agreements, whether written or oral, between the Parties with respect to its subject matter and constitutes . . . a complete and exclusive statement of the terms of the agreement between the Parties with respect to its subject matter.[79]

The court found that the reinsurance agreement, which contained the binding arbitration clause, remained in effect and that the trust agreement did not amend or replace the reinsurance agreement.[80] The ruling noted that the agreements were meant to be read in conjunction with each other.[81] The decision rejected the notion that the trust agreement could replace the reinsurance agreement and its arbitration clause, and agreed with the cedent that such an argument would lead to an absurd result.[82]

The court then determined that the question of arbitrability should be left to the arbitrators.[83] The reinsurer argued that the dispute about the trust agreement assets did not fall within the scope of the reinsurance agreement's arbitration clause.[84] The court held that this was a question of arbitrability, which fell within the broad scope of the arbitration clause.[85] The court also commented that the American Arbitration Association rules, which were incorporated into the arbitration clause, vested the arbitrator with the power to determine questions of arbitrability.[86] Accordingly, the court granted the cedent's motion to compel arbitration and denied the reinsurer's motion to enjoin arbitration.[87]

In *Lomonico v. Foulke Management Corp.*,[88] the U.S. District Court for the District of New Jersey granted a motion to compel arbitration, denied a motion to dismiss, and stayed the case pending arbitration. *Lomonico* involved a situation where the plaintiff had signed a series of documents related to a deal whereby he would trade in his car to the defendant car dealership and buy or lease a car from that same dealership.[89] The plaintiff did not review the documents before he signed them, nor did the defendant advise the plaintiff of the terms of the documents.[90] When

79. *Id.* at *2.
80. *Id.* at *7.
81. *Id.* at *8.
82. *Id.*
83. *Id.* at *11.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. Civil No. 18-11511 (RBK/AMD), 2020 WL 831134 (D.N.J. Feb. 20, 2020).
89. *Id.* at *1.
90. *Id.*

the plaintiff sought to avoid the deal, the car dealership alleged that the documents contained a valid arbitration provision and moved to compel arbitration of the dispute.[91] The plaintiff argued that he was unaware of the arbitration provision and that he was entitled to discovery "to resolve the dispute over whether [he] ever received copies of the documents he signed."[92] The court disagreed, stating that plaintiff would "need to come forward with 'reliable evidence that is more than a naked assertion . . . that [he] did not intend to be bound by the arbitration agreement,'" and finding that he had not done so.[93]

The plaintiff also challenged arbitrability on the ground that he was not provided signed copies of the documents, making the entire contract void under the New Jersey Consumer Fraud Act.[94] The court again disagreed because (1) the arbitration provision contained a delegation clause, and (2) the plaintiff challenged the validity of the entire agreement, rather than the arbitration provision itself.[95]

In *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*,[96] the United States Supreme Court considered whether the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention) precluded the application of domestic equitable estoppel doctrines. ThyssenKrupp Stainless USA entered into three contracts with F.L. Industries for the construction of cold rolling mills at an Alabama steel mill.[97] All of the contracts contained identical arbitration clauses.[98] F.L. Industries entered into a subcontract with GE Energy to provide motors for the mills.[99] Soon after delivery of the motors, Outokumpu Stainless USA acquired the plant from the previous owners.

After the acquisition, the motors failed, and Outokumpu brought suit against GE for breach of contract.[100] GE moved to dismiss the suit and compel arbitration under the original contracts signed by ThyssenKrupp and F.L. Industries.[101] The lower court issued an order compelling arbitration, but the Eleventh Circuit vacated, holding that arbitration could not be compelled under the Convention between two parties unless those parties actually signed the agreement to arbitrate.[102] The court based its ruling

91. *Id.* at *3.
92. *Id.* at *4.
93. *Id.* citing Andre v. Dollar Tree Stores, Inc., No. 18-142, 2018 WL 3323825 (D. Del. July 6, 2018)).
94. *Id.* (citing N.J. Stat. Ann. § 56:8–2.22).
95. *Id.* at *6.
96. 140 S. Ct. 1637 (2020).
97. *Id.* at 1642.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 1642–43.

on the fact that the Convention explicitly mentioned compelling arbitration only between signatories to a written contract.[103] Thus, the Eleventh Circuit ruled that GE could not rely on the state doctrine of equitable estoppel to enforce the arbitration clause between two non-signatories because the Convention was silent on that issue.[104]

The Supreme Court reversed, holding that the Convention does not conflict with the enforcement of arbitration agreements by non-signatories under domestic-law equitable estoppel doctrines.[105] Because the Convention only specifically addresses enforcement by signatories, it relies on contracting states to turn to domestic law to enforce arbitration in situations where the Convention is silent.[106] The Court remanded the case for consideration of whether equitable estoppel would compel the non-signatories to arbitration.[107]

In *Certain Underwriters at Lloyd's, London v. Century Indemnity Co.*,[108] a dispute arose over the billing of molestation losses. After settling with its insured, the cedent allocated all of the molestation claim payments to the policy in effect at the time of the first act of molestation as agreed in the settlement agreement, and then accumulated the payments allocated to each policy period and billed them as a single loss occurrence.[109] An arbitration resolved the initial billing dispute in favor of the reinsurer, holding that the allocation under the settlement agreement was not the product of a reasonable and business-like investigation.[110] The ceding company then rebilled the same losses, but this time spread the loss payments across each of the policies in effect during the time of the abuse and then accumulated all the payments for each policy period and billed them as a single loss occurrence.[111]

After the first arbitration, the final award (and a clarification) was confirmed and a judgment was entered.[112] After the rebilling, the reinsurer refused to pay based on the judgment confirming the original arbitration award.[113] The cedent demanded arbitration and moved to compel arbitration.[114] The reinsurer moved to enforce the judgment, to enjoin the second arbitration demand, and to dismiss the petition to compel arbitration.[115]

103. *Id.*
104. *Id.* at 1643.
105. *Id.* at 1645.
106. *Id.*
107. *Id.* at 1647–48.
108. Nos. 18-cv-12041, 19-cv-11056, 2020 WL 1083360 (D. Mass. Mar. 6, 2020).
109. *Id.* at *2.
110. *Id.*
111. *Id.* at *3.
112. *Id.*
113. *Id.* at *2.
114. *Id.* at *3.
115. *Id.* at 6.

The court granted the reinsurer's motion to enforce the judgment in part, and denied the motion to enjoin the second arbitration and the motion to dismiss the petition to compel arbitration.[116] In so doing, the court addressed the preclusive nature of the first arbitration award (and judgment) and whether the second arbitration panel or the court should determine the preclusive effect of the first award.

The court held that the preclusive effect of a prior arbitration on a subsequent arbitration is an arbitrable dispute.[117] Here, said the court, the cedent was seeking to determine whether the preclusive scope of the prior arbitration decision encompassed the rebilling that was done without allocating the loss payments under the terms of the settlement agreement.[118] Thus, the court found that the issue was not whether the ceding company was attacking the first arbitration, but whether the original arbitration award precluded arbitration of the rebilling.

The court found that nothing in the arbitration award indicated that it was intended to have a prospective effect over new billings or that it foreclosed submitting the reinsurance billings in a new format.[119] The court stated that in concluding that the billings were improper, the arbitration award turned on the unreasonableness of the settlement agreement allocation and did not address all other issues.[120] Thus, the court held that the preclusive effect of the arbitration award was an issue for the subsequent arbitration panel to resolve.

The court applied the same principles to the reinsurer's motion to dismiss the petition to compel the second arbitration.[121] The court found that the cedent was an aggrieved party because there was no umpire appointed and there was an ongoing dispute between the parties regarding the appointment of the arbitrators.[122]

There was also an issue as to how many arbitration panels should be formed. The court declined to direct the formation of multiple panels because that issue was a procedural matter for the arbitrators to decide.[123] As the court concluded, "[i]t will be up to the arbitrator to determine whether multiple arbitration panels should be formed."[124]

116. *Id.*
117. *Id.* at *4.
118. *Id.*
119. *Id.* at *4.
120. *Id.*
121. *See id.* at *6.
122. *Id.* at *5.
123. *Id.* at *6.
124. *Id.*

B. *Consolidation*

In *Pennsylvania National Mutual Casualty Insurance Co. v. New England Reinsurance Corp.*,[125] the Third Circuit affirmed the decision of the United States District Court for the Middle District of Pennsylvania to convene a new arbitration panel to hear the parties' dispute, rather than sending the parties back to a prior panel.[126] Penn National entered into several treaties with multiple reinsurance companies, including Everest Reinsurance Company.[127] All of the treaties required arbitration of disputes.[128] In addition, the arbitration clauses provided that "[i]f more than one reinsurer is involved in the same dispute, all such Reinsurers shall constitute and act as one party . . . ."[129]

A dispute arose between Penn National and Everest, and Penn National demanded arbitration.[130] Everest refused to participate, claiming that the dispute should have been consolidated with an earlier arbitration.[131] Penn National brought suit to compel Everest to participate in the newly-demanded arbitration and Everest cross-moved to require referral to the prior panel it claimed should hear the dispute.[132]

The district court ruled that courts were only permitted to decide "gateway" matters where there was a valid arbitration clause, and noted that Everest could request the same relief—referral to the earlier panel—from the newly constituted panel.[133] Thus, the court granted Penn National's motion to compel the newer arbitration and denied Everest's motion to refer the matter to the previous panel.[134] The Third Circuit affirmed the district court's decision, finding that if it were to send the consolidation question to the earlier panel, it would be prejudging that question in contravention of the express terms of the arbitration agreement.[135]

C. *Discoverability of Reinsurance Information*

In *Mid-State Automotive, Inc. v. Harco National Insurance Co.*,[136] an insured brought suit in federal court against its insurer alleging breach of contract

125. 794 F. App'x 213 (3d Cir. 2019). Given the brevity of the Third Circuit's decision, some of the facts and elements of the district court's decision discussed herein have been obtained from the district court's opinion. *Pa. Nat'l Mut. Cas. Ins. Co. v. Everest Reinsurance Co.*, 2019 WL 1205297(M.D. Pa. Mar. 14, 2019).
126. *Pa. Nat'l Mut. Cas. Ins. Co.*, 2019 WL 1205297, at *1.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at *2.
132. *See id.* at *3.
133. *Id.* at *2.
134. *Id.*
135. Pa. Nat'l Mut. Cas. Ins. Co. v. Everest Reins. Co., 794 F. App'x 213, 215 (3d Cir. 2019).
136. No. 2:19-cv-00407, 2020 WL 1488741 (S.D. W. Va. Mar. 25, 2020).

and bad faith after a fire loss at the insured's car dealership.[137] The parties were engaged in a discovery dispute centered on the insurer's redactions of reinsurance information included in documents that the insurer had produced.[138] The insured moved to compel full production of the reinsurance information, claiming that it was "highly relevant" to the insurer's allegedly unfair claims settlement practices.[139] The court agreed.[140]

Reinsurance information, the court reasoned, is relevant where it sheds lights on the insurer's state of mind in handling claims.[141] In particular, prior deposition testimony revealed that the insurer had been preparing ongoing "reinsurance reports" for its reinsurer's benefit that contained summaries of the status of the fire loss claim and the insurer's investigation.[142] Because those reports presumably contained the insurer's assessment of its claims handling, the court held that this type of reinsurance information was relevant to establishing whether the insurer acted unreasonably in denying coverage.[143]

The federal district court for the District of Idaho refused to permit discovery into communications between an insurer and its reinsurer in *Idahoan Foods, LLC v. Allied World Assurance Co. (US), Inc.*[144] In *Idahoan Foods*, an Idaho food processing company was a party to a contract with a potato company to produce potato flakes and slices.[145] The food processor suffered major losses when a fire at the potato company's facility destroyed nearly one million hundred-weight pounds of potatoes.[146] As a result, the food processor produced 16 million fewer pounds of refined potato products than it had forecasted for fiscal year 2017.[147] The food processor filed a claim under its policy with its insurer for business income and extra expense coverage due to the loss.[148]

After the insurer denied a majority of the food processor's claim, the food processor filed suit in Idaho federal court to recover the additional losses it believed to be covered under its insurance policy.[149] During discovery, the insured sought to compel production of the insurer's communications with its reinsurer.[150] The court held that the reinsurance contracts themselves

137. *Id.* at *1.
138. *Id.* at *8.
139. *Id.* at *7.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. No. 4:18-cv-00273-DCN, 2020 WL 1948823 (D. Idaho Apr. 22, 2020).
145. *Id.* at *1.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *See Id.*

were discoverable, but any communications and discussions between the insurer and the reinsurer were "too far removed" for purposes of establishing breach of contract and bad faith by the insurer.[151] There is little reason, the court held, "to involve another party [the reinsurer] that had essentially an 'arms-length' transaction with [the insurer]."[152] The court ordered the insured to produce copies of its reinsurance contract, but denied the motion to compel production of communications and related information between the insurer and reinsurer.[153]

D. *Enforceability of Foreign Arbitral Awards*

In *Cvoro v. Carnival Corp.*,[154] plaintiff Cvoro developed carpal tunnel syndrome while working on a Carnival Cruise ship sailing under a Panamanian flag. Carnival sent her home to Serbia and arranged for follow-up care.[155] During the follow-up care, Cvoro was permanently injured, and sought arbitration in Monaco under the terms of the seafarer's employment agreement she had signed with Carnival.[156] The Monaco arbitration applied Panamanian law in accordance with the agreement, despite Cvoro arguing that U.S. federal law should apply.[157] Cvoro wanted U.S. federal law to apply because under the Jones Act in the United States, her remedies were more favorable than under the causes of action available under Panamanian law.[158] The arbitration panel did not make any award to Cvoro.[159] Cvoro then brought suit in the Southern District of Florida to have the arbitration decision set aside as against public policy in the United States.[160]

The Eleventh Circuit affirmed the district court's dismissal of the complaint, ruling that while U.S. federal law is protective of maritime employees, it is also respectful of international arbitration awards.[161] The court ruled that it could not set aside a foreign arbitration award under principles of public policy just because the remedies available under foreign law were less favorable than those available under U.S. federal law.[162] The court noted, but did not rely on, the fact that Cvoro did not actually pursue the claims available to her under Panamanian law.[163]

151. *Id.* at *2.
152. *Id.* at *3.
153. *Id.*
154. 941 F.3d 487 (11th Cir. 2019).
155. *Id.* at 491.
156. *Id.*
157. *Id.* at 492.
158. *Id.* at 499.
159. *Id.* at 492–93.
160. *Id.* at 493.
161. *Id.* at 498–99.
162. *Id.* at 499–500.
163. *Id.* at 500.

E. *Expenses in Excess of Limits*

The question of whether reinsurers are required to reimburse cedents for expenses in excess of the limits in facultative contracts has been the subject of litigation since the 1990 decision in *Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co.*,[164] in which the Second Circuit held that reinsurers were not obligated to pay any additional sums for defense costs over and above the limits on liability stated in the reinsurance certificates. In *Global Reinsurance Co. of America v. Century Indemnity Co.*,[165] Global, the reinsurer, sought a declaratory judgment that the limits stated in the certificates were the maximum that it must pay on each reinsurance contract. Century, the cedent, contended that the limits stated in the certificates capped indemnity payments but not Global's obligation to pay defense expenses, as the underlying primary policies required Century to pay defense costs in addition to the applicable limits of indemnity. The relevant provision of the reinsurance certificates provided:

> All loss settlements made by the Company, provided they are within the terms and conditions of the original policy(ies) and within the terms and conditions of the certificate of reinsurance, shall be binding on the Reinsurer. Upon receipt of a definitive statement of loss, the Reinsurer shall promptly pay its proportion of such loss as set forth in the Declarations. In addition thereto, the Reinsurer shall pay its proportion of expenses [agreed by the parties in this case to include defense costs] . . . incurred by the Company in the investigation and settlement of claims or suits and its proportion of court costs and interest on any judgment or award, in the ratio that the Reinsurer's loss payment bears to the Company's gross loss payment. If there is no loss payment, the Reinsurer shall pay its proportion of such expenses only in respect of business accepted on a contributing excess basis and then only in the percentage stated in Item 4 of the declarations in the first layer of participation.[166]

The certificates also contained a "following form" clause providing that Global's liability "'shall follow'" the liability of Century on the underlying primary policies, and "'shall be subject in all respects to all the terms and conditions of [Century's] policy except when otherwise specifically provided herein . . . .'"[167]

The trial court previously granted summary judgment in Global's favor, relying on *Bellefonte* to conclude that the reinsurer was not obligated to pay any sums for defense costs over and above the limits of liability in the reinsurance certificates. However, in an earlier appeal, the Second Circuit certified a question to the New York Court of Appeals, asking whether

164. 903 F.2d 910 (2d Cir. 1990).
165. 442 F. Supp. 3d 576 (S.D.N.Y. 2020).
166. *Id.* at 581.
167. *Id.*

New York contract law "'impose[s] either a rule of construction, or a strong presumption, that a per occurrence liability cap in a reinsurance contract limits the total reinsurance available under the contract to the amount of the cap regardless of whether the underlying policy is understood to cover expenses.'"[168] The Court of Appeals ruled that no such rule or presumption existed and that courts were bound to use "'traditional rules of contract interpretation'" in assessing reinsurance agreements.[169] The Second Circuit remanded the case, directing the trial court to interpret the terms "'solely in light of its language, and to the extent helpful, specific context.'"[170]

The trial court viewed the New York Court of Appeals' direction to "'use the traditional rules of contract interpretation'" as "casting doubt" on *Bellefonte* and cases following its reasoning, stating "even if those decisions have not been overturned, their continuing applicability may be scrutinized."[171] Heeding this direction, the trial court analyzed the language of the contract with the assistance of expert testimony from each party—the "specific context" ordered by the Second Circuit. However, the court found that "both parties overstate their argument" because both had ignored and misconstrued the explicit text of the contracts.[172] Instead, the court ruled that the "plain and unambiguous meaning" of the contracts was that the dollar limit stated in the reinsurance certificates "caps Global's obligation to pay losses and also caps Global's obligation to pay expenses when there are no losses, but does not cap Global's obligation to pay expenses when there are covered losses."[173] The express language of the contract, the court reasoned, directed Global to pay Century for expenses based on a proportionate share of losses, but did not expressly limit the expense costs owed by a limit or dollar amount in the certificate, "and the sentence should not be construed as 'impliedly stating' such a limit. Therefore, this clause must 'follow' the underlying insurance as to the payment of expenses, which means that these expenses must be paid in addition to, and are not capped by, the liability limit."[174]

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168. *Id.* at 579 (quoting Global Reins. Corp. of Am. v. Century Indem. Co., 843 F.3d 120, 122 (2d Cir. 2016)).

169. *Id.* (quoting Global Reins. Corp. of Am. v. Century Indem. Co., 91 N.E.3d 1186, 1192–93 (N.Y. 2017)).

170. *Id.* (quoting Global Reins. Corp. of Am. v. Century Indem. Co., 890 F.3d 74, 77 (2d Cir. 2018)).

171. *Id.* at 590.

172. *Id.* at 587.

173. *Id.*

174. *Id.* (quoting Global Reins. Corp. of Am. v. Century Indem. Co., 91 N.E.3d at 1192–93).

F. *Follow the Settlements*

In *Utica Mutual Insurance Co. v. Fireman's Fund Insurance Co.*,[175] the United States Court of Appeals for the Second Circuit reversed a jury verdict in favor of cedent Utica against reinsurer Fireman's Fund. Utica insured Goulds Pumps under seven primary and umbrella policies; Fireman's Fund reinsured the umbrella policies. The central question in the litigation was whether the umbrella policies were excess to underlying *aggregate* (rather than per-occurrence) limits for bodily injury claims, which would allow Utica to combine all of the relatively small asbestos bodily injury claims from Goulds, which would in turn trigger the umbrella coverage and Fireman's reinsurance obligations. Although the primary policies were missing, the umbrella policies were located and contained schedules listing aggregate limits for property damage claims but not bodily injury claims.[176] Utica and Goulds litigated the question of whether the missing primary policies contained aggregate limits for bodily injury claims and then entered into a settlement in which the parties agreed that the primary policies did contain an aggregate limit for bodily injury claims that had been exhausted by Utica's prior claim payments and that Goulds had "available remaining insurance" in the amount of $325 million to pay claims from the umbrella policies.[177]

In light of the settlement agreement providing that the primary policies had been exhausted, Utica sought reimbursement from Fireman's under the reinsurance contracts, citing the "follow the settlements" clauses in those contracts, which stated that "'[a]ll claims involving this reinsurance, when settled by [Utica] shall be binding on [Fireman's Fund].'"[178] Fireman's denied liability on the basis that the umbrella policies had not been triggered because the bodily injury losses had not exceeded the stated limits in the schedules to the umbrella policies, relying on the "follow form" clause in the reinsurance contracts providing that its liability "'shall be subject in all respects to all the terms and conditions of [the umbrella policies].'"[179] After a jury verdict in the trial court for Utica, the Second Circuit ruled that the umbrella policies did not attach after exhaustion of any underlying aggregate limits for bodily injury claims. The court found that the "'applicable limits of liability'" in the umbrella policies referred specifically to the occurrence giving rise to Utica's liability. Because the umbrella policies included schedules explicitly setting forth aggregate limits for property damage claims, the lack of similar schedules relating to bodily injury

175. 957 F.3d 337 (2d Cir. 2020).
176. *Id.* at 340.
177. *Id.* at 342.
178. *Id.* at 341–42.
179. *Id.* at 341.

claims meant that the parties did not intend for the umbrella policies to apply after exhaustion of any underlying aggregate limits for those bodily injury claims.[180]

The Second Circuit also rejected Utica's contention that the "follow-the-settlements" clauses in the reinsurance contracts obligated Fireman's to accept Utica's interpretation of the umbrella policies as reflected in the settlement with Goulds. Citing New York law that a follow-the-settlements clause cannot "alter the terms or override the language of reinsurance policies,"[181] the court held that Utica's theory "directly contradicts the relevant language in the reinsurance contracts and umbrella policies." Because Fireman's reinsurance contracts "followed form," the controlling provisions were those in the umbrella policies, which "unambiguously" did not provide aggregate limits for bodily injury claims. Because the "follow-the-settlements" doctrine could not override that unambiguous language, Fireman's Fund was not obligated to pay for losses that did not trigger the per-occurrence limits in the schedules to the umbrella policies.[182]

In *Insurance Co. of the State of Pennsylvania v. Equitas Insurance Ltd.*, the federal district court for the Southern District of New York, applying English law, ruled that the ceding company was entitled to a presumption that it intended to purchase back-to-back reinsurance coverage for its underlying policy and that, therefore, the reinsurer was obligated to follow the ceding company's settlements.[183]

In that case, the parties cross-moved for summary judgment on a dispute over a large environmental pollution claim paid by the cedent under an umbrella policy.[184] The underlying policy was governed by Hawaii law and the settlement was allocated by the cedent under the "all sums" approach.[185] The cedent reinsured the umbrella policy under two facultative certificates.[186] The certificates were governed by English law and contained follow-the-settlements language.[187]

In granting summary judgment in favor of the cedent and denying summary judgment to the reinsurer, the court focused on the strong presumption of back-to-back coverage for facultative reinsurance.[188] The court provided a neat summary of English reinsurance law as it pertains to

180. *Id.* at 345.
181. *Id.* at 347 (citing U.S. Fid. & Guar. Co. v. Am. Re-Ins Co., 985 N.E.2d 876, 882 (N.Y. 2013)).
182. *Id.* at 347–48.
183. No. 17 CV 6850-LTS-SLC, 2020 WL 4016815, at *1, *5 (S.D.N.Y. July 16, 2020).
184. *Id.* at *1.
185. *Id.* at *4.
186. *Id.*
187. *Id.* at *5.
188. *Id.* at *3.

follow-the-settlements and back-to-back coverage.[189] Under English law, said the court, there is a presumption as a matter of law that the cedent's settlements are covered if the cedent can prove that it paid the settlement and the claims arguably fall within the insurance and reinsurance contracts.[190] A reinsurer can refuse to follow the settlement if it falls outside the legal scope of cover.[191]

The court noted that in determining the legal scope of cover under a reinsurance contract, English law provides a strong presumption of back-to-back coverage.[192] In other words, said the court, liability under a proportional facultative certificate is co-extensive with that of the reinsured policy.[193]

The main dispute here was whether the all-sums approach under Hawaii law flowed through to the facultative certificates or whether an exception to the back-to-back presumption under English law applied.[194] The reinsurer argued that under English law, the "all-sums" approach violated the temporal term of the contract and the back-to-back presumption could not expand coverage beyond what the parties intended.[195] In so arguing, the reinsurer relied on an exception to the back-to-back presumption under English law applicable in situations where the parties are unclear on the governing law.[196] The court rejected the reinsurer's argument, finding that the exception did not apply.[197] In this case, the parties knew that Hawaii law would apply and that Hawaii law concerning allocation could change.[198]

Finally, the court rejected the reinsurer's late notice defense, holding that the reinsurer did not meet its burden of presenting evidence that the cedent acted with extreme dishonesty that resulted in the reinsurer being extremely prejudiced by the notice.[199]

G. *Functus Officio*

In *Chicago Insurance Co. v. General Reinsurance Corp.*, the Southern District of New York denied a petition to compel arbitration, staying arbitration and granting a motion for declaratory relief.[200] The reinsurance agreement at issue provided for disputes between the parties to be arbitrated

189. *Id.*
190. *Id.* at *2.
191. *Id.*
192. *Id.* at *3.
193. *Id.*
194. *Id.* at *4.
195. *Id.* at *5.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. No. 18-CV-10450 (JPO), 2019 WL 5387819 (S.D.N.Y. Oct. 22, 2019).

by a three-arbitrator panel.[201] In 2017, the parties arbitrated a dispute over whether the ceding company was entitled to bill its reinsurers on the basis that losses at each insured site of the underlying policyholder constituted a separate occurrence under the reinsurance agreement.[202] The arbitration panel rejected that argument, finding in favor of the reinsurers and retaining jurisdiction "'to resolve any dispute arising out of [the] Final Award.'"[203] Under the panel's decision, the plaintiff could submit only one billing per asbestos insured.[204]

In 2018, a dispute arose concerning new billings that the cedent issued to the reinsurers, purportedly "in accordance with the [Final Award's] protocols," as set forth by the 2017 arbitration panel.[205] The reinsurers claimed the original 2017 panel had retained jurisdiction over the dispute.[206] The ceding company claimed that the 2017 panel was *functus officio* and that it was entitled to a new arbitration with a different panel hearing the dispute over the 2018 billings.[207] The court rejected the ceding company's *functus officio* argument, finding that the new billing "arose from" the original panel's decision and that the original panel therefore retained jurisdiction over disputes arising out of the 2018 billing.[208]

H. *Insolvency—Offset and Mutuality*

In re Rehabilitation of Scottish Re (U.S.)[209] addressed a conflict between a triangular offset agreement and the requirement of "mutuality" of debts under Delaware's insurance liquidation statute. Scottish Re entered into approximately sixty reinsurance contracts with a group of life insurers referred to as the "Protective Entities." Beginning in February 2016, Scottish Re and the Protective Entities disputed Scottish Re's right to increase the premium rates on the contracts. At the same time, Scottish Re had fallen behind on reimbursements to the Protective Entities for claims paid. After negotiation, the parties entered into a settlement (the "Settlement Agreement") providing that premium and undisputed claims "may be offset on any reinsurance treaty between Protective and [Scottish Re], or on any treaties involving business coinsured with Protective . . . . "[210] A year later, Scottish Re was placed into Rehabilitation under the Delaware Uniform Insurers Liquidation Act (DUILA). During the rehabilitation proceedings,

201. *Id.* at *1.
202. *Id.* at *2.
203. *Id.* (citations omitted).
204. *Id.*
205. *Id.*
206. *Id.* at *2.
207. *Id.*
208. *Id.*
209. No. 2019-0175, 2020 WL 2549288 (Del. Ch. May 19, 2020).
210. *Id.* at *1.

the Protective Entities submitted "Asserted Offset Claims" to the Receiver, who objected to the claims on the basis that the calculations revealed the claims to be "triangular" or "cross-entity"—that is, premium due by one of the Protective Entities was offset by claims owed to a different Protective Entity.[211] The Protective Entities asked the court for an order directing the Receiver to enforce the provision of the pre-rehabilitation Settlement Agreement allowing offset between and among all the parties.

The Delaware Chancery Court rejected the Protective Entities' petition. It relied on the provision of DUILA allowing offsets in rehabilitation only for *mutual* debts between the insurer and another person.[212] The court ruled that the "triangular" offsets did not reflect "mutual" debts, which required that "'each party must own his claim in his own right severally, with the right to collect in his own name against the debtor in his own right and severally.'"[213] The Protective Entities, seemingly conceding the lack of mutuality in the proposed offsets, argued that the Settlement Agreement itself created the requisite mutuality to satisfy DUILA because it expressly allowed offsets among and between the various Protective Entities. The court rejected that argument as well, finding that the Settlement Agreement did not "create" mutuality because it "did not alter the Protective Entities' underlying legal relationships with respect to the amounts owed to and due from Scottish Re."[214] The court noted that an "absolute assignment" of one party's rights in a claim to another party would arguably create the requisite mutuality, but that the Settlement Agreement did not effect such an assignment.[215] Moreover, the court concluded, allowing the Settlement Agreement to create a "contractual exception" to the mutuality requirement would frustrate the statutory purpose to ensure that all similarly situated creditors were treated equally.[216]

The Protective Entities alternatively attempted to enforce their offset rights under the common law of "recoupment," which permits a defendant to assert a purely defensive claim to reduce the damages recoverable by a plaintiff where the recoupment claim arises out of the same transaction or occurrence as the plaintiff's suit. The court conceded that this "'equitable doctrine of recoupment has been recognized in insurance and other types of insolvency cases,'" and, when recognized, "'generally is not deemed to be subject to the setoff requirement of mutuality.'"[217] However, the court

211. *Id.*
212. Del. Code tit. 18, § 5927(a).
213. *Scottish Re*, 2020 WL 2549288 at *3 (quoting *In re* SemCrude, L.P., 399 B.R. 388, 393 (Bankr. D. Del. 2009)).
214. *Id.* at *4.
215. *Id.*
216. *Id.*
217. *Id.* at *5 (quoting Nat'l Ass'n of Ins. Comm'rs, Receiver's Handbook for Insurance Company Insolvencies 510 (2018)).

ruled that the Protective Entities had not demonstrated the elements of recoupment because the underlying reinsurance contracts, not the Settlement Agreement, were the controlling agreements that gave rise to the premium payments and claims for which offset was sought.[218]

Finally, the Protective Entities claimed that the Receiver was required to allow cross-entity offsets under the Settlement Agreement because the offset provision was part of an "executory contract" for which the Receiver is obligated to accept or reject all provisions. The court ruled this argument was premature because the Receiver had yet to file a plan for Scottish Re's emergence from rehabilitation. While the offset provision was "unenforceable during the course of these proceedings," the court allowed that the parties might need to resolve the dispute regarding the interpretation of the offset provision if the Settlement Agreement was included as an "accepted" executory contract as part of the eventual plan of rehabilitation.[219]

I. *Preemption*

The United States District Court for the Western District of Washington issued two recent decisions on motions to compel arbitration that leave the state of play on the enforceability of mandatory arbitration provisions in insurance and reinsurance contracts unsettled in that jurisdiction.

In *CLMS Management Services Ltd. Partnership v. Amwins Brokerage of Georgia*, *LLC*,[220] plaintiffs brought an insurance coverage action under a policy that contained a mandatory arbitration provision. Washington state law bars mandatory arbitration clauses in insurance contracts.[221] While the Federal Arbitration Act (FAA) would normally preempt a conflicting state law under the Supremacy Clause, the McCarran-Ferguson Act[222] creates a system of "reverse-preemption" for insurance law.[223] In *CLMS*, defendants argued that McCarran-Ferguson reverse-preemption applies only to an "Act of Congress," and that Article II, Section 3 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention)—which contains mandatory "shall" language instructing U.S. courts to refer cases to arbitration—does not require any separate act of Congress for its directive to apply.[224] To resolve the motion before it, the court undertook an analysis of the interplay between the Convention and

218. *Id.*
219. *Id.* at *6.
220. No. 19-cv-05785, 2019 WL 7185547 (W.D. Wash. Dec. 26, 2019).
221. *See* Wash. Rev. Code § 48.18.200; *see also* State Dep't of Transp. v. James River Ins. Co., 292 P.3d 118 (Wash. 2013).
222. 15 U.S.C. § 1012(b).
223. *See CLMS*, 2019 WL 7185547, at *2. In *James River*, for example, the Washington Supreme Court held "that under the McCarran-Ferguson Act, RCW 48.18.200 preempts Chapter 1 of the FAA." *Id.* (citing *James River*, 292 P.3d at 124).
224. *Id.* at *2–3.

the McCarran-Ferguson Act, citing a number of cases that had reached conflicting decisions on the issue of whether Article II, Section 3 of the Convention is "self-executing" such that the McCarran-Ferguson Act does not reverse-preempt the FAA in favor of state insurance law.[225] The court concluded that "Section 3 is self-executing . . . [and] is not an 'Act of Congress' that is subject to preemption under the McCarran-Ferguson Act."[226] Accordingly, "[t]he Convention controls and the Policy's arbitration clause is not barred by Washington law."[227] Finally, the court concluded that the parties' agreement to arbitrate fell within the scope of the Convention, and thus granted the motion to compel arbitration.[228] Plaintiffs have appealed this decision.[229]

In the other recent Washington district court case, *Washington Cities Insurance Authority v. Ironshore Indemnity Inc.*,[230] the court denied defendant's motion to compel arbitration, holding that the arbitration provision in the parties' reinsurance contract was void under Washington's statute prohibiting mandatory arbitration clauses in insurance contracts.[231] Whereas the central issue in *CLMS* was whether the Washington statute reverse-preempted the Convention, the court in *WCIA* did not mention the Convention at all. Rather, the *WCIA* court undertook a much more streamlined analysis, focusing principally on the question of whether the Washington statute—which by its terms applies to "'insurance contracts'"—also applies to reinsurance.[232] The court answered that question in the affirmative, finding that the statute applies to both insurance *and* reinsurance contracts. Thus, the court held that the mandatory arbitration provision in the parties' reinsurance agreement was void, and denied defendant's motion to compel arbitration.[233]

In a case before the Arkansas federal court, *J.B. Hunt Transport, Inc. v. Steadfast Insurance Co.*,[234] the court found that the McCarran-Ferguson Act does not supersede the Convention or Chapter II of the FAA. In *J.B. Hunt Transport*, the policyholder brought suit against two insurance companies

225. *See id.*
226. *Id.* at *5.
227. *Id.*
228. *Id.* at *6.
229. CLMS Mgmt. Servs. Ltd. P'Ship v. Amwins Brokerage of Ga. LLC, No. 20-35428 (9th Cir.).
230. 443 F. Supp. 3d 1218 (W.D. Wash. 2020).
231. Wash. Rev. Code § 48.18.200.
232. *WCIA*, 443 F. Supp. 3d at 1222 (quoting Wash. Rev. Code § 48.18.200(1)).
233. *Id.* at 1221–23. The court also rejected defendant's separate argument that other provisions of the Washington code—governing purchase of reinsurance coverage by local government joint insurance programs—carved the parties' reinsurance agreement out of Revised Code of Washington, section 48.18.200's bar on mandatory arbitration provisions in insurance contracts. *Id.* at 1223.
234. 470 F. Supp. 3d 936 (W.D. Ark. July 1, 2020).

for failing to defend and indemnify the policyholder for an underlying wrongful death action settlement.[235] One of the policies, written outside the United States, had an arbitration clause.[236] That insurer moved to compel arbitration.[237] The policyholder defended the motion by arguing that the arbitration clause in the policy was unenforceable because of a provision in Arkansas insurance law that precluded inclusion of arbitration provisions in insurance policies.[238]

In ruling that the Arkansas anti-arbitration statute did not reverse-preempt the Convention or Chapter II of the FAA, the court found that Congress did not intend McCarran-Ferguson to permit state law to vitiate international agreements entered into by the United States.[239] The court also agreed with those other courts that found Article II, Section 3 of the Convention to be self-executing.[240] Article II, Section 3 directs that the courts of a Contracting State "'when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration.'"[241] Following the rationale of other courts, the federal district court in Arkansas focused on the word "shall" to conclude that Article II, Section 3 of the Convention is a self-executing provision of an international agreement and therefore is not preempted by the McCarran-Ferguson Act.[242] The court granted the motion to compel arbitration and stayed the action in its entirety until the arbitration is completed.[243]

J. *Right to Associate*

In *Barnes v. Security Life of Denver Insurance Co.*,[244] the United States Court of Appeals for the Tenth Circuit reversed the district court's denial of Jackson National Life Insurance Company's motion to intervene because the interests of Jackson and defendant Security Life of Denver Insurance Company (SLD) were not identical and SLD's counsel could not be expected to act in the best interests of both SLD and Jackson.[245] The court concluded that Jackson had established the requirements for intervention as of right and did not address Jackson's permissive intervention arguments.[246]

235. *Id.* at 939.
236. *Id.* at 941.
237. *Id.* at 939.
238. *Id.* at 941.
239. *Id.* at 943–45.
240. *Id.* at 943.
241. *Id.* at 944 (quoting Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II, § 3, June 10, 1958, 21 U.S.T. 2517).
242. *Id.* at *945.
243. *Id.* at *947.
244. 945 F.3d 1112 (10th Cir. 2019).
245. *Id.* at 1125.
246. *Id.* at 1121.

Barnes involved a situation where the plaintiff filed a putative class action against SLD alleging that, in the course of administering certain life insurance policies, SLD breached its contractual duties by imposing administrative costs that were not authorized under the terms of the policies.[247] SLD had entered into a reinsurance arrangement with Jackson and its predecessor pursuant to which SLD and Jackson independently administered groups of life insurance policies that were originally issued by SLD.[248] There was no indication that SLD and Jackson made the same decisions with respect to policy administration.[249]

Jackson moved for leave to intervene in the proceedings as of right on the grounds that it had an interest related to the property or transaction that was the subject of the plaintiff's action.[250] Jackson argued that as the entity that administered and reinsured the plaintiff's policy, it had a direct, substantial, and legally protectable interest in defending the manner in which it had administered the policy.[251] Jackson argued that SLD could not adequately represent Jackson's interests because Jackson administered only a portion of the policies, and, consequently, their interests and defense strategies may diverge in the litigation.[252]

In finding that Jackson had the right to intervene under Federal Rule of Civil Procedure 24(a)(2), the court noted that "the interest in the proceedings [must] be direct, substantial, and legally protectable," and that a "protectable interest is one that would be impeded by the disposition of the action."[253] The court agreed with Jackson that because it was solely responsible under the terms of the reinsurance agreement for paying or otherwise discharging all extracontractual obligations, and would thus bear the responsibility for paying any liability arising out of the misadministration of the policies, it had established an interest in the action that was direct, substantial, and legally protectable for the purposes of intervention under Rule 24(a)(2).[254] Further, the court concluded that Jackson established that its participation in the action would be "compatible with efficiency and due process."[255]

Next, the court concluded that Jackson easily satisfied the minimal burden of showing the potential for impairment of its interests, which only requires a showing that impairment of its substantial legal interest is possible, and need not be of a strictly legal nature but can also be of practical

247. *Id.* at 1115.
248. *Id.* at 1116–17.
249. *Id.* at 1117.
250. *Id.* at 1118.
251. *Id.*
252. *Id.* at 1118–19.
253. *Id.* at 1121–22 (citations omitted).
254. *Id.*
255. *Id.*

impact.[256] If the plaintiff prevailed, Jackson would be impacted both monetarily and practically, in terms of potentially having to modify the manner in which it carried out its administrative duties with respect to those policies.[257]

Finally, the court concluded that Jackson's interest would not be adequately represented by the existing parties to the litigation.[258] Here, the interests of Jackson and SLD were not identical given that SLD would likely defend against the plaintiff's claims, in part, by pointing to Jackson as the entity responsible for administering the policies. Given that the charges and expenses for the two distinct groups of policies had been managed by different insurers, there was no reason to assume that Jackson's and SLD's interests and defense strategies would align.[259] Moreover, SLD refused to allow Jackson to control the litigation because SLD's own unique interests were at stake.[260] Because Jackson satisfied each of the requirements for intervention as of right, the court concluded that the district court erred in denying Jackson's motion to intervene.[261]

K. *Vacatur*

In *Eaton Partners, LLC v. Azimuth Capital Management IV, Ltd.*,[262] the Southern District of New York denied Azimuth Capital Management IV, Ltd.'s motion to vacate the arbitrator's award in favor of Eaton Partners, LLC where the arbitrator did not commit misconduct by refusing to accept evidence from a party's witness.[263]

Prior to the first arbitration hearing, one of Azimuth's witnesses became unavailable due to a sudden death in the family.[264] Eaton expressed concerns about adjourning the hearing and suggested video testimony as an alternative.[265] The arbitrator agreed that suggestion might work.[266] After considering video testimony and speaking with the witness, Azimuth

256. *Id.* at 1123–24.
257. *Id.*
258. *Id.* at 1124–25.
259. *Id.* at 1125.
260. *Id.*
261. *Id.* at 1126. One judge dissented, disagreeing that Jackson had made a sufficient showing that SLD would not adequately represent Jackson's interests regarding claims on the policies. The dissent noted that the majority opinion ignored the impact of the law of judgments on the relationship between an indemnitor and an indemnitee and reasoned that in light of the law of judgments, it would be irrational of SLD not to represent Jackson's interests in the litigation because if SLD did not do so, a judgment against SLD in the litigation would have no preclusive effect if SLD sought indemnification from Jackson. *Id.* at 1126–35 (Hartz, J., dissenting).
262. No. 18 Civ. 11112 (ER), 2019 WL 4640008 (S.D.N.Y. Sept. 24, 2019).
263. *Id.* at *3.
264. *Id.* at *1.
265. *Id.*
266. *Id.*

withdrew the witness and proceeded with the case.[267] At a subsequent hearing, the arbitrator denied Azimuth's request to introduce a new rebuttal witness who was not on the witness list.[268]

While acknowledging the high burden of proof required to vacate an arbitration award, Azimuth argued that the arbitrator was guilty of misconduct for failing to postpone the hearing when its witness became unavailable and refusing to accept the additional rebuttal witness testimony.[269] The court noted that "[n]ot every failure of an arbitrator to receive relevant evidence, such as excluding witness testimony, constitutes misconduct requiring vacatur."[270] Instead, "[w]hen a party has had the opportunity to present all their evidence, and there is a wealth of evidence in the record to support the arbitration award, even an improper exclusion of testimony does not constitute a denial of a fundamentally fair hearing."[271] If, however, an arbitrator refuses to accept evidence from a key witness, the misconduct can rise to the level required for vacatur.[272] Accordingly, "excluding a key witness which causes the opposing party's crucial arguments to go unopposed is cause for vacating an arbitration award."[273] The court ultimately concluded that the exclusion of Azimuth's witness did not amount to the exclusion of a "key" witness.[274]

The court similarly rejected Azimuth's claims that the arbitrator improperly failed to postpone the hearing and that the arbitrator was guilty of misconduct in accepting Eaton's position regarding a video deposition given that the arbitrator had engaged the parties in a discussion on the best course of action.[275] The court held that "[e]ven if the Arbitrator had in fact refused to adjourn the hearing and only allowed [the witness] to appear by video, this would not have constituted a deprivation of Azimuth's right to a fundamentally fair hearing."[276] As a result, the court denied Azimuth's motion to vacate, confirmed the award, and awarded Eaton reasonable attorney's fees.[277]

In *Monster Energy Co. v. City Beverages, LLC*,[278] the Ninth Circuit held that an arbitrator's failure to disclose both his ownership interest in the organization administering the arbitration and the organization's

267. *Id.* at *1–2.
268. *Id.* at *1.
269. *Id.* at *3.
270. *Id.* (citing Areca, Inc. v. Oppenheimer & Co., 960 F. Supp. 52, 54–55 (S.D.N.Y. 1997)).
271. *Id.* (citing Pompano-Windy City Partners, Ltd. v. Bear Stearns & Co., 794 F. Supp. 1265, 1277–78 (S.D.N.Y. 1992)).
272. *Id.* (citing Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997)).
273. *Id.*
274. *Id.* at *4.
275. *Id.*
276. *Id.*
277. *Id.* at *6.
278. 940 F.3d 1130 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 164 (June 29, 2020).

significant repeat business handling arbitrations for one of the parties justified vacatur of the arbitration award.[279] Monster and City Beverages, doing business as Olympic Eagle Distributing, entered an exclusive distribution agreement with an arbitration clause requiring the use of JAMS Orange County.[280] After Monster exercised its termination rights, to which Olympic Eagle objected for state law reasons, the district court compelled arbitration before JAMS.[281] JAMS provided a list of neutrals, from which the parties chose retired judge John W. Kennedy, Jr.[282] In his disclosure, Kennedy explained that each JAMS neutral "has an economic interest in the overall financial success of JAMS" and given "the nature and size of JAMS, the parties should assume that one or more of the other neutrals who practice with JAMS has participated in an arbitration, mediation or other dispute resolution proceeding with the parties, counsel or insurers in this case and may do so in the future."[283] He also disclosed that he had arbitrated and ruled against Monster in another dispute.[284] Kennedy ultimately ruled against Olympic Eagle, and Olympic Eagle moved to vacate "based on later-discovered information" showing Kennedy was a JAMS co-owner—along with roughly one-third of other JAMS neutrals.[285] After the district court confirmed the award, Olympic Eagle appealed.[286]

The Ninth Circuit reversed, explaining that under *Commonwealth Coatings Corp. v. Continental Casualty Co.*, vacatur is appropriate where an arbitrator "fails to 'disclose to the parties any dealings that might create an impression of possible bias.'"[287] To justify vacatur, an undisclosed interest in an organization "must be substantial" and the organization's "business dealings with a party to the arbitration must be nontrivial."[288] The court found that Kennedy's ownership interest in JAMS, with its right to a share of profits, greatly exceeded "the general economic interest" of other JAMS neutrals in the organization's success, making Kennedy's interest substantial.[289] The court further found that the ninety-seven arbitrations JAMS administered for Monster over the preceding five years represented a nontrivial rate of business dealings, justifying vacatur.[290] The court then established a rule: before conducting an arbitration, an arbitrator must disclose any ownership

279. *Id.* at 1138.
280. *Id.* at 1132–33, 1136.
281. *Id.* at 1132–33.
282. *Id.*
283. *Id.* at 1133.
284. *Id.* at 1136.
285. *Id.* at 1133, 1136 n.2.
286. *Id.* at 1133.
287. *Id.* at 1135–36 (quoting Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 149 (1968)).
288. *Id.* at 1136.
289. *Id.*
290. *Id.* at 1136, 1138.

interest in the organization "under whose auspices the arbitration is conducted" and the organization's "nontrivial business dealings with the parties to the arbitration."[291] One judge dissented, arguing that disclosure of the missing information would have made no difference, given what *was* disclosed, and that the rule would require vacatur in numerous JAMS cases.[292]

In *Metso Minerals Canada, Inc. v. ArcelorMittal Exploitation Miniére Canada*,[293] the Southern District of New York confirmed an arbitration award, rejecting an argument that vacatur was appropriate because the arbitrators had "manifestly disregarded the law."[294] ArcelorMittal entered a contract with Metso to purchase a new mill for use at ArcelorMittal's iron plant in Quebec.[295] The contract said that "its overarching objective was to expand the plant's iron production capacity by 8 million tons per year," but the mill never met this target.[296] ArcelorMittal initiated arbitration, asserting claims for breach of contract and breach of the duty to inform.[297] According to ArcelorMittal, Metso knew the design of its mill was defectively small, but failed to disclose that it "presented risks that could threaten output."[298] The arbitration panel split, with the majority rejecting ArcelorMittal's claims and finding that the mill was not defective because it matched the design, and therefore there was nothing Metso needed to disclose.[299] The dissent found Metso had breached its duty to inform by failing to communicate its concerns while designing the mill about whether the mill could meet the production target.[300] Metso petitioned to confirm the award, and ArcelorMittal cross-petitioned to vacate, arguing that the majority manifestly disregarded the law in dismissing the duty to inform claim.[301]

The court confirmed the award, finding that ArcelorMittal had failed to carry the heavy burden required for vacatur. In addition to the four narrow statutory grounds under the Federal Arbitration Act, a court in the Second Circuit may vacate where the arbitrators show a "manifest disregard of law."[302] The court found that ArcelorMittal had satisfied at most only one of the three prongs of the relevant test. First, the disregarded law must have been clear and applicable.[303] While the parties agreed that the

291. *Id.* at 1137–38.
292. *Id.* at 1139, 1142 (Friedland, J., dissenting).
293. No. 19 Civ. 3379 (LAP), 2019 WL 5693731 (S.D.N.Y. Nov. 1, 2019).
294. *Id.* at *1.
295. *Id.*
296. *Id.* at *4.
297. *Id.* at *1.
298. *Id.*
299. *Id.* at *2.
300. *Id.* at *5.
301. *Id.* at *3.
302. *Id.* at *2.
303. *Id.* at *3.

duty to disclose applied, they disagreed over whether the duty could be breached if the product was not defective.[304] The court, however, found that it was (largely) clear under Canadian Supreme Court precedent that a seller could breach the duty even if the product were not defective.[305] Second, the disregarded law must have been improperly applied.[306] Here, ArcelorMittal's claim faltered as it presumed the majority had dismissed the claim simply because the mill was not defective and refused to consider whether Metso had breached its duty by failing to disclose *design* risks.[307] The court found it plausible the majority had simply deemed those risks to be insufficiently important to require disclosure—so failing to disclose them did not breach Metso's duty to inform.[308] Third, the arbitrators must have intentionally disregarded the law, and on this point, ArcelorMittal fell "well short" of its burden.[309]

In *Adventure Motorsports Reinsurance v. Interstate National Dealer Services*,[310] a Georgia appellate court reversed a lower court's confirmation of an arbitration award, holding that the arbitrator manifestly disregarded the law by ignoring express contractual language.[311] Southern Mountain Adventures, a motorsports dealership, entered a contract with Interstate, a vehicle service contract administrator, in which Southern Mountain agreed to sell Interstate's service contracts to its customers.[312] Southern Mountain received as a commission the difference between its retail price for the service contract and the price on a "Rate Card," which listed the price dealers paid to Interstate.[313] The price paid to Interstate covered a variety of things, including reserves to pay service claims, and if any reserves remained when each service contract expired, Southern Mountain would share in those profits.[314] After two years under this arrangement, the parties restructured the deal so that the reserves would go to Adventure Motorsports Reinsurance instead of Interstate, with Interstate continuing to be reimbursed for claims from the reserves.[315] If any reserves remained when each service contract expired, Adventure Motorsports would keep the profit.[316] Eventually, Southern Mountain terminated the contract with Interstate and joined

304. *Id.* at *2.
305. *Id.* at *4.
306. *Id.* at *5
307. *Id.*
308. *Id.* at *6.
309. *Id.*
310. 846 S.E.2d 115 (Ga. Ct. App. 2020), *petitions for cert. filed*, Aug. 3, 2020 (Nos. S21C0008, S21C0015).
311. *Id.* at 117, 119.
312. *Id.* at 116–17.
313. *Id.*
314. *Id.* at 117.
315. *Id.*
316. *Id.*

with Adventure Motorsports to initiate arbitration, claiming that Interstate had improperly collected certain fees.[317] The arbitrator agreed, and the lower court confirmed the award.[318]

The appellate court reversed, holding that the arbitrator had ignored the terms of the contract.[319] Under the Georgia Arbitration Code, a court may vacate an arbitration award where the arbitrator manifestly disregarded the law.[320] An arbitration's outcome alone is insufficient to establish manifest disregard—there must be evidence in the record that the arbitrator "'knew the law and expressly disregarded it.'"[321] The rules of contract construction apply in arbitration, and an award should be consistent with the express terms of the parties' agreement.[322] The arbitrator had found that the agreement between Southern Mountain and Interstate did not authorize Interstate to collect fees for certain purposes—for example, Interstate could collect fees to cover claims but not fees to cover administrative costs.[323] Interstate argued, and the appellate court agreed, that all of the fees paid were based on the Rate Card prices.[324] That Interstate "used those payments to run its business, pay its costs, and retain a profit is not a ground for eliminating the . . . contractual liability" of Southern Mountain and Adventure Motorsports to pay Interstate "the prices listed on the Rate Card."[325] By ignoring the contracted-for prices on the Rate Card, the arbitrator manifestly disregarded the law.[326]

317. *Id.*
318. *Id.*
319. *Id.* at 119.
320. *Id.* at 118 (citing Ga. Code Ann. § 9–9–13(b)(5)).
321. *Id.* (quoting Airtab, Inc. v. Limbach Co., *LLC*, 673 S.E.2d 69, 72 (Ga. Ct. App. 2009)).
322. *Id.*
323. *Id.*
324. *Id.* at 118–19.
325. *Id.* at 119.
326. *Id.*

RECENT DEVELOPMENTS IN FIDELITY AND SURETY LAW

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I. Surety Law

A. *Performance Bonds*

1. Conditions Precedent

In *Western Surety Co. v. U.S. Engineering Construction, LLC*,[1] a subcontractor terminated a second-tier subcontractor and completed the second-tier subcontractor's scope of work before notifying the performance bond surety. In the surety's action for declaratory judgment, the trial court held that the surety's remedies under the bond "necessarily implie[d]" that "timely notice" was a condition precedent to claims against the bond.[2] The subcontractor appealed, arguing that the bond did not specify when notice of termination was required.[3] The District of Columbia Circuit affirmed, explaining that the subcontractor "deprived" the surety of "its contractually agreed-upon opportunity to participate in remedying" the second-tier subcontractor's default by unilaterally completing its scope of work before notifying the surety.[4]

In *Ernest Bock & Sons, Inc. v. City of Philadelphia*,[5] two co-sureties argued that they were discharged from any obligations under their performance bond because the obligee failed to comply with the conditions precedent of notice and declaration of default.[6] In response, the obligee asserted that informal notices and warnings furnished to the principal, together with

1. 955 F.3d 100 (D.C. Cir. 2020).
2. *Id.* (citing Hunt Constr. Grp. v. Nat'l Wrecking Corp., 587 F.3d 1119 (D.C. Cir. 2009)).
3. *Id.* at 104.
4. *Id.* at 104–06.
5. Nos. 349 C.D. 2018, 350 C.D. 2018, 2020 WL 4645106 (Pa. Commw. Ct. Aug. 12, 2020), *appeal denied*, 249 A.3d 255 (Pa. 2021).
6. *Id.* at *13–14.

a formal declaration of default to the sureties, were sufficient under the bonded contract and performance bond.[7] The court held that the obligee's informal notices and warnings were "insufficient to satisfy the written notice requirements" of the performance bond.[8] The court further reasoned that the obligee could not "invoke its rights" under the performance bond by declaring the principal in default "without written notice and an opportunity to cure."[9]

In *Seawatch at Marathon Condominium Association, Inc. v. Guarantee Co. of North America*,[10] an owner and surety were unable to agree to the terms of a takeover agreement and the owner filed a declaratory action to determine its rights and responsibilities under the bond. The trial court found that the surety was entitled to hire the terminated contractor and that the owner's refusal to enter into the takeover agreement did not constitute a material breach.[11] The Florida District Court of Appeal affirmed, reasoning that the performance bond's completion language was "clear and unambiguous" and did not restrict whom the surety could use to complete the project.[12] The court further reasoned that the owner's refusal to enter into the takeover agreement did not relieve the surety from the bonded obligations because the "parties genuinely disagreed in their interpretation of the bond" and the owner "promptly sought judicial intervention through its declaratory action."[13]

In *United States ex rel. GLF Construction Corp. v. FEDCON Joint Venture*,[14] a prime contractor terminated a subcontractor for default, notified the subcontractor's performance bond surety, and completed the subcontractor's scope of work before the surety completed its investigation. The surety moved for summary judgment, arguing that the prime contractor deprived the surety of its performance rights under the bond.[15] The court denied the surety's motion, holding that the prime contractor's evidence created a genuine issue of material fact as to whether the prime contractor's conduct deprived the surety "of its ability to protect itself pursuant to the performance options in the bond."[16] The court emphasized that there was evidence suggesting that the surety "declined to timely pursue its performance options under the bond," citing deposition testimony in which

7. *Id.* at *13.
8. *Id.* at *14, 19.
9. *Id.* at *14.
10. 286 So. 3d 823 (Fla. Dist. Ct. App. 2019).
11. *Id.* at 826, 828–29.
12. *Id.* at 827.
13. *Id.* at 829.
14. No. 817CV01932T36AAS, 2019 WL 5295329 (M.D. Fla. Oct. 18, 2019).
15. *Id.* at *20–21.
16. *Id.* at *28–29.

the surety's representative disclosed that the surety did not "follow up" with the prime contractor during its investigation and that the surety was unlikely to tender performance under the circumstances.[17]

2. Arbitration

In *Great American Insurance Co. v. Johnson Controls, Inc.*,[18] an obligee moved to dismiss a surety's claim seeking declaratory judgment limiting its liability under the performance bond. The obligee and surety disputed whether the surety was bound by the arbitration provision included within the bonded contract.[19] In granting the obligee's motion to dismiss, the court held that the bond incorporated the bonded contract by reference, and that the arbitration provision's incorporation of the American Arbitration Association Construction Rules constituted "clear and unmistakable evidence that the parties intended to reserve arbitrability questions for an arbitrator."[20]

3. Venue

In *Granite Re, Inc. v. Northern Lines Contracting, Inc.*,[21] an obligee moved to dismiss a surety's declaratory judgment action on grounds of forum non conveniens because the bonded contract's forum-selection clause mandated all claims to be brought in state court. In response, the surety argued that, as a non-signatory, it was not bound by the bonded contract's forum-selection clause and that venue was otherwise proper under the bond's own permissive forum-selection clause authorizing suit "in any court" where the work was located.[22] The court granted the obligee's motion, holding that, since the bond incorporated the bonded contract by reference, the bonded contract's mandatory forum-selection clause controlled.[23]

4. Attorneys' Fees

In *City of Olympia v. Travelers Casualty & Surety Co. of America*,[24] an obligee obtained a judgment for liquidated damages, attorneys' fees, and costs against a performance bond surety's principal. The surety argued that it was not obligated to pay the judgment for attorneys' fees and costs because such judgment was awarded under a cost-shifting statute and not the underlying construction contract.[25] In response, the obligee argued that

17. *Id.*
18. Case No. 1:20-cv-96, 2020 WL 4569126 (S.D. Ohio Aug. 7, 2020).
19. *Id.* at *3–4.
20. *Id.* at *1, 6–8, 10.
21. 478 F. Supp. 3d 772 (D. Minn. 2020).
22. *Id.* at 774.
23. *Id.* at 778–80.
24. No. 3:19-cv-5562-RBL, 2020 WL 42252 (W.D. Wash. Jan. 3, 2020).
25. *Id.* at *2 (citing Wash. Rev. Code § 39.04.240).

the cost-shifting statute was incorporated into the contract.[26] The court granted the obligee's motion, explaining that it must construe the bond's ambiguous term "obligation" in the obligee's favor to implicitly incorporate the cost-shifting statute because such statute was designed for disputes arising out of public works contracts.[27] The court continued, alternatively, explaining that the bond expressly covered the judgment for attorneys' fees and costs as "indirect loss resulting from [the principal's] failure to perform."[28]

In *Arete Ventures, Inc. v. University of Kentucky*,[29] a surety appealed an award of attorneys' fees and costs to an obligee exceeding the performance bond's penal sum. The appellate court affirmed, reasoning that the state's procurement code did not "include language limiting the surety's liability to only the penal sum."[30] The court further reasoned that the bond itself included "expansive and comprehensive" language that did not "limit the amount of attorney fees in any way."[31]

5. Principal's Defenses

In *Harris County Water Control and Improvement District No. 89 v. Philadelphia Indemnity Insurance Co.*,[32] an owner terminated a prime contractor and brought suit against the contractor and its surety. The contractor failed to appear, and the owner moved for default judgment.[33] In response, the surety argued that the court should not enter default judgment because, as surety, it had "the right to assert" the prime contractor's defenses.[34] The court agreed and denied the motion without prejudice, ruling that entering a default judgment before the surety asserted the prime contractor's defenses "runs the risk of creating two judgments with inconsistent findings."[35]

6. Bad Faith

In *Goudy Construction, Inc. v. Raks Fire Sprinkler, LLC*,[36] a surety moved to strike, or in the alternative, dismiss a prime contractor's claim for bad faith. In response, the prime contractor cited insurance precedent and argued that its bad faith claim was cognizable because the performance bond was

26. *Id.*
27. *Id.* at *3–4.
28. *Id.*
29. 619 S.W.3d 906 (Ky. App. 2020), *review denied* (Apr. 20, 2021).
30. *Id.* at 918.
31. *Id.*
32. Civ. No. H-19-1755, 2019 WL 5191129 (S.D. Tex. Oct. 15, 2019).
33. *Id.* at *1–2.
34. *Id.* at *2.
35. *Id.* at *2–3.
36. Civ. No. 2:19-CV-1303-RDP, 2019 WL 6841067 (N.D. Ala. Dec. 16, 2019).

regulated as "insurance" under state insurance law.[37] The court granted the surety's motion, explaining that state law restricted bad faith claims to "first-party insurance contract[s]" and that inclusion of suretyship bonds under state insurance law was simply "for regulatory and practical purposes."[38]

B. *Payment Bonds*

1. Jurisdiction, Venue, and Arbitration

In *Manganaro MidAtlantic, LLC v. KBE Building Corporation*,[39] a prime contractor and its surety jointly moved to consolidate two cases related to subcontractor work on the same project. The court granted the joint motion and consolidated the cases, ruling that both cases "involve substantial questions of law and fact" because they arose during the same time period and included the same prime contract, prime contractor and surety, causes of action, and defenses and counterclaims.[40] The court further ruled that consolidation would be more efficient because both cases would be resolved in a bench trial.[41]

In *Bedrock Masonry, Inc. v. Innovative Construction & Design Ltd.*,[42] a subcontractor moved to consolidate its case against a prime contractor and surety with another subcontractor's case against the prime contractor and surety on the same project. The prime contractor and surety opposed the consolidation, arguing that the two cases involved separate contracts, unrelated scopes of work, and different alleged contractual breaches.[43] The court granted the subcontractor's motion and reasoned that consolidation would reduce costs and increase efficiencies because of the overlap between the claims, counterclaims, defenses, evidence, and counsel in the two cases.[44]

In *United States ex rel. North Coast Elec. Co. v. Safari Elec., LLC*,[45] a subcontractor filed suit against a supplier on multiple federal construction projects in state court, whereas the supplier filed suit against the subcontractor, the prime contractors, and payment bond sureties on the same projects in federal court.[46] The subcontractor and prime contractors jointly moved to stay the federal court action pending resolution of the earlier filed state court action, arguing that a stay would promote judicial economy, prevent

37. *Id.* at *3 (citing Ala. Code § 27-5-7).
38. *Id.* at *4–5.
39. Nos. 3:19CV00080, 3:20CV00018, 2020 WL 5209535 (W.D. Va. Sept. 1, 2020).
40. *Id.* at *2–3.
41. *Id.* at *3.
42. Nos. 2:19-CV-429-RMP, 2:19-CV-375-SMJ, 2020 WL 4196036 (E.D. Wash. July 21, 2020).
43. *Id.* at *2.
44. *Id.* at *2–3.
45. No. 2:19-cv-00763-RAJ, 2020 WL 5066023 (W.D. Wash. Aug. 27, 2020).
46. *Id.* at *1.

inconsistent results, and avoid needless litigation.[47] The court denied the joint motion, explaining that federal courts cannot "abdicate" their "exclusive jurisdiction over Miller Act claims."[48]

In *United States ex rel. Superior Steel, Inc. v. B.L. Harbert International, LLC*,[49] a prime contractor moved to compel arbitration and stay a subcontractor's payment bond claim under the subcontract's dispute-resolution provision. In response, the subcontractor asserted that the dispute-resolution provision was unconscionable because it gave the prime contractor sole authority to determine how disputes would be resolved, severely limited discovery, and was offered on a take-it-or-leave-it basis.[50] The subcontractor also asserted that its claims were not arbitrable because the dispute-resolution provision excluded "suit[s]" under the Miller Act.[51] The court granted the prime contractor's motion, noting that the subcontractor had failed to provide "any actual evidence" that the dispute-resolution provision's discovery limitation adversely affected the subcontractor or that the subcontractor "lacked the ability to negotiate any contract provision if it so chose."[52] The court also noted that the subcontractor failed to overcome the presumption favoring arbitration because the dispute-resolution provision's reference to "suit" was ambiguous under the circumstances.[53]

In *United States ex rel. John E. Kelly & Sons Electrical Construction, Inc. v. Hartford Fire Insurance Co.*,[54] a prime contractor and surety moved to transfer venue under a subcontract's mandatory forum-selection clause. The subcontractor opposed, arguing that the federal court in Maryland was "better equipped" to decide Maryland state law claims and that the Miller Act's venue provision required the action to be tried in federal court in Maryland.[55] The court granted the motion and held that both federal courts were "well-qualified" to review the case and that the subcontract's mandatory forum-selection clause was sufficient to waive the Miller Act's venue requirement.[56]

In *Ideal Manufacturing, Inc. v. NGC Group, Inc.*,[57] a subcontractor moved to compel a surety to participate in arbitration involving the principal under a subcontract's arbitration provision and a bonded contract's arbitration

47. *Id.* at *1, *4.
48. *Id.* at *4–5.
49. No. CV 119-173, 2020 WL 4227307 (S.D. Ga. July 23, 2020).
50. *Id.* at *4–5.
51. *Id.* at *6.
52. *Id.* at *4–5, *11.
53. *Id.* at *7–10.
54. No. 8:19-CV-02924-PX, 2020 WL 704989 (D. Md. Feb. 12, 2020).
55. *Id.* at *1–3 (citing 40 U.S.C. § 3133(b)(3)(B)).
56. *Id.* at *2–3.
57. Civ. No. 1:19-cv-164, 2020 WL 826638 (S.D. Tex. Feb. 4, 2020), *adopted by* 2020 WL 824102 (S.D. Tex. Feb. 19, 2020).

provision. The court denied the subcontractor's motion, explaining that the subcontractor's claims did not fall within the subcontract's arbitration provision because such provision only applied to claims between the prime contractor and subcontractor.[58] The court further explained that the subcontractor could not enforce the arbitration provision contained within the bonded contract or within the bond because the subcontractor was not a party to either contract.[59]

2. Notice

In *United States ex rel. Thomas Industrial Coatings v. Western Surety Co.*,[60] a second-tier subcontractor filed suit against a subcontractor's payment bond seeking nearly four times more in damages than previously disclosed to the subcontractor and its surety. The surety moved for summary judgment dismissing the second-tier subcontractor's claim for failure to provide notice with "substantial accuracy" of the claim amount.[61] The court denied the motion, explaining that it would not read a "substantial accuracy" requirement into the subcontractor's non-statutory payment bond when the parties failed to include the provision.[62] The court continued, noting that reading a "substantial accuracy" requirement into the bond would "contravene" the Miller Act by expanding its notice requirements beyond claims against the prime contractor's payment bond.[63]

3. Limitations

In *A&C Construction & Installation, Co. WLL v. Zurich American Insurance Co.*,[64] a second-tier subcontractor appealed the dismissal of its claim under the Miller Act as untimely. The second-tier subcontractor argued that its claim notice furnished more than ninety days before its last day of work was sufficient.[65] The Seventh Circuit affirmed summary judgment, reasoning that the second-tier subcontractor's early notice was insufficient because the Miller Act unambiguously required such notice "within 90 days" of its last day of work.[66]

In *Charro Boring, Inc. v. Philadelphia Indemnity Insurance Co.*,[67] a subcontractor instituted an arbitration proceeding against a prime contractor and its surety. The arbitrator dismissed the surety without prejudice and

58. *Id.* at *5–6, *10.
59. *Id.* at *6–7.
60. 1:18-CV-00174, 2020 WL 609548 (D. N.D. Feb. 7, 2020).
61. *Id.* at *1, *3–4.
62. *Id.* at *4–6.
63. *Id.* at *4.
64. 963 F.3d 705 (7th Cir. 2020).
65. 936 F.3d at 708.
66. *Id.* at 710 (citing 40 U.S.C. § 3133(b)(2)).
67. No. 4:19-CV-0653-KPJ, 2020 WL 4284928 (E.D. Tex. July 27, 2020).

awarded the subcontractor damages against the prime contractor.[68] The subcontractor filed suit to enforce the award against the bond, and the surety moved for summary judgment, contending that the statute of limitations had expired.[69] In response, the subcontractor argued under alternative theories of estoppel and equitable tolling that the statute of limitations should not be enforced because the surety participated in the arbitration.[70] The court granted the surety's motion and held that the surety's "passive" arbitration participation in which it repeatedly refused to consent to arbitration did not amount to "a promise, an inducement, or a trick" sufficient to avoid the statute of limitations.[71]

In *United States ex rel. Lee Masonry Products v. Forrest B. White, Jr. Masonry, Inc.*,[72] the court conducted a bench trial in which a supplier and surety disputed whether the supplier's claim was timely filed after material was last furnished to the project. The supplier's subcontractor had performed timely contract work in addition to corrective work.[73] The court held that the supplier had failed to proffer "direct evidence" demonstrating that its materials were used in timely contract work.[74] Therefore, the court held that the supplier's lien was untimely because it was based on materials "used for [irrelevant] corrective or repair work."[75]

In *SRS Distribution, Inc. v. Axis Alliance, L.L.C.*,[76] the court considered whether a subcontractor could bring a bond claim when the subcontractor included an erroneous untimely date of last work in its mechanics' lien affidavit. The subcontractor and surety disputed whether "substantial compliance" with state law was sufficient to create a mechanics' lien.[77] The court affirmed the judgment dismissing the subcontractor's lien and held that "a valid lien was never created" under a strict construction of the mechanic's lien law.[78]

In *Digesare Mechanical, Inc. v. U.W. Marx, Inc.*,[79] a surety obtained summary judgment dismissing a bond claim as untimely under bond language more restrictive under the circumstances than a state mechanics' lien law. The appellate court reversed, holding that the state mechanics' lien law

68. *Id.* at *1–2.
69. *Id.* at *2–3.
70. *Id.* at *3–4.
71. *Id.*
72. Civil Action No. 3:13-CV-958-CHL, 2020 WL 1939353 (W.D. Ky. Apr. 22, 2020).
73. *Id.* at *8–9.
74. *Id.* at *9.
75. *Id.* at *9–10 (citing United States *ex rel.* Interstate Mech. Contractors, Inc. v. Int'l Fid. Ins. Co., 200 F.3d 456, 462 (6th Cir. 2000)).
76. 153 N.E.3d 953 (Ohio Ct. App. 2020).
77. *Id.* at 955 (citing Ohio Rev. Code Ann. § 1311.06).
78. *Id.* at 957.
79. 112 N.Y.S.3d 306 (App. Div. 2019).

"governs bonds furnished pursuant to that statute, and, although parties may agree to expand the statute's protections, they may not limit them."[80] The court continued by interpreting the bond to "provide for the accrual date set forth in the statute."[81]

4. Proper Claimants

In *McDonald v. Fidelity & Deposit Co. of Maryland*,[82] the court considered whether an employee trust fund could recover unpaid employer trust contributions from a public payment bond. On appeal, the employee trust fund asserted that all unpaid trust contributions were recoverable and the surety argued that only amounts due directly to employees were recoverable.[83] The court adopted a "middle ground," in which it recognized that the mechanics' lien law "encompasses any and all traceable amounts that are ultimately 'due' an individual employee."[84] The court continued, noting that wages and retirement contributions would qualify, whereas general contributions to keep an employee trust fund solvent, liquidated damages, and audit fees would likely not qualify.[85]

In *Aaron Enterprises v. Federal Insurance Co.*,[86] a subcontractor received progress payments shortly before a prime contractor filed for bankruptcy. The subcontractor filed an action for declaratory judgment seeking a declaration that the surety was obligated to pay the subcontractor if the bankruptcy trustee recovered the progress payments.[87] The surety moved to dismiss, asserting that the subcontractor's "contingent claim" did not create a "current case or controversy."[88] The court granted the surety's motion, explaining that the subcontractor's claim was "not ripe" and alternatively sought "an advisory opinion regarding an affirmative defense in potentially separate litigation."[89] The court emphasized that the subcontractor's claim "depends on a future, contingent scenario that is far from immediate in nature and, in fact, may never materialize as such[.]"[90]

80. *Id.* at 312 (citing N.Y. Fin. Serv. Law § 137(b)(4)).
81. *Id.* at 312–13.
82. 462 P.3d 343 (Utah 2020).
83. *Id.* at 347.
84. *Id.* at 345–49.
85. *Id.* at 348–49.
86. 415 F. Supp. 3d 595 (E.D. Pa. 2019).
87. *Id.* at 598.
88. *Id.* at 599.
89. *Id.* at 600–02.
90. *Id.* at 600–01.

5. Principal's Defenses

In *Crosno Construction, Inc. v. Travelers Casualty & Surety Co. of America*,[91] a subcontractor filed an action against a prime contractor's payment bond surety while the prime contractor sought payment from the owner in a separate lawsuit. The trial court granted the subcontractor summary judgment, holding that the subcontract's pay-when-paid provision was unenforceable because it impaired the subcontractor's rights under the state anti-waiver statute.[92] On appeal, the surety and an amicus curiae argued, among other things, that the pay-when-paid provision was enforceable because it did not waive the subcontractor's "unconditional right to payment within a reasonable time" and any statute-of-limitation concerns could be resolved by filing and immediately staying the payment bond action pending resolution of the lawsuit between the owner and prime contractor.[93] The California Court of Appeal affirmed, reasoning that allowing the surety to "postpone its payment bond obligation until some unspecified and undefined point in time when [the prime contractor's] litigation with the [owner] concluded . . . would unquestioningly and unreasonably affect or impair [the subcontractor's] right to recover under the payment bond without either an express waiver or full payment required" by state law.[94]

In *Professional Electrical Contractors of Connecticut, Inc. v. Stamford Hospital*,[95] the court considered, as a matter of first impression, whether a lienable fund is exhausted when, after notice that a subcontractor has filed a mechanics' lien, an owner continues to pay a prime contractor until the full contract price has been paid. The court held that "when the general contractor is not in default, unless there were payments made in bad faith, the lienable fund is the amount still owed by the property owner to the general contractor at the time the property owner received notice of the lien" under state law.[96] The court noted that an alternative holding would "lead to absurd results" because it would "permit an owner and a general contractor to render a subcontractor's lien essentially meaningless."[97]

In *Maguire-O'Hara Construction, Inc. v. Cool Roofing Systems, Inc.*,[98] the court considered whether a prime contractor's bankruptcy petition automatically stays a subcontractor's claims against the prime contractor's payment bond surety. The court held that the automatic stay applied,

91. 261 Cal Rptr. 3d 317 (Ct. App. 2020).
92. *Id.* at 319, 321–22, 327 (citing Cal. Civ. Code § 8122).
93. *Id.* at 328–329.
94. *Id.* at 327–328, 334 (citing Cal. Civ. Code §§ 8124, 8126).
95. 230 A.3d 773 (Conn. App. Ct. 2020).
96. *Id.* at 786, 795 (citing Conn. Gen. Stat. § 49-34).
97. *Id.* at 792, 794–95.
98. Case No. CIV-19-705-R, 2020 WL 674442 (W.D. Okla. Feb. 11, 2020).

noting that case law permitted "a stay to be expanded to cover solvent co-defendants."[99] The court emphasized that the surety's liability was "dependent upon" the prime contractor's liability and the surety had an "absolute contractual indemnity right" against the prime contractor.[100]

In *E Solutions For Buildings, LLC v. Knestrick Construction, Inc.*,[101] an equipment supplier on a public project brought claims against the subcontractor, the prime contractor, and the prime contractor's payment bond surety.[102] The trial court awarded the supplier damages against the subcontractor, but dismissed the supplier's claim against the prime contractor and surety, explaining that the supplier's claim was not ripe until the subcontractor "fails to pay the judgment."[103] The supplier appealed and the appellate court reversed, explaining that it was "unaware of any such limiting requirement" and that such requirement would preclude claimants from complying with strict statute-of-limitation requirements.[104]

C. *Other Bonds*

1. Appeal Bond

In *Tornatore v. Cohen*,[105] litigation arose from an injury during chiropractic treatment. The patient obtained judgment and the chiropractor posted an appeal bond to stay execution.[106] After the appellate court affirmed the judgment, the surety refused to pay interest beyond the bond's penal sum and the patient obtained an order from the trial court awarding prejudgment and post-judgment interest against the surety.[107] The surety appealed and the appellate court affirmed, explaining that the bond did not limit the amount to be paid "to any fixed sum" and "unambiguously" obligated the surety "to fully pay the amount directed by the judgment" including "prejudgment and post-judgment interest."[108]

In *A.T.O. Golden Construction Corp. v. Allied World Insurance Co.*,[109] a prime contractor and surety jointly moved to post an appeal bond after the sub-

99. *Id.* at *1–2 (citing Okla. Federated Gold & Numismatics, Inc. v. Blodgett, 24 F.3d 136, 141 (10th Cir. 1994)).

100. *Id.* at *1.

101. No. M2018-02028-COA-R3-CV, 2019 WL 5607473 (Tenn. Ct. App. Oct. 30, 2019), *appeal denied*, Mar. 26, 2020.

102. *Id.* at *2.

103. *Id.* at *2, *16.

104. *Id.* at *4, *16–17.

105. 128 N.Y.S.3d 107 (App. Div. 2020).

106. *Id.* at 108–09.

107. *Id.*

108. *Id.* at 108–10.

109. Case No. 17-24223-Civ-Williams/Torres, 2019 U.S. Dist. LEXIS 213571 (S.D. Fla. Dec. 10, 2019), *adopted by* 2020 U.S. Dist. LEXIS 10099 (S.D. Fla. Jan. 17, 2020).

contractor obtained a judgment. In response, the subcontractor argued that the prime contractor and surety should post separate bonds because they were jointly and severally liable.[110] The court granted the surety's motion and rejected the subcontractor's argument, explaining that requiring multiple appellate bonds would disturb "the status quo" and "transform a single debt shared between two parties to two debts applicable to each party."[111]

2. Mechanics' Lien Release Bond

In *Wonder Works Construction Corp. v. Bridgeton Amirian 13th Street, LLC*,[112] a prime contractor filed its mechanics' lien after the improved property was conveyed by an unrecorded deed to a purchaser. The purchaser recorded the deed and moved to vacate and discharge the mechanics' lien release bond, arguing that state law prohibited enforcement of the lien after the purchaser recorded the deed transfer.[113] The court agreed and granted the motion, emphasizing that "it is the date of conveyance, not recording, that controls the disposition of a mechanic's lien" under state law.[114]

In re Hollister Construction Services, LLC[115] involved a debtor prime contractor and post-petition claims by a subcontractor and supplier against an owner's mechanics' lien release bond. The owner moved for an order declaring that post-petition claims against the mechanics' lien release bond violated the automatic stay.[116] The court granted the owner's motion in part, reasoning that claims against the mechanics' lien release bond violated the automatic stay because any payment by the surety would entitle the surety to "an equitable lien" on the estate's accounts receivable.[117]

D. *Rights of Surety*

1. Indemnity

In *Great American Insurance Co. v. 53rd Place, LLC*,[118] a surety moved for default judgment against indemnitors for actual and anticipated losses under condominium warranty bonds. The surety submitted affidavits of claims counsel, together with copies of the indemnity agreement and tendered payment checks.[119] The court granted the surety's motion in

110. *Id.* at *7–8.
111. *Id.* at *9, 11.
112. No. 654926/2019, 2020 WL 4003595 (N.Y. Sup. Ct. July 14, 2020).
113. *Id.* at *3 (citing N.Y. Lien Law § 13).
114. *Id.*
115. 617 B.R. 45 (Bankr. D. N.J. 2020).
116. *Id.* at 47, 49, 56.
117. *Id.* at 56–58.
118. No. 3:19-cv-902, 2020 WL 4340538 (E.D. Va. July 28, 2020).
119. *Id.* at *3.

part, explaining that the surety was not entitled to receive judgment for anticipated losses because it had "not yet suffered the additional loss."[120]

In *Bondex Insurance Co. v. Trio Siteworks, LLC*,[121] a surety moved for leave to amend its complaint against indemnitors and add claims for fraud arising from the indemnitors' repeated failure to disclose a collateral demand and related judgment against them. The indemnitors opposed the motion, arguing that the amendment would be futile because, among other reasons, the fraud claims were time-barred.[122] The court granted the surety's motion in part, reasoning that the indemnitors waived their statute-of-limitations defense under the indemnity agreement.[123] The court further reasoned that the surety's fraud allegations were adequately pleaded because the surety likely "would not have entered into [the] contract" or would have "demanded higher premiums or more collateral" if it knew of the collateral demand and judgment against the indemnitors.[124]

2. Collateral Deposit

In *Philadelphia Indemnity Insurance Co. v. Ohana Control System*,[125] the surety obtained a jury verdict against the indemnitors under the indemnity agreement and moved post-trial for specific performance requiring the indemnitors to post collateral.[126] The court granted the surety's motion and the indemnitors moved for a new trial under FRCP 59(a), arguing that fairness required an evidentiary hearing.[127] The court rejected the indemnitors motion, holding that the indemnitors' proffered evidence was cumulative and would not have affected the court's earlier decision because the existing claims against the performance bond were not frivolous.[128]

In *Frankenmuth Mutual Insurance Co. v. Cadet Construction Co.*,[129] a surety moved for a preliminary injunction compelling the indemnitors to post cash collateral in the penal sum of the performance bond. The court granted in part the surety's motion, explaining that the surety would likely suffer irreparable harm absent relief because the indemnitors had been terminated for default and the surety had incurred expenses in investigating and paying bond claims.[130] The court, however, refused to compel the indemnitors to post cash collateral in the penal sum, concluding that a lesser

120. *Id.* at *3, *5.
121. No. 19-614, 2020 WL 2539191 (E.D. Pa. May 19, 2020).
122. *Id.* at *2.
123. *Id.* at *4.
124. *Id.*
125. Civ. No. 17-00435-SOM-RT, 2020 WL 3490021 (D. Haw. June 26, 2020).
126. *Id.* at *1.
127. *Id.* at *1, *3
128. *Id.* at *4–6.
129. 1:19-CV-1125, 2020 WL 2322726 (M.D.N.C. May 11, 2020).
130. *Id.* at *4, *6.

amount comprised of the surety's "reserve," and existing bond payments "seem[ed] adequate" to protect the "surety from irreparable harm."[131]

In *Granite Re, Inc. v. National Credit Union Administrative Board*,[132] a surety filed suit under state law when its credit union's conservator refused to honor an irrevocable letter of credit (ILOC). The conservator moved to dismiss, arguing that it was authorized to repudiate the ILOC under federal law because the ILOC was not a contract and federal law otherwise preempted state law.[133] The trial court agreed and dismissed the surety's complaint.[134] On appeal, the Eighth Circuit reversed, reasoning that federal law expansively defined contract to include "the letter of credit" at issue and that the surety incurred recoverable damages under bonds issued in reliance on the ILOC.[135] The court further reasoned that it did not need to resolve if federal law preempted state law because federal and state law was "reconcilable" because the surety's damages were the "same under either statute."[136]

In *American Contractors Indemnity Co. v. Reflectech, Inc.*,[137] a surety moved for summary judgment against indemnitors under an indemnity agreement for expenses incurred in resolving payment and performance bond claims. In response, the indemnitors proffered expert testimony and argued that the indemnity agreement was unconscionable.[138] The court granted the surety's motion, explaining that the existence of unconscionability in a contract is a legal question decided by the court and not expert testimony.[139]

In *Liberty Mutual Insurance Co. v. Frank Coluccio Construction Co.*,[140] a surety moved for a temporary restraining order to prevent a terminated principal from selling further assets without prior consent. The court denied the surety's motion, holding that the surety failed to demonstrate that the indemnitors were "squirreling away money, as opposed to selling assets in the ordinary course of business[.]"[141] The court also held that the surety failed to demonstrate an injury because liability under the performance bond remained "speculative."[142]

131. *Id.* at *5.
132. 956 F.3d 1041 (8th Cir. 2020) (citing N.D. Cent. Code § 41-05-11).
133. *Id.* at 1043–45 (citing 12 U.S.C. § 1787(c)).
134. *Id.* at 1044.
135. *Id.* at 1045–48.
136. *Id.* at 1048.
137. No. 1:18CV297-HSO-RHW, 2020 WL 1190474 (S.D. Miss. Mar. 12, 2020).
138. *Id.* at *5.
139. *Id.*
140. Civ. No. C19-1652 MJP, 2019 WL 5802071 (W.D. Wash. Nov. 7, 2019).
141. *Id.* at *2–3.
142. *Id.* at *3.

3. Subrogation

In *Travelers Casualty & Surety Company of America v. Vazquez Colón*,[143] the owner filed a counterclaim seeking to interplead project retainage and remaining contract balance. The surety moved to dismiss, arguing that there were no adverse claims against the retainage and contract balance because it had paid the principal's subcontractors and was therefore subrogated to the rights of such subcontractors.[144] In response, the owner asserted that adverse claims existed because the principal, as a government debtor, was barred from recovering further payment under territorial statute.[145] In granting the surety's motion, the court reasoned that the principal's outstanding debt was "irrelevant" because the surety's subrogation rights were "superior to those of general creditors."[146]

In *Pineda REO, LLC v. Weir Bros., Inc.*,[147] a subcontractor defaulted on a bonded project and the surety paid subcontractors and suppliers, and otherwise fulfilled its bonded obligations. The subcontractor's secured lender moved to garnish project retainage and remaining contract balance, and the prime contractor filed a counterclaim seeking to interplead such funds.[148] The court evaluated cross-motions for summary judgment disputing whether the surety's equitable interest in the disputed funds took priority over the government's tax lien and the secured lender's interest.[149] The court held that the surety's interest was inferior, explaining that the indemnity agreement failed to create a valid express trust under state law because it did not designate a trustee or beneficiary and otherwise referred to the surety as a "secured party" with a "security interest."[150]

In *Capitol Indemnity Corp. v. United States*,[151] the government terminated a prime contractor for default and entered into a takeover agreement with the prime contractor's performance bond surety. The surety filed suit against the government to recover certain progress payments released to the prime contractor before termination.[152] The government moved to dismiss, arguing that pre-termination communications did not trigger the surety's equitable subrogation rights.[153] The court granted in part and denied in part the government's motion, holding that the surety did not state a claim for the

143. No. 18-1795 (GAG), 2020 WL 3259428 (D. P.R. June 15, 2020).
144. *Id.* at *1–2.
145. *Id.* at *2 (citing P.R. Laws Ann. tit. 3, § 282).
146. *Id.* at *3.
147. Civ. No. 3:18-CV-1660-N, 2020 WL 1236548 (N.D. Tex. Mar. 12, 2020).
148. *Id.* at *1–2.
149. *Id.* at *2–9.
150. *Id.* at *7–8, *11.
151. 147 Fed. Cl. 371 (2020).
152. *Id.* at 374–76.
153. *Id.* at 374, 378–80.

earlier of two progress payments because the surety did not "acknowledge its potential liability" or make any "objections to the progress payments" at that time.[154] In contrast, the court held that the surety stated a claim to recover the latter progress payment because the surety's pre-payment communications with the government were "tantamount" to the surety "acknowledging" default and assuming responsibility.[155]

In *Guarantee Co. of North America v. Ikhana, LLC*,[156] a prime contractor requested additional compensation and time based on repeated work stoppages and contract modifications. The government denied the prime contractor's requests and terminated the prime contractor for default.[157] The prime contractor appealed the government's denial and termination for default to the Armed Services Board of Contract Appeal (the "Board").[158] The surety subsequently entered into a settlement agreement with the government and moved to intervene and withdraw the prime contractor's appeal based on the prime contractor's purported assignment of contractual rights under the indemnity agreement following termination for default.[159] The Board denied the surety's motion for lack of standing and the surety appealed.[160] The Federal Circuit affirmed, explaining that the surety could not "commandeer" the appeal because its standing based on the settlement agreement arose after the prime contractor's claims arose.[161]

II. FIDELITY LAW

A. *Financial Institution Bonds*

In *Berkley Regional Insurance Co. v. Greater Eastern Credit Union*,[162] the insurer issued a financial institution bond based on the written representation from the insured's CEO that the insured had no pending losses or information that could give rise to a claim. After the insurer issued the bond, the insured learned that the CEO stole over one million dollars from the company.[163] The insurer rescinded the bond and sought declaratory relief that the bond was null and void based upon the CEO's false representation in the application.[164] The court found that the insurer properly

154. *Id.* at 374, 380–82.
155. *Id.* at 380–81.
156. 941 F.3d 1140 (Fed. Cir. 2019).
157. *Id.* at 1142.
158. *Id.*
159. *Id.* at 1141–42.
160. *Id.* at 1141–43.
161. *Id.* at 1143–44.
162. 438 F. Supp. 3d 857, 859 (E.D. Tenn. 2020).
163. *Id.*
164. *Id.*

rescinded the bond because the CEO, as agent of the insured, lied on the application, which increased the risk to the insurer.[165]

In *Citizens State Bank v. Leslie*,[166] the insured purchased an interest in twelve fraudulent mortgage loans. A dispute arose as to whether the insured had met the conditions of the financial institution bond to cover the losses resulting from the fraudulent loans.[167] The bond required possession of the original loan documents by an authorized representative, that the bank relied "on the faith" of the loan documents, and that the bank acted in good faith in purchasing the mortgage loans.[168] The court found that the bank met the possession condition because the closing agent, a representative authorized to possess the loan documents, had possession of the loan documents.[169] Additionally, the court found issues of material fact as to whether the bank relied on the loan documents and whether the bank acted in good faith when it purchased its interest in the mortgage loans.[170]

Furthermore, in *Citizens State Bank v. Leslie*[171] the insurer moved to strike the expert's opinion.[172] In the appeal, the insurer objected to the part of the order denying the motion with regard to the expert's opinion that one of the individuals was an authorized representative of the bank.[173] The insurer argued that the lower court erroneously found that the insurer's objection to the opinions regarding whether an individual was an authorized representative of the bank went to the weight of the testimony and not the admissibility.[174] In denying the appeal, the court held that Texas law allows admission of testimony that provides "an explanation concerning the relevant course of dealing and industry context" of a particular contract.[175] While the court held that extrinsic evidence was allowed to inform the court of the meaning of contract language, it was not allowed to "alter or contradict the terms" of the contract.[176]

In *Crown Bank JJR Holding Co. v. Great American Insurance Co.*,[177] the parties disputed whether a bank's loss arising from an email impersonation of an account holder was covered under a financial institution bond and a computer crime policy. The bank received wire transfer requests via email,

165. *Id.* at 866.
166. Civil No. 6-18-CV-00237-ADA, 2020 WL 1644017 (W.D. Tex. Apr. 2, 2020).
167. *Id.*
168. *Id.*
169. *Id.* at *4–5.
170. *Id.* at *17.
171. Civ. No. 6-18-CV-00237-ADA, 2020 WL 1065723, at *1 (W.D. Tex. Mar. 5, 2020).
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at *3.
176. *Id.*
177. Civil Action No. 16-8778, 2020 WL 634147 (D. N.J. Feb. 11, 2020).

resulting in millions of dollars being sent to unknown accounts.[178] Among other things, the parties disputed the cause of the loss with the insurer maintaining that the insured's failure to follow its procedures was the cause, and the insured contending that the loss was caused by the receipt of fraudulent wire transfer forms.[179] In denying the insured's motion for summary judgment as to its entitlement to coverage, the court did not reach the issue of causation under the bond as the insured failed to show that the plain language of the bond would cover the loss.[180] The court denied both parties' motions for summary judgment as to coverage under the Computer Systems Fraud Insuring Agreement ("CSFIA").[181] The court noted that the insured argued that the language of the CSFIA was ambiguous, but did not offer its own construction that would afford coverage, and that neither party addressed the relevant standard for interpreting the CSFIA.[182]

In *MPB Collection LLC v. Everest National Insurance Co.*,[183] the parties brought competing motions for summary judgment in a dispute over coverage under a financial institution bond. The underlying dispute involved a large loan by the insured to a company. The insured later discovered that the company had not been truthful in its loan application by forging the personal guaranties with creditors.[184] The court found that the plain language of the insuring agreement was satisfied and the "loss resulting directly from" language refers to loss directly caused by the extension of credit.[185] The insurer argued that the loss did not "result directly" from the guaranties, but rather, from the many other misrepresentations made to it by the company so that it could obtain the loan. In rejecting this argument, the court held that "the issue raised by the language of the bond is whether the loss was directly caused by the loan, not whether the loan may have lacked value for reasons in addition to the forged [guaranties]."

B. *Crime Coverage*

In *Quality Plus Services, Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*,[186] the insured made a claim on its crime coverage policy for monetary transfers based on illegitimate email requests made to an employee. On the denial of cross-motions for summary judgment, the court held that there were genuine issues of material fact as to the location from which

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178. *Id.* at *2.
179. *Id.* at *3.
180. *Id.* at *4.
181. *Id.* at *7.
182. *Id.*
183. No. CV-17-04022-PHX-GMS, 2019 WL 5789469, at *1 (D. Ariz. Nov. 6, 2019), *appeal docketed*, No. 20-15275 (9th Cir. Feb. 21, 2020).
184. *Id.*
185. *Id.*
186. Civil Action No. 3:18cv454, 2020 WL 239598 (E.D. Va. Jan. 15, 2020).

the emails originated and thus the applicability of the funds transfer fraud provision. Issues of material fact also existed as to the number of people who sent the emails and thus whether the emails constituted one occurrence under the policy or multiple occurrences.

In *Sherwin-Williams Co. v. Beazley Insurance Co., Inc.*,[187] the court denied the insurer's motion for summary judgment, finding that there were issues of material fact as to whether alleged overcharges constituted employee theft under the crime insurance policy. The alleged theft involved the insured employee's approval of inflated invoices by a vendor.[188] The insured determined that the employee had colluded with an unknown employee of the vendor to deprive the insured of millions of dollars.[189] The employee had also established a shell company for the purpose of receiving kickbacks.[190] The court rejected the insurer's argument that even if employee theft was involved, the insured's claim fell under a policy exclusion for losses caused by a third party, noting that a juror could find the exclusion inapplicable.[191]

In *M&C Holdings v. Great American Insurance Co.*,[192] the insured's employee siphoned commissions paid by the insured to both legitimate and fictional third-party travel agencies. The crime protection insurance policy provided that the insurer will pay for loss "resulting directly from acts committed … by [the insured] during the Policy Period."[193] Insurer filed a motion to dismiss insured's complaint stating the parties subject to harm for the employee's scheme were the uncompensated third-party travel agencies and thus, the insured did not suffer a direct loss. Insurer further argued that insured failed to file suit within the two-year limitations period contained in the policy. The court denied the motion finding that the insured properly alleged a direct loss arising from the actual disbursement of the insured's funds, and that there was an issue as to whether the insurer waived compliance with the limitations provision.

In *Communications Unlimited Contracting Services, Inc. v. Liberty Mutual Insurance Co.*,[194] the insured made a claim for cable television equipment stolen by an employee. Insurer denied the claim based on the two-year limitations period in its commercial crime policy and plaintiff filed suit.[195] Granting the insurer's motion for summary judgment, the court found that discovery of the loss triggering the two-year limitation period occurred

187. Civil No. 18-02964 (DWF/DTS), 2020 WL 4226866 (D. Minn. July 23, 2020).
188. *Id.* at *1.
189. *Id.*
190. *Id.*
191. *Id.* at *5.
192. Case No. 1:20-cv-121, 2020 WL 4365635 (S.D. Ohio July 29, 2020).
193. *Id.*
194. Case No. 2:18-CV-00613-CLM, 2020 WL 5016820 (N.D. Ala., Aug. 25, 2020).
195. *Id.*

when the insured was back-charged by the cable television company for which it was completing installations that equipment was missing and not at the time it resolved its dispute with the contracting cable company two years later.[196]

In *Ohio Casualty Insurance Co. v. MyPayrollHR, LLC*,[197] the insurer alleged that the insured fraudulently obtained a renewed commercial crime policy and sought rescission. The insurer alleged that the insured was engaged in financial fraud crimes at the time it applied for insurance coverage and that failing to disclose such criminal activity amounted to fraud in obtaining the policy.[198] The court granted the insurer's motion for default judgment.[199] The court noted that the insurer's motion for default judgment contained additional information about the scheme, as well as documents demonstrating that the insured concealed material information from the insurer in applying for and renewing the policy.[200] Citing New York law, the court held that "an insurer may rescind a policy if it was issued in reliance on material misrepresentations" and that rescission can also occur "if the insured fraudulently concealed from or misrepresented a material fact to the insurer at the time the policy was issued."[201]

In *Principle Solutions Group, LLC v. Ironshore Indemnity Inc.*,[202] a scammer, posing as the managing director of the insured, emailed the controller of the insured and directed a wire of funds. The scammer then posed as an attorney, who emailed the controller and gave wiring instructions.[203] The controller completed the wire transfer, resulting in a loss to the insured.[204] A dispute arose between the insured and insurer as to whether the loss was covered under the commercial crime insurance policy. The court granted, in part, the insured's motion for summary judgment.[205] On appeal, the Eleventh Circuit affirmed, finding that the emails together constituted a "fraudulent instruction" and, applying Georgia's proximate causation interpretation of "resulting directly from," the scheme "directly" caused the loss despite intervening acts that may preclude recovery under a "direct means direct" interpretation.[206]

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196. *Id*. at *8-9.
197. No. 1:19-CV-1267 (TJM/CFH), 2020 WL 1451302 (N.D.N.Y. Mar. 25, 2020).
198. *Id*. at *1.
199. *Id*. at *2.
200. *Id*. at *1.
201. *Id*.
202. 944 F.3d 886, 889 (11th Cir. 2019).
203. *Id*. at 889.
204. *Id*.
205. *Id*. at 893.
206. *Id*. at 891–92.

In *RealPage Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*,[207] the insured sued its commercial crime policy insurer under the Texas Prompt Payment of Claims Act ("PPCA"), among other causes of action, after the insurer denied coverage for most of its losses. The insurer moved to dismiss the insured's PPCA claims alleging that it could not bring claims under the PPCA because the policy was a fidelity bond and the PPCA does not apply to fidelity bonds.[208] Specifically, the insurer argued that commercial crime policies are synonymous with fidelity bonds.[209] The court disagreed.[210] Adopting the Black's Law Dictionary definition of "fidelity bond," the court found that only a portion of the Policy functioned as a fidelity bond and allowed the insured's PPCA claims to go forward.[211]

C. *Computer Fraud Coverage*

In *Cincinnati Insurance Co. v. Norfolk Truck Center, Inc.*,[212] the insurer filed a lawsuit seeking declaratory relief and claiming that it did not owe coverage to the insured under a computer fraud insuring agreement after an imposter caused the insured to wire money to the wrong location. The issue was whether the loss resulted "directly" from the use of a computer, which fell under the Computer Fraud insuring agreement of the policy.[213] The court found that "directly" means "something that is done in a 'straightforward' or 'proximate' manner and 'without deviation' or 'without intervening agency' from its cause." Applying this definition, it found that the Policy covered the loss because computers were used every step of the way, including receipt of the instruction and the insured's wiring of funds.[214]

In *G&G Oil Co. of Indiana v. Continental Western Insurance Co.*,[215] the insured sought recovery made to a computer hacker in ransomware attack under the computer fraud provision of insurer's commercial crime policy. On appeal from a trial court order granting the insurer's, and denying the insured's, motions for summary judgment, the court held that the claim was not covered under the computer fraud provision where the hacker's computer was not used to make an unauthorized direct transfer of property.[216]

In *Mississippi Silicon Holdings LLC v. Axis Insurance Co.*,[217] a bad actor posed as a representative with one of the insured's material suppliers and

207. Civil Action No. 3:19-CV-1350-B, 2020 WL 1550798 (N.D. Tex. Apr. 2, 2020).
208. *Id.* at *5, *7.
209. *Id.* at *8.
210. *Id.* at *11.
211. *Id.* at *15–16.
212. 430 F. Supp. 3d 116, 118-19 (E.D. Va. 2019).
213. *Id.* at 125.
214. *Id.* at 130.
215. 145 N.E.3d 842 (Ind. Ct. App. 2020).
216. *Id.* at 845–47.
217. 440 F. Supp. 3d 575, 577–78 (N.D. Miss. Feb. 21, 2020).

requested wire transfers to a bank account different from that listed in the billing company's invoices. The insured's employees initiated the wire transfers, which resulted in a loss.[218] The insured sued its insurer after the insurer approved coverage under the social engineering fraud coverage but denied coverage under the computer transfer fraud and fund transfer fraud insuring agreements.[219] The court found that the computer transfer fraud provision was inapplicable because it required that the fraudulent act "directly" cause the loss, and refused to follow a "proximate cause" standard, which the facts did not support.[220] The court also found that the funds transfer fraud provision was inapplicable because it required that the transfer be "issued without the [insured's] knowledge or consent."[221]

D. *Employee Theft*

In *Whitney Equipment Co., Inc. v. Travelers Casualty & Surety Co. of America*,[222] an employee manipulated the company's books, resulting in employee bonus payments and a company-wide vacation, causing losses to the insured. The insured had an employee theft policy that covered the "direct loss of . . . Money . . . directly caused by Theft . . . committed by an Employee."[223] The court found that a "theft" occurred because the employee intentionally took money from the company.[224] Additionally, the court found that the theft directly caused the loss because the bonuses and company-wide vacations were based solely on the employee's actions.[225] However, the court found that the insured could not recover for the vacation expenses because an exclusion applied that excluded from coverage payments made by the company to third parties.[226]

In *Concorde Investment Services, LLC v. Everest Reinsurance Co.*,[227] an employee embezzled from insured's investment firm's client. Insured filed suit against insurer, and insurer moved to dismiss for insured's failure to file suit within the two-year limitation period contained in the policy. Denying the motion to dismiss, the court found that plaintiff's claim for breach of the implied duty of good faith was not covered by the limitations provision and that issues of the insurer's waiver and estoppel precluded the dismissal of the remaining counts.[228]

218. *Id.*
219. *Id.* at 579.
220. *Id.* at 582–83.
221. *Id.* at 585.
222. 431 F. Supp. 3d 1223, 1225 (W.D. Wash. 2020).
223. *Id.*
224. *Id.* at 1227.
225. *Id.* at 1229.
226. *Id.* at 1230.
227. Case No. 19-13203, 2020 WL 2933329 (E.D. Mich. June 3, 2020).
228. *Id.* at *8-9.

E. *Business Insurance Policy*

In *3BC Properties, LLC v. State Farm Fire & Casualty Co.*,[229] the court considered whether the insured could recover under the business insurance policy where the employee falsified time records for herself and her relatives, resulting in overpayments. After the court granted the insurer's motion for summary judgment, the insured appealed.[230] The court affirmed and held that unearned salaries and commissions are nonetheless salaries and commissions—they do not lose their essential character as employer-to-employee financial transactions merely because they were obtained through deceit.[231] Thus, the policy provision indemnifying the employer for losses arising out of an employee's dishonesty did not cover salaries not earned in the normal course of employment.[232]

229. 156 N.E.3d 626 (Ill. App. 2d Dist. 2020).
230. *Id.* at 628.
231. *Id.* at 630–31.
232. *Id.*

RECENT DEVELOPMENTS IN HEALTH INSURANCE, LIFE INSURANCE, AND DISABILITY INSURANCE LAW

Elizabeth G. Doolin, Julie F. Wall, and Joseph R. Jeffery[*]

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2020 was the year we never expected and the year we will never forget. And this year's article will likely be the last one in a long while where the term COVID-19 does not appear in any of the cases we discuss. Whether you are here for the latest on ERISA preemption, new cases on the limits of disability coverage for one's own occupation, or, as our discussion of accidental death cases this year highlights, reasons to be grateful your staycation, we hope our compendium of new and notable decisions will help you make sense of a small corner of 2020 (and those carefree days of late 2019!). As has been the case every year since its enactment, the Affordable Care Act continued to make headlines this survey period. The United States Supreme Court issued rulings on the Risk Corridors program and the religious and moral exemption regulations to the ACA's Contraceptive Mandate, while the Fifth Circuit considered the constitutionality of Individual Mandate. Life insurance cases continued to highlight revocation on divorce statutes, rescission, and stranger originated life insurance issues, even as courts saw interesting takes on perennial accidental death, disability, and ERISA issues. All of this and more is explored in this review of recent developments in health insurance, life insurance, and disability insurance law.

I. ACCIDENTAL DEATH

This survey period brought numerous cases dealing with questions about whether underlying illness contributed to purportedly accidental deaths, including a number of cases where there was no question that an accident occurred, but there were often unanswerable questions about what precipitated the accident. The First Circuit took a look at one such particularly contentious case and held that an insurer need not prove which of many potential underlying medical conditions may have caused an auto accident so long as there was credible expert testimony to a reasonable degree of medical certainty that at least one such condition likely caused the accident. This resulted in a split in standards of proof between circuits and a fiery dissent. Other noteworthy cases involve questions of whether self-administered care constitutes medical treatment and whether coverage for travelers on a common carrier includes snorkeling next to it.

A. *"If You're Going Through Hell, Keep Going"*[1]*—Cautionary Tales From People Who Have Seen Worse Years Than 2020*

In *Parsons v. Unum Life Insurance Co. of America*,[2] summary judgment was awarded to the defendant insurer under a *de novo* standard of review when

1. Winston Churchill, Churchill By Himself: The Definitive Collection of Quotations (2013) (ebook).
2. 2019 WL 5213871, at *1 (N.D. Miss. Oct. 16, 2019).

the district court found that, even without an autopsy, the sworn testimony of one witness to the insured's death left no logical alternative but to conclude that the insured's death was caused by an underlying medical condition. The policy at issue covered death as a result of "accidental bodily injury," defined as "bodily injury that is the direct result of an accident and not related to any other cause,"[3] and excluded death "caused by, contributed to by, or resulting from disease of the body."[4]

Scarlett Hart provided an account of the tragic circumstances of her father William Parson's death to support her mother's claim for accidental death benefits.[5] According to Scarlett, William was cutting grass in a tractor on their property when she went to check on him and found him looking blue in the face and "slumped over" in the driver's seat with the tractor running.[6] She began to climb into the tractor, but William's foot "slipped off the clutch" and the tractor began to move forward.[7] Scarlett attempted to stop the tractor and to pull William off, but fell and had her leg run over by the tractor; the tractor then proceeded down a hill causing William to fall from the tractor and be crushed underneath the tire and mower.[8] First responders were unable to revive William and he was pronounced dead.[9] No autopsy was performed.[10]

The insurer denied accidental death benefits because William was already non-responsive at the wheel of his tractor before he fell and was run over, and thus had clearly experienced some type of medical event that contributed to his death.[11] Plaintiff admitted William "may have suffered a medical event prior to the accident," but asserted that "but for [William's] daughter, [Scarlett], attempting to assist her father, he would not have fallen off of the tractor or been run over by it."[12] This admission left no question that some medical event at least contributed to William's death, which therefore fell outside the policy's terms of coverage.[13]

Although the record showed William suffered from diabetes and "had two stainless steel valves in his heart," the court found it unnecessary to speculate as to the "exact nature of the medical event which caused [William] to lose consciousness."[14] While it was certainly not the legal outcome

3. *Id.* at *2.
4. *Id.*
5. *Id.* at *3.
6. *Id.* at *1, *3.
7. *Id.* at *3.
8. *Id.*
9. *Id.*
10. *Id.* at *4.
11. *Id.* at *1.
12. *Id.* at *3.
13. *Id.* at *5.
14. *Id.* at *6.

the family likely wanted, one hopes there may have been some tangential comfort for Scarlett in the court's conclusion that—contrary to Mrs. Parson's assertion that Scarlett was the cause of her father's accident—her "decision to climb on the tractor [could not] be separated, in a causation sense, from the apparent medical event which caused her to take this action in the first place."[15] Scarlett's efforts to help her father were therefore not to blame for what happened, but rather some type of illness or medical emergency, precluding coverage.

In *Lebron v. Boeing Co. Employee Health & Welfare Plan*,[16] the court spent little time describing any narrative or other record evidence because the case turned neatly—or so the Southern District of Texas found—on the Fifth Circuit's definition of medical treatment. *Lebron* involves a very sad incident in which plaintiff Luis Lebron's wife, Barbara, who was suffering from end-stage renal failure, accidentally cut her inguinal catheter (for dialysis) while attempting to change her bandage at home by herself.[17] Barbara, who was taking blood thinner in connection with her treatment, was unable to stop the bleeding and died.[18]

The ERISA-governed group plan at issue excluded coverage for death caused in whole or in part by "illness, sickness, disease, bodily or mental infirmity, [or] medical or surgical treatment (unless treating a covered injury)[.]"[19] The insurer denied coverage on the basis that Barbara's death was caused or contributed to by both her dialysis treatment for end stage renal failure and her use of the blood thinner.[20]

The court entered summary judgment in favor of defendants under a *de novo* standard of review.[21] Initially, the court agreed with plaintiff that Barbara's death was *not* caused by her end-stage renal failure.[22] Despite the fact that her catheter had been placed to treat the disease, this did not render the disease a "cause" of her death.[23] Moreover, the court declined to conclude that taking blood thinners caused or contributed to Barbara's death, even though "it may seem axiomatic that Barbara's use of a blood thinner would have contributed to her loss of blood following the accidental cutting of her inguinal catheter," because defendants failed to provide any record evidence supporting a causal connection.[24] Nevertheless, the court still found for defendants because Barbara's act of changing the bandages

15. *Id.* at *5.
16. Civil Action No. H-18-3935, 2020 WL 444428, at *2–4 (S.D. Tex. Jan. 14, 2020).
17. *Id.* at *3.
18. *Id.*
19. *Id.* at *1.
20. *Id.* at *3.4
21. *Id.* at *1–2.
22. *Id.* at *3.
23. *Id.*
24. *Id.*

on her catheter, which precipitated the accidental severing of her catheter line, fell under the Fifth Circuit's definition of "medical and surgical treatment," including:

> What is done by a physician of any recognized type or by a surgeon in diagnosing a bodily ailment and seeking to alleviate or cure it [as well as] *things done by the patient to carry out specific directions given for these ends by a physician.*[25]

The court further noted that exsanguination (bleeding to death) is a "known complication of hemodialysis."[26] We look forward to learning next year if the Fifth Circuit stands by its inclusion of self-administered treatment in this definition, revises the rule, or distinguishes *Lebron* as falling outside the intended boundaries of this definition.

B. *"Doubt Is Not a Pleasant Condition, but Certainty Is Absurd"*[27]*—A Battle of the Experts and a Rejection of the Need for Certainty by the First Circuit*

Where discretion is granted to a claims administrator, is it enough to say that any one of many underlying medical conditions likely caused the accident that resulted in the insured's death without ever actually determining which condition was the likely culprit? The First Circuit says, "Yes," but the dissent argues that the majority's holding approves denial of accidental death benefits based on "the mere existence" of underlying medical conditions.[28] *Arruda v. Zurich American Insurance Co.* involved a claim for accidental death benefits bought by the wife of Joseph Arruda, whose ERISA-governed group policy was insured by Zurich.[29] Arruda died in a car crash while driving to work one morning when his vehicle crossed four lanes of traffic, collided with another vehicle traveling in the opposite direction, and rolled across the other side of the highway.[30] Although Arruda was alive but severely injured when first responders arrived, he died at the scene a short time later after appearing to experience respiratory distress and seizure.[31] Accident and autopsy reports stated the cause of death was "hypertensive heart disease," with a contributing cause of "Upper Cervical Spine Fracture due to Blunt Impact" as a result of the motor vehicle accident.[32]

About four months before his accident, Arruda received an implantable cardioverter defibrillator (ICD) which monitored his heart and could

25. *Id.* at *4 (emphasis in original).
26. *Id.*
27. *Voltaire*, A Speaker's Treasury of Quotations: Maxims, Witticisms and Quips for Speeches and Presentations 33 (Michael C. Thomsett & Linda Rose Thomsett eds., 2009).
28. 951 F.3d 12, 30 (1st Cir. 2020).
29. *Id.* at 13.
30. *Id.* at 14.
31. *Id.* at 14, 16.
32. *Id.* at 14–16.

administer electric shocks, if necessary, to correct his heart rhythm.[33] Arruda's wife obtained a "logbook" from the ICD manufacturer showing information captured by the ICD on the date of Arruda's accident.[34] The logbook had an entry time-stamped a little over an hour prior to the accident showing "a successful 'rhythm ID update'" and an "alert" time-stamped approximately four and a half hours after the insured died, which read "Ventricular Tachy mode set to value other than Monitor+Therapy."[35] No other items or events were recorded for the date of Arruda's accident and death.[36]

During its claim investigation, Zurich learned that the insured had suffered from numerous medical and psychiatric conditions, including obesity, chronic sinusitis, hypertension, hypertrophic cardiomyopathy, primary hyperaldosteronism, hypokalemia, depression, anxiety, dyslipidemia, diverticulosis, insomnia, fatigue, paresthesia, myalgias, bronchitis, kidney stones, and syncope.[37] Zurich denied the accidental death claim because (1) Arruda's death was not covered as it was not the result of an accident "independent of all other causes," and (2) Arruda's death was excluded from coverage because it was "caused by, contributed to, or result[ed] from . . . illness or disease."[38]

In reaching its conclusion, Zurich relied primarily on analysis from one of three independent experts, while Arruda's wife supported her claim with analysis from a competing expert. Each of the experts reviewed and offered conclusions on the insured's medical records, autopsy results, the various accident reports, and the data from the ICD. The plaintiff's expert concluded that it was not possible to determine from the evidence what caused the insured's accident, although Zurich's primary expert found that the accident "was caused by several possible pre-existing illnesses or diseases, singly or in combination" and opined that "there is a good chance that [the insured] fell asleep behind the wheel" due to undiagnosed sleep apnea, which was a known complication of some of his other conditions.[39]

The majority, unlike the district court, ultimately concluded that Zurich's denial was based on substantial evidence as it too was convinced by the insurer's expert. The majority noted that, while he did not reach any conclusion as to the *precise* cause of the insured's accident, he had carefully ruled out several non-illness related causes, provided a detailed account of all of the evidence, including conflicting evidence, and reached a "firm

33. *Id.* at 14.
34. *Id.* at 17.
35. *Id.*
36. *Id.*
37. *Id.* at 14.
38. *Id.* at 17.
39. *Id.* at 19.

conclusion to a reasonable degree of forensic medical certainty, which was self-evidently reasoned, that some manifestation(s) of Arruda's pre-existing conditions caused him to have the accident that killed him."[40] The majority noted that, while Arruda's wife submitted the ICD logbook, she did not provide any interpretive information, and there was no evidence showing how the device was programmed to function.[41] While Zurich's expert considered the logbook, neither he nor the majority viewed the fact that it showed no abnormal rhythm at the time of the accident as conclusive, particularly given that it contained only one entry from the time the insured was still alive, over an hour before the accident, and had no record at the time the insured died, which would be expected if the device was actually sending reliable real-time information about an individual's heart rhythm.[42]

In reversing the district court's summary judgment ruling for plaintiff, the majority acknowledged that under the "substantial factor" test applied by the Fourth, Ninth, and Eleventh Circuits, "a pre-existing infirmity or disease is not to be considered as a cause unless it substantially contributed to the disability or loss."[43] But, in the First Circuit's view, "the substantial factor test is in tension with our circuit law on the abuse of discretion test," which required only that the decision was "reasonable and supported" by evidence "sufficient to support a conclusion."[44] Moreover, under the abuse of discretion standard, the sufficiency of the insurer's evidence did not "disappear merely by reason of contradictory evidence."[45]

The dissent strongly criticized the majority as condoning "a denial of benefits based on the mere existence of Mr. Arruda's preexisting conditions."[46] "The inescapable fact," wrote the dissent, "is that many healthy people fall asleep at the wheel while driving, and many sick people fall asleep at the wheel while driving for reasons that have nothing to do with their illness."[47] While the insurer's expert asserted that his conclusions were made to a "reasonable degree of forensic medical certainty," the dissent insisted that this "has no talismanic significance," and its "probative force depends on the quality of the evidence underlying it," which the dissent found lacking due to the inability of any expert to draw a conclusion as to the particular cause of the insured death.[48]

40. *Id.* at 22 (emphasis in original).
41. *Id.* at 17, 23.
42. *Id.* at 23.
43. *Id.* at 24 (internal citations omitted, emphasis in original).
44. *Id.*
45. *Id.* at 21.
46. *Id.* at 30.
47. *Id.* at 28.
48. *Id.* at 27–28.

C. *"Travel Isn't Always Pretty"*[49]*—Three Tales of Death in Paradise to Help You Appreciate Your Staycation*

Like *Arruda* and *Parsons*, the first two cases in this trifecta of travel tribulations involve close calls on whether an accident was caused by an underlying condition, but in the third case, the claim turned in large part on the fact that the insured was in the water *beside* a boat that had been transporting him, rather than on it, when the accident occurred. In each instance, the dilemma was in the details for the claims investigators and the beneficiaries attempting to prove their case.

In summer of 2017, Chester Chamberlain was scuba diving in Cozumel, Mexico, with his three adult children, Thomas, Clare, and John, when for an unknown reason their dive master suddenly performed an "emergency rise" maneuver with Chester.[50] According to an affidavit from Thomas, who witnessed them rise, Chester was gasping for air when they surfaced, but then lost consciousness.[51] The dive master performed CPR, but Chester never regained consciousness and was pronounced dead at a local hospital shortly thereafter.[52] No autopsy was performed, and Chester's Mexican death certificate listed his cause of death as cardiorespiratory arrest and diabetes mellitus type II.[53]

John submitted a claim for accidental death benefits under an ERISA-governed group plan insured by Metropolitan Life Insurance Company and provided the insurer with discretion to determine claims.[54] John had difficulty obtaining medical records or reports from authorities in Cozumel, and the U.S. State Department adopted the cause of death listed on Chester's Mexican death certificate.[55] With only this official record and limited hospital notes, Metropolitan Life denied accidental death benefits on the basis that Chester died from physical disease rather than accidental causes.[56] John sued, arguing Metropolitan Life's denial was arbitrary and capricious and that it had failed to adequately investigate the cause of death.[57] The district court agreed that Thomas's affidavit was insufficient to overcome the rest of the evidence, all of which pointed to cardiorespiratory arrest and diabetes as the cause of death.[58] The court emphasized that,

49. Attributed to Anthony Bourdain. Sarah May, Don't Pack That (2019) (ebook).
50. Chamberlain v. Metro. Life Ins. Co., Case No. 18-cv-1902, 2020 WL 4436735, at *1 (E.D. Wis. Aug. 3, 2020).
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at *2.
55. *Id.*
56. *Id.*
57. *Id.* at *3.
58. *Id.* at *4.

under the applicable standard of review, "Defendant's determination merely has to be a rational determination, not the *only* rational determination."[59]

Charles Hillebrandt was also scuba diving in Cozumel, Mexico when he similarly experienced difficulty breathing, surfaced with assistance from his scuba guide, and became unresponsive after having what appeared to the guide to be a heart attack.[60] The guide performed CPR on the boat and Charles was taken by ambulance to a local clinic where he was "cyanotic and comatose, with no palpable pulse."[61] Charles was then "resuscitated," but remained in a coma while tests were performed, including an ultrasound of his lungs which showed "pattern B (focal alveolar interstitial syndrome)" on both sides, and an echocardiogram which showed no abnormalities.[62] Charles was airlifted to a Houston hospital, where he remained in a coma and ultimately died.[63] An autopsy found signs of hypertensive and atherosclerotic cardiovascular disease and focal dilated airways with alveolar septal rupture, and the report stated that Charles's death "may have resulted from a cardiac event due to underlying cardiovascular disease," but that his scuba diving equipment would need to be tested to draw further conclusions.[64] The equipment was not available for testing, so the cause of death remained undetermined.[65]

The plaintiff, Charles' widow, submitted claims to Unum Life Insurance Company of America for life and accidental death benefits under an ERISA-governed group plan which gave Unum discretion to determine claims.[66] Unum obtained Charles's medical records which showed a history of asthma and cardiac problems, as well as the autopsy report. Unum then submitted these records to an independent reviewer who opined that no cause of death could be determined to a reasonable degree of medical certainty, and that neither cardiac disease nor equipment failure could be ruled out as a cause.[67] Unum paid the life claim, but denied accidental death benefits.[68]

Charles's widow later sued, presenting expert testimony of her own, and the court initially remanded for Unum to consider this additional opinion.[69] The window's expert concluded that Charles died from complica-

59. *Id.*
60. Hillebrandt v. Unum Life Ins. Co. of Am., Civil Action No. 2:16-cv-0844, 2019 WL 1576879, at *1 (W.D. La. Feb. 13, 2019).
61. *Id.* at *1–2.
62. *Id.*
63. *Id.* at *1.
64. *Id.* at *2.
65. *Id.*
66. *Id.* at *1–2.
67. *Id.* at *2.
68. *Id.*
69. *Id.* at *3.

tions of an air embolism sustained while scuba diving, disagreed that any cardiac event had occurred based on Charles's echocardiogram results, and opined that the diving equipment may or may not have played a role and would not necessarily have showed evidence of any malfunction even if it had been available for examination.[70] Unum obtained a second analysis from another expert, who conceded it was possible that Charles suffered an air embolism triggered by some "initial event."[71] However, Unum's second expert found the record did not indicate whether Charles had performed an "out-of-control or rapid ascent" and further showed that he was not unconscious when he first reached the surface.[72] The second expert also argued that the alveolar septal ruptures described in Charles's autopsy report could have resulted from resuscitation efforts or mechanical ventilation during hospitalization rather than an air embolism.[73] Without identifying the cause of Charles's death, Unum's second expert opined that "the role of natural disease cannot be excluded as a cause or contributing factor in this death."[74]

After reviewing both experts' analyses, Unum again denied accidental death benefits because there was evidence that Charles's medical conditions *could* have reasonably contributed to or caused his death, and thus it was not proven that his death resulted from an accident independent of all other causes as required for coverage.[75] His widow appealed with a supplemental rebuttal report from her original expert, but Unum affirmed its denial.[76] Returning to court, the parties agreed that one of Charles's health conditions may have "triggered his initial distress and his ascent, with an air embolism possibly resulting thereafter… [and] that the occurrence of [an air embolism] was made more likely by his preexisting health conditions."[77] Thus, the issue before the court was whether the plan language barred coverage where physical illness contributed to an accidental injury, and whether there was substantial evidence to support such a contributing cause.[78]

The district court sided with the insurer, finding that the policy language "explicitly defines covered losses as those caused by accidental injury and then defines 'injury' as only including 'bodily injury that is the direct result of an accident and not related to any other cause.'"[79] In addition, the policy

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at *4.
76. *Id.*
77. *Id.* at *5.
78. *Id.*
79. *Id.* at *8.

excluded coverage for "'any accidental losses caused by, contributed to by, or resulting from' several occurrences, including 'disease of the body.'"[80] Moreover, the court found there was substantial evidence supporting the insurer's conclusion, as the evidence indicated that Charles's need to surface and resulting embolism was likely caused either by equipment malfunction or underlying medical issues, the latter of which would mean his death was not an "accident" under the terms of the policy.[81] The court cited *Hancock v. Metropolitan Life Insurance Co.*[82] for the principle that, under an arbitrary and capricious standard, "[e]ven if the cause of death remains undetermined, a claim may reasonably be denied due to plaintiff's failure to meet his burden" to show that death resulted from a covered accidental cause.[83] "The decedent's well-documented and recent history of asthma," the court concluded, as well as "the unrefuted likelihood that the disease could cause a pulmonary over-expansion injury and embolism while diving provide the necessary support to show that Unum's decision fell somewhere 'on a continuum of reasonableness.'"[84] The Fifth Circuit affirmed, without further discussion, for the same reason stated by the district court.[85]

For our last tale of tragedy in paradise, we travel back in time to July of 2016 (would that it were possible!) when Charith Perera was snorkeling with his wife, Chinta, and their two children on a family vacation at a resort in the Maldives and was found unresponsive in the water.[86] Mrs. Perera claimed her husband drowned after being struck by their boat during rough seas.[87] After Charith was discovered unresponsive, CPR was performed and he was transported to a hospital where he was declared dead.[88]

A death certificate was issued listing myocardial infarction and "hypercholesterolemia" as the cause of death, but it was also noted by Maldivian authorities at the time that "post mortem service is not available in Maldives and investigation is continuing, the real cause of the death cannot be confirmed[.]"[89] An autopsy was subsequently performed and the following conclusions were reached:

> The decedent was a 58-year-old male, who was found unresponsive submerged in the water. He apparently was snorkeling with his family and it is unknown how long he was under water. Autopsy reveals galeal contusions, mild atherosclerotic heart disease, pulmonary emphysema and prostatic hypertrophy.

80. *Id.*
81. *Id.* at *8–9.
82. 590 F.3d 1141, 1156 (10th Cir. 2009).
83. *Hillebrandt*, 2019 WL 1576879, at *9 (citing *Hancock*, 590 F.3d at 1156).
84. *Id.*
85. Hillebrandt v. Unum Life Ins. Co. of Am., 787 F. App'x 235, 236 (5th Cir. 2019).
86. Perera v. Metro. Life Ins. Co., 2020 WL 1430921, at *1, 3 (M.D. Fla. Jan. 30, 2020).
87. *Id.* at *1.
88. *Id.* at *3.
89. *Id.*

> Autopsy reveals no evidence of acute or remote myocardial infarction. Based on all information available to me at this time, it is my opinion that Charith PERERA died as a result of drowning. The manner of death is accident.[90]

Mrs. Perera submitted a claim for life and common-carrier accidental death coverage under an ERISA-governed group plan which provided Metropolitan Life with discretion to determine claims.[91] Specifically, the accidental death policy provided special coverage in the event of "accidental death while traveling in a common carrier," defined as "a government regulated entity that is in the business of transporting fare paying passengers," not including "chartered or other privately arranged transportation; taxis; or limousines."[92] Metropolitan Life denied accidental death benefits because the vessel transporting the Pereras on their snorkeling excursion was not a common carrier, and even if it had been, Perera did not die while traveling on the vessel in question, but rather in the water while snorkeling.[93]

Mrs. Perara submitted a declaration in support of her argument that the boat was a common carrier, explaining that it was "operated by the resort," which she characterized as "a public resort in which anyone can book a room," that their transportation fare was included in their resort costs and fees, but that the crew "did not verify that passengers were staying at the resort" and that the boat "transports passengers from the resort to various locations around the islands of the Maldives . . . on a regular schedule posted or available from the resort staff."[94]

The district court entered summary judgment for Metropolitan Life primarily on the basis that Perera was in the water when he died as a result of drowning and therefore could not have been "traveling in" a common carrier at the time of his death, regardless of the boat's status.[95] Moreover, the court found that it was "not unreasonable" for Metropolitan Life to conclude that the boat in question was not a common carrier under the terms of the plan, and was instead a form of private transportation, based on Mrs. Perera's own description.[96]

In *Hillebrandt* and *Chamberlain*, the outcome can fairly be characterized as turning on the standard of review. Both cases involved close calls by an insurer that passed muster not necessarily because the courts agreed but because, as the majority found in *Arruda*, there was support in the record for the insurer's conclusion, even in the face of contradicting evidence. In

90. *Id.*
91. *Id.* at *2, *4.
92. *Id.* at *1–3.
93. *Id.* at *6.
94. *Id.* at *5–6.
95. *Id.* at *9.
96. *Id.* at *10.

Perera, the Perera also suffered from underlying conditions, but they were rendered immaterial due to the particular common carrier benefit being sought and the specific requirement that the accident occur while traveling in the carrier, combined with Mrs. Perera's failed attempt to stretch resort transportation to fit the policy language. For those of you suffering from chronic wanderlust and surfing through Instagram for photos of vacations past in the face of closed borders and quarantines, we hope these anecdotes help you feel a little snugger on your couch at home . . . for now.

II. DISABILITY

A. *"To define is to limit"*[97]*—Health Care Providers Were Unable to Show Total Disability From Their Own Occupations*

"Regular Occupation" or "your occupation" definitions (sometimes referred to as "own occupation" definitions) in disability policies often make it easier for insureds to establish their total disability than "any occupation" definitions. Two cases from this reporting period serve as reminders, however, that insureds who are able to return to work in some capacity face uphill battles even when "own occupation" definitions apply.

In *Travis-Stratton v. Riversource Life Insurance Co.*,[98] the parties' interpretations of what constituted the plaintiff dentist's "Regular Occupation" under the terms of her disability insurance policy differed. Dr. Roslyn Travis-Stratton owned a dental practice and had practiced dentistry since 1990.[99] She worked at her office twenty hours per week, spending five percent of her time at work using office equipment, ninety percent of her time using "small hand tools," and five percent of her time "on general office duties."[100] As of December 2015, Travis-Stratton also worked part time at another dental office.[101] She described the type of dental work she provided to patients at both jobs identically.[102] Travis-Stratton argued her "Regular Occupation" was being a dentist, while Riversource argued it was being a dentist and owner of her dental practice.[103]

In March 2016, Travis-Stratton's treating physician limited her to working twenty hours per week because of "numbness in her arms."[104] Another physician, providing a second opinion, also restricted Travis-Stratton to working twenty hours per week and concluded she could continue working

97. Oscar Wilde, The Picture of Dorian Gray (Penguin 2003).
98. Case No. 17-cv-6912, 2020 WL 1233767, at *1 (N.D. Ill. Mar. 13, 2020).
99. *Id.* at *2.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at *4.
104. *Id.* at *3.

as a dentist.[105] Travis-Stratton then stopped working at the other dental practice and worked only at her own dental office.[106] Between March 2016 and November 2017, Travis-Stratton "performed more procedures, fillings, root canals and extractions" at her dental office than she performed at the other dental office in the previous twenty months.[107]

Her disability insurance policy offered a "Total Disability Benefit," providing benefits only while Travis-Stratton was Totally Disabled, meaning "because of Injury or Sickness, You are … In the first two years of such disability, unable to perform the material and substantial duties of Your Regular Occupation . . . .[108] "Regular Occupation" was defined as: "The job or occupation in which You work on a full time basis, or one from which You derive the majority of Your earned income at the time You are disabled."[109]

Ultimately, the court granted summary judgment for Riversource, not because it decided either party's interpretation of Travis-Stratton's occupation was correct,[110] but because even under Travis-Stratton's view of "Regular Occupation" it was undisputed that she was able "to perform dental procedures, i.e., the material and substantial duties of the position."[111] Specifically, the court found that even after her claimed disability began in 2016, Travis-Stratton kept performing dental procedures such as "root canals, fillings and extractions" at her own office.[112] It also held that the fact that Travis-Stratton was working only twenty hours per week was "not dispositive" because she had a total disability policy, not a partial disability policy.[113]

The ability to work at least some of the time was also dispositive in *Sternberg v. Paul Revere Life Insurance Co.*[114] There, Dr. Richard Sternberg, an orthopedic surgeon, owned three disability insurance policies that provided "benefits for total and residual disability due to sickness or injury."[115] His main responsibilities involved working in a hospital clinic five half days a week, performing open surgical procedures, taking call in the emergency

105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at *1–2.
109. *Id.* at *1.
110. *Id.* at *5 (noting the parties did not offer suggestions about how the court should choose between the two options in the policy's definition of "Regular Occupation").
111. *Id.* at *6.
112. *Id.* The court distinguished Travis-Stratton's current disability claim from the one she filed in 2009, when the insurer paid disability benefits because she was unable to perform extractions—a material and substantial duty of being a dentist.
113. *Id.* This case was handled by author Elizabeth G. Doolin and contributor Stuart F. Primack.
114. No. 1:17-cv-8523 (ALC), 2020 WL 42278, at *1 (S.D.N.Y. Jan. 3, 2020).
115. *Id.*

room, and handling inpatient responsibilities with surgical involvement.[116] Due to a detached retina and spinal surgery complications, Sternberg took various leaves of absence from his job, between which he had periods when he returned to work.[117] During the periods he was working, Sternberg could not take call in the emergency room or perform open surgical procedures.[118] Further, his annual salary was reduced by approximately twenty-three percent when he returned to work.[119] Beginning March 23, 2015, he was completely disabled.[120]

The disability policies defined "Your Occupation" as "the occupation in which You are regularly engaged at the time You become Disabled," and defined Total Disability to mean "because of Injury or Sickness . . . You are unable to perform the important duties of Your Occupation . . . ." It also provided, in part:

> '**Residual Disability**' prior to the Commencement Date, means that due to Injury or Sickness:
>
> a. (1) You are unable to perform one or more of the important duties of Your Occupation; or
>
> (2) You are unable to perform the important duties of Your Occupation for more than 80% of the time normally required to perform them; and
>
> b. Your loss of Earnings is equal to at least 20% of Your Prior Earnings while You are engaged in Your Occupation or another occupation . . . .[121]

Thus, the issue before the district court was whether Sternberg was totally disabled during the periods he returned to work. Paul Revere Life Insurance Co. considered Sternberg's billing information during the those periods, which showed he "'continued to perform some surgical procedures consistent with that of an Orthopedic Surgeon on a limited basis since the onset of his claim.'"[122] Therefore, Paul Revere determined Sternberg was entitled to Residual Disability benefits, not Total Disability benefits for the interim periods.[123]

The court noted that "[u]nder New York law, 'a claimant is 'totally disabled' when he or she is no longer able to perform the 'material' and 'substantial' responsibilities of his or her job.'"[124] It further found an insured can perform the important duties of his occupation if he can perform duties

116. *Id.* at *2.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at *1.
122. *Id.* at *2.
123. *Id.*
124. *Id.* at *4 (quoting Shapiro v. Berkshire Life Ins. Co., 212 F.3d 121, 124 (2d Cir. 2000)).

of a "position of the same general character as the insured's previous job, requiring similar skills and training, and involving comparable duties."[125] Under this standard, which was less stringent than Paul Revere's's definition rejected by the court,[126] the court found that after Sternberg revised his "work schedule and responsibilities the general character of his work remained the same,"[127] as he "saw the same patients, in the same facility and clinics, and continued to perform non-operative orthopedic therapies."[128] The court acknowledged Sternberg's salary reduction, but noted that such a reduction by itself did not show he "changed his occupation."[129] Significantly, it noted that if p Sternberg's medical practice centered only around surgery, the outcome might have been different.[130] But since it did not, the court granted summary judgment for the Paul Revere.[131]

B. *"Variety's the very spice of life":[132] Varied Results on Bad Faith Claims*

As practitioners in this area would expect, there were, during this reporting period, several disability insurance cases in which insureds alleged bad faith claims. Of course, resolving such claims on dispositive motions often involves detailed factual analysis and depends on states' common law and statutory bad faith claim elements, as shown in the following cases.

In *Sandoval v. Unum Life Insurance Co. of America*,[133] the Tenth Circuit affirmed the district court's grant of partial summary judgment for Unum Life Insurance Company of America on Sandoval's common law and statutory bad faith claims under Colorado law. Sandoval, who worked as a training supervisor, had surgery due to neck and arm pain, returned to work, and then had a second surgery.[134] Her surgeon opined that Sandoval could not return to work again due to her "substantial pain."[135] After initially paying Sandovaldisability benefits under the subject disability policy, Unum later terminated benefits after two independent physicians reviewed Sandoval's medical records and opined she could return to work.[136] In requesting reconsideration of her claim, Sandoval submitted an additional

125. *Id.* (quoting Brumer v. Paul Revere Life Ins. Co., 133 F.3d 906 (2d Cir. 1998)).
126. Paul Revere argued that "total disability" under the policies meant Sternberg's inability to perform "*any* or *all* the important duties of his occupation," but "residual disability" meant the inability to perform "*one* or *more* of the important duties of his occupation." *Id.* (emphasis in original).
127. *Id.* at *5.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at *6.
132. William Cowper, The Task (1785).
133. 952 F.3d 1233 (10th Cir. 2020).
134. *Id.* at 1236.
135. *Id.*
136. *Id.* at 1235.

statement from her surgeon, a functional capacity examination report, and a vocational assessment.[137] Unum then engaged a consulting internist who opined plaintiff could return to work.[138]

Sandovalsued after Unum maintained its denial upon reconsideration, asserting claims for common-law bad faith and unreasonable conduct under a Colorado statute,[139] in addition to breach of contract.[140] The court explained the difference between these two bad faith claims:

> To prevail on the cause of action for a common-law tort, [the plaintiff] must show that [the insurer] (1) acted unreasonably and (2) knew or recklessly disregarded the unreasonableness of its conduct. *See Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1275 (Colo. 1985) (en banc). For the statutory tort, [the plaintiff] must show that [the insurer] unreasonably delayed or denied payment of benefits, but need not show knowing or reckless conduct. Colo. Rev. Stat. § 10-3-1115(1)(a). The denial of benefits was unreasonable if [the insurer] refused to pay "a covered benefit without a reasonable basis for that action." Colo Rev. Stat. § 10-3-1115(2).[141]

In affirming the district court's entry of partial summary judgment for Unum on the bad faith claims, the Tenth Circuit found that Unum conducted a reasonable investigation before it denied Sandoval's claim. Specifically, it determined that although Unum's claims manual called for deference to the opinions of treating physicians, Unum's disagreement with Sandoval's treating physician was not unreasonable because Unum "tried twice to contact Ms. Sandoval's surgeon and was rebuffed both times."[142] In addition, Unum interviewed Sandoval after obtaining written information from her, reviewed her medical records, and engaged an occupational physician to review her records as well, who found that plaintiff could return to her job with modifications.[143] Unum also consulted an orthopedic surgeon, upon the occupational physician's recommendation who, as well, opined that Sandoval could return to work.[144] The court further considered that, on reconsideration of Sandoval's claim, Unum consulted another physician—an internist—whose opined that Sandoval's medical records and additional information did not support her claim.[145]

Despite Sandoval's arguments to the contrary, the court concluded Unum could reasonably rely on the internist's opinion given that "he had

137. *Id.* at 1236.
138. *Id.*
139. *Id.* at 1235 (citing Colo. Rev. Stat. §§ 10-3-1115 to 1116).
140. *Id.*
141. *Id.* at 1236.
142. *Id.* at 1238.
143. *Id.*
144. *Id.*
145. *Id.*

seen many patients who had undergone surgeries like Ms. Sandoval's and studied with a physician who was well known for treating chronic pain."[146] Further, it noted Sandoval did not present evidence that "the internist had failed to satisfy industry standards" in assessing a test used to evaluate her functional capacity.[147]

The court was also unpersuaded by an affidavit from Sandoval's expert witness, as they did not point to "any industry standards requiring Unum's consulting physicians to examine Ms. Sandoval before opining about her ability to work."[148] It further noted that the expert witness's "discussion of Ms. Sandoval's avoidance of narcotic medications" and challenge of Unum's reliance on a particular strength test score did not suggest Unum was unreasonable.[149] Specifically, as the consulting internist noted, because Sandoval did not attempt any available alternative pain treatments, Unum "could reasonably conclude that Ms. Sandoval was not disabled despite the expert witness's opinion to the contrary."[150]

While the Tenth Circuit upheld partial summary judgment for the insurer on the bad faith claims, it affirmed the district court's denial of the insurer's motion for summary judgment on the plaintiff's breach of contract claim because a jury could reasonably find plaintiff was disabled.[151]

In contrast, district courts denied insurers' motions for summary judgment on the plaintiffs' bad faith claims in two other recent cases. In *Fees v. American Family Life Insurance Co. of Columbus*[152] (AFLAC), Jody Fees was employed by York Plumbing, Inc. when he applied for the short term disability policy at issue.[153] The disability policy defined "'Total Disability' as 'being under the care and attendance of a Physician due to a condition that causes you to be unable to perform the material and substantial duties of your Full-Time Job, and not working at any job.'"[154] In addition, it allowed short term disability benefits for Total Disability caused by "Off-the-Job Injury" meaning "an Injury that occurs while you are not working at any job for pay or benefits."[155]

Fees alleged he was totally disabled because of his knee surgery that followed an off-the-job injury he suffered on August 21, 2016, when he was employed as a plumber with Forrest Shoemaker AC, Inc.[156] His employ-

146. *Id.* at 1238–39.
147. *Id.* at 1239.
148. *Id.*
149. *Id.*
150. *Id.* at 1240.
151. *Id.* at 1240–41.
152. Case No. 19-CV-0476-CVE-JFJ, 2020 WL 3039124, at *1 (N.D. Okla. June 5, 2020).
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at *2.

ment at Forrest Shoemaker AC, Inc. ended on September 12, 2017.[157] After Fee's knee surgery on December 5, 2017, his physician told him not to work until April 5, 2018 and restricted him from various activities.[158] Those restrictions prevented Fees from conducting the essential duties of a plumber.[159] Fees filed his claim for benefits on December 15, 2017, and his physician's statement listed the first date of disability as December 5, 2017.[160] When AFLAC denied Fees's short term disability benefit claim, Fees sued for breach of contract and bad faith.[161] AFLAC moved for summary judgment on both claims.[162]

Fees alleged AFLAC improperly denied his claim, incorrectly investigated his disability claim, and "failed to adequately train or supervise its employees."[163] In addition, he argued that AFLAC unreasonably "shifted its rationale for denying benefits."[164] AFLAC maintained that its denial of Fees's claim was reasonable because Fees did not prove he was working full-time at the time of his disabling injury.[165]

The court disagreed, finding Fees was totally disabled after the 2017 knee surgery due to his August 21, 2016 injury and thus met all prerequisites for short term disability benefits.[166] Accordingly, it denied summary judgment to AFLAC related to the breach of contract claim. The court also denied AFLAC's summary judgment motion on the bad faith claim, explaining that a fact issue existed regarding whether AFLAC knew Fees's August 21, 2016 injury was a covered "Off-the-Job Injury" and failed to investigate the injury.[167] The court noted that if AFLAC had such information, "then it had no reasonable basis for delaying payment and did not deal fairly and in good faith with plaintiff."[168]

In *Dileo v. Federated Life Insurance Co.*,[169] the district court for the Middle District of Pennsylvania also denied an insurer's summary judgment motion on the insured's bad faith claim. The disability policy in that case provided that Federated Life Insurance Co. would "pay a total disability benefit while plaintiff is totally disabled or a partial disability benefit while plaintiff is partially disabled."[170] Dileo alleged that on March 5, 2015 he fell

157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at *2.
161. *Id.* at *1.
162. *Id.*
163. *Id.* at *5–6.
164. *Id.* at *6.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. No. 3:18cv628, 2020 WL 137038, at *1 (M.D. Pa. Jan. 13, 2020).
170. *Id.*

on his left side when getting out of a truck at work and he claimed that this fall aggravated a pre-existing injury to his spine, causing a new injury to his left shoulder.[171] However, "[d]isability caused by plaintiff's cervical spine condition [was] not covered under the Policy."[172] Dileo's medical records included a report from his treating physician explaining that the left shoulder and arm damage he sustained from the March 5, 2015 fall was the reason he could not work as a mechanic.[173] Federated contended, however, "that '[p]laintiff's attribution of his disability to the left shoulder injury is simply an effort to avoid the Policy's Disability Waiver Rider which provides that disability resulting from a spinal condition . . . is not covered.'"[174]

In its summary judgment motion, Federated argued that Dileo could not prove by clear and convincing evidence that it acted in bad faith under 42 Pa. Cons. Stat. § 8371.[175] The court noted that:

> Section 8371 does not define "bad faith," but Pennsylvania courts have adopted the following definition of "bad faith" on the part of an insurer:
>
>> any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith.[176]

Because the record contained the physician's report attributing Dileo's inability to work as a mechanic to the left shoulder and arm damage, the court held that the facts could show Federated knew it did not have a reasonable basis for denying Dileo's claim.[177] Accordingly, the court denied Federated's motion for partial summary judgment on the bad faith claim.[178]

C. *"Lost time is never found again":[179] The Eleventh Circuit Affirmed Dismissal of a Disability Claim as Time-Barred*

Resolving when contractual limitations periods in disability policies begin to run is not always clear-cut. In *Kuber v. Prudential Insurance Co. of America*,[180] however, the Eleventh Circuit did not struggle in affirming

171. *Id.*
172. *Id.*
173. *Id.* at *3.
174. *Id.*
175. *Id.* at *2.
176. *Id.* (quoting Perkins v. State Farm Ins. Co., 589 F. Supp. 2d 559, 562 (M.D. Pa. Dec. 16, 2008)).
177. *Id.* at *3.
178. *Id.*
179. Benjamin Franklin, Essays and Letters 80 (1821).
180. 819 F. App'x 754, 756 (11th Cir. 2020).

the district court's dismissal of Kuber's suit to recover long term disability benefits as time-barred under the subject policy's three-year contractual limitations period. Kuber was insured under a non-ERISA group contract and certificate, which were governed by Delaware law. The court noted, with respect to the subject policy:

> "[Kuber] can start legal action regarding [his] claim 60 days after proof of claim has been given and up to 3 years from the time proof of claim is required." A different provision explains that Kuber must provide proof of claim "no later than 90 days after [his] elimination period ends." So in a normal case (like this one), the three-year clock starts running 90 days after the elimination period ends.[181]

Kuber alleged that he stopped working on September 18, 2012.[182] Under the policy, his elimination period terminated on March 17, 2013.[183] He was required to provide proof of claim ninety days later, or by June 15, 2013.[184] After the elimination period ended, Prudential began paying Kuber long term disability benefits, but it ceased benefits in 2015.[185] The three-year contractual limitations period then ended on June 15, 2016.[186] After exhausting his administrative appeals, Kuber filed suit on December 28, 2018, over thirty months after the contractual limitations period ended.[187] In support of his position, Kuber cited certain policy language "to suggest that, in some cases, proof of claim may not be required 90 days after the elimination period ends."[188] The court declined to address Kuber's hypotheticals because there was nothing to suggest that they covered his situation and concluded: "All we say for sure is that, in Kuber's case, the limitation provision unambiguously began to run 90 days after the elimination period ended."[189] Accordingly, the Eleventh Circuit agreed that Kuber's claim was time-barred and affirmed the district court's decision.[190]

181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 755.
186. *Id.* at 756.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*

III. ERISA

A. *"Status quo, you know, is Latin for 'the mess we're in'"*[191]— *Standard of Review*

To our regular survey readers, it should come as no surprise that decisions addressing the applicable standard of review remain a perennial favorite. The Supreme Court laid the foundation for this issue more than thirty years ago when it held that a benefit denial challenged under § 1132(a)(1)(B) is reviewed *de novo* unless the plan gives the administrator discretionary authority.[192] When an administrator has discretion to determine eligibility for benefits or to construe the terms of the plan, "a court should review the plan administrator's decision only for abuse of discretion."[193] This has been the law of the land ever since. But with each passing year, there seem to be ever more challenges to the application of this well-settled rule. The attempts run the gamut from creative argument to legislative enactments. The decisions from this survey period present no exception.

In *Lyn M. v. Premara Blue Cross*,[194] for example, the Tenth Circuit reversed the district court's ruling and refused to apply the discretionary standard of review to a benefit claim denial because the plan participants were not aware that the plan administrator had discretionary authority. The plan participants did not know that the "Plan Instrument" conferred discretionary authority to the plan administrator because they were not provided with that document.[195] Instead, the plan beneficiaries were given a summary plan description (SPD), which did not mention or reference the Plan Instrument or any grant of discretionary authority.[196] The SPD did, however, provide that plan participants could "ask to examine or receive free copies of all pertinent plan documents, records, and other information relevant to [their] claim by asking . . . for them."[197] The Tenth Circuit ruled that the SPD's language was insufficient to confer discretion and did not trigger the arbitrary and capricious standard of review.[198] ERISA requires that plan administrators provide notice of their discretionary authority or of the existence of a document with information about the discretionary

191. Ronald Reagan, Remarks at a Reception for Members of the Associated General Contractors of America (Mar. 18, 1981).

192. Firestone Tire & Rubber v. Bruch, 489 U.S. 101, 115 (1989); Hestir v. USAble Life, Case No. 4:19-cv-00067-LPR, 2020 WL 5834251, at *1, *7 (E.D. Ark. Sept. 30, 2020).

193. *Bruch*, 490 at 115; Buttram v. Central States, Se. & Sw. Areas Health & Welfare Fund, 76 F.3d 896, 899 (8th Cir. 1996).

194. 966 F.3d 1061, 1065 (10th Cir. 2020).

195. *Id.*

196. *Id.*

197. *Id.* at 1067.

198. *Id.*

authority.[199] And, absent this notice, participants "cannot be bound by a reservation of discretionary authority inserted into some secret document locked away by the plan administrator."[200]

Following this reasoning, the Tenth Circuit found the district court erred when it applied the arbitrary and capricious standard of review because the plan administrator was not entitled to deference; rather, the court should have engaged in *de novo* review.[201] The dissenting judge claimed that the majority's decision "imposes a new duty on plan administrators" because it requires them to notify plan participants of "undistributed, inspectable documents that could affect the scope of judicial review."[202] The dissenting judge also found that making the SPD "available" satisfied ERISA's requirements because there is no statutory duty to specifically notify plan participants of documents that may affect the judicial standard of review.[203] As the dissent further noted, the "majority's approach requires a plan administrator to not only notify members that other documents may exist that might be relevant to their claims, but also to specifically notify them that those other documents may impact review of their claim in the courts.[204] Time will tell whether this decision is followed by other courts or whether it will remain an outlier.

The applicable standard of review can also be implicated by a plan's "choice of law" provision, which sets forth which state's law will govern, or by legislation prohibiting provisions providing for discretionary review. But what law governs when a policy does not have a choice of law provision?

That question was recently addressed in *Byerly v. Standard Insurance Co.*[205] Byerly, a Texas resident employed by a Florida-based company, sought benefits under an ERISA-governed accidental death and dismemberment benefit plan after a diabetes complication led to a partial leg amputation. His claim was denied because the amputation was caused by a "sickness" and not "solely and directly by an accident independently of other causes." Byerly then sued Standard Insurance in Texas, claiming he was wrongfully denied benefits. The parties argued that their respective home state's law governed where the policy did not contain a choice of law provision.[206]

A choice of law analysis was required because the laws of Texas and Florida were in conflict,[207] in that Texas prohibits discretionary clauses in

199. *Id.* at 1066.
200. *Id.*
201. *Id.* at 1068.
202. *Id.* at 1071.
203. *Id.*
204. *Id.*
205. Civil Action No. 4:18-CV-00592, 2020 WL 1451543 (E.D. Tex. Mar. 25, 2020).
206. *Id.* at *6.
207. *Id.* at *7.

insurance policies but Florida does not.[208] Moreover, the application of Texas law would require an ERISA preemption analysis.[209] The district court found that "when exercising federal question subject matter jurisdiction, [courts] should apply 'federal common law choice of law principles' to ascertain which substantive law will apply."[210] The court further found federal common law required application of the *Restatement (Second) of Conflict of Laws*.[211] In an insurance contract dispute, the relevant factors include (1) the place of contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation of the parties.[212] The *Byerly* court ruled that the balance of the factors required the application of Florida law, as the policy was issued to a Florida company, the decision to enter into the contract was made in Florida, the policy was issued in Florida, and all premium payments were paid in Florida.[213] Per the court, the "fact that one employee, [plaintiff], lives in Texas, applied for benefits from Texas, and now claims that Texas law should apply to the [p]olicy is unconvincing."[214] The court also found that it was unreasonable for Byerly to argue that he had any justified expectation that Texas law would govern the policy under which he was insured.[215]

This decision demonstrates the deliberative exercise a court will follow when determining which state law governs when there is no choice of law provision in an ERISA-governed plan.

In contrast, the plan in *Hestir v. USAble Life*,[216] provided that Arkansas law controlled the policy. The court noted such a choice of law provision is followed when it is "'applicable and not otherwise governed by federal ERISA law,' and when the choice of law is not 'unreasonable or fundamentally unfair.'"[217] Neither party in *Hestir* contended that application of Arkansas law would be unreasonable or fundamentally unfair.[218] However, Rule 101 of the Arkansas Insurance Code prohibits the use of discretionary clauses,[219] providing:

208. *Id.*; Tex. Ins. Code § 1701.062(a).
209. 2020 WL 1451543, at *7.
210. *Id.* at *9; Singletary v. United Parcel Serv., Inc., 828 F.3d 342, 351 (5th Cir. 2016).
211. 2020 WL 1451543, at *9; SPBS, Inc. v. Mobley, Civil Action No. 4:18-CV-00391, 2018 WL 4185522, at *11 (E.D. Tex. Aug. 31, 2018).
212. *Byerly*, 2020 WL 1451543, at *11–13.
213. *Id.* at *15.
214. *Id.*
215. *Id.*
216. *Hestir*, 2020 WL 5834251, at *7.
217. *Id.*
218. *Id.*
219. Code Ark. R. 054.00.101-7; *id.*

"No policy, contract, certificate or agreement offered or issued in this State providing for disability income protection coverage may contain a provision purporting to reserve discretion to the insurer to interpret the terms of the contract, or to provide standard of interpretation or review that are inconsistent with the laws of this State."[220]

USAble Life argued Rule 101 was inapplicable because it only applies to "disability income policies issued in [Arkansas] which [were] issued or renewed on and after March 1, 2013,"[221] and the plan at issue became effective on January 1, 2011 and was renewed on January 1, 2012.[222] Hestir, on the other hand, argued that the plan was renewed on its "anniversary date, which was January 1, 2011 and each succeeding January 1."[223] He further claimed that because the policy was effective on January 1, 2015, the plan was necessarily renewed after March 1, 2013.[224]

Siding with USAble Life, the court noted that an argument similar to Hestir's was offered and rejected in *Roebuck v. USAble Life*[225] because there was "nothing in the language of the policy . . . that indicated that 'the policy renews every year on January 1.'" The *Roebuck* court thus "decline[d] to assume—without any basis in the record evidence—that the anniversary date [was] also a renewal date."[226] Noting there was nothing in the record that supported Hestir's assertion that the plan's anniversary date should be construed as a renewal date,[227] the *Hestir* court held that Rule 101 did not apply to the plan, the discretionary clause was valid, and the abuse of discretion standard applied.[228]

B. *"Any fool can know. The point is to understand"*[229]*: Limitations—Actual Knowledge Means Actual Knowledge*

ERISA authorizes plan participants and beneficiaries to seek equitable relief for breach of a fiduciary duty. A plaintiff with "actual knowledge" of an alleged fiduciary breach is required to file suit within three years

220. *Id.*
221. *Id.*
222. *Hestir*, 2020 WL 5834251, at *7.
223. *Id.*
224. *Id.*
225. 380 F. Supp. 3d 852, 863 (E.D. Ark. Mar. 30, 2019).
226. *Id.*; *Hestir*, 2020 WL 5834251, at *7. Other courts have similarly found that "the anniversary date of a policy is not a 'renewal' of that policy under Rule 101, 29 U.S.C. § 1132(a)(3). *See* Owens v. Liberty Life Assurance Co. of Boston, 184 F. Supp. 3d 580, 585 (W.D. Ky. 2016); Price v. Tyson Long-Term Disability Plan, Case No. 5:16-CV-05075, 2017 WL 3567531, at *3-4 (W.D. Ark. Aug. 17, 2017)..
227. *Hestir*, 2020 WL 5834251, at *8.
228. *Id.*
229. Attributed to Albert Einstein.

of gaining that knowledge.[230] But until recently, actual knowledge did not always mean *actual* knowledge.

In *Intel Corporation Investment Policy Committee v. Sulyma*,[231] the Supreme Court unanimously held that the "actual knowledge" requirement of ERISA's statute of limitations under 29 U.S.C. § 1113(2) means that a plaintiff must actually be aware of the relevant facts before the limitations period begins to run. The underlying suit involved a breach of fiduciary claim by Sulyma, a retirement plan participant.[232] Intel moved for summary judgment, asserting Sulyma's claim was not timely because he received several notices disclosing the plans' investments and, therefore, had "actual knowledge" of the plans' investments more than three years before filing suit.[233] The district court agreed and granted summary judgment for Intel.[234] Sulyma appealed, claiming the district court incorrectly applied a "constructive knowledge" standard when the statute required "actual knowledge."[235] On appeal, the Ninth Circuit reversed the district court's decision and held that a defendant must show that a plaintiff was actually aware of the nature of the alleged breach more than three years before the action was filed.[236]

The Supreme Court agreed with the Ninth Circuit, holding that "actual knowledge" under the statute means just that, "actual" knowledge.[237] In order to have "actual knowledge" of information, a plaintiff must in fact be aware of it.[238] The Court noted that disclosure of relevant information strongly suggests that an individual gained knowledge of the information disclosed.[239] But, in order to meet the actual knowledge threshold, 29 U.S.C. § 1113(2) "requires more than evidence of disclosure alone."[240] Accordingly, "actual knowledge" can no longer be established by showing that an individual received information from which he could have become aware of the relevant information.[241] Rather, proof will now be required that the individual actually received and read the information.[242] The Court also

230. 29 U.S.C. § 1113; Intel Corp. Inv. Policy Comm. v. Sulyma, 140 S. Ct. 768 (2020); Guenther v. Lockheed Martin Corp., Nos. 17-16984, 18-15823, 2020 WL 5001809, at *1, *4 (9th Cir. Aug. 25, 2020).

231. *Intel Corp. Inv. Policy Comm.*, 140 S. Ct. at 772.

232. *Id.* at 774.

233. *Id.*

234. *Id.* at 772.

235. Sulyma v. Intel Corp. Inv. Policy Comm., 909 F.3d 1069, 1072 (9th Cir. 2018); *see* 29 U.S.C. § 1113(2).

236. *Sulyma*, 909 F.3d at 1078.

237. *Intel Corp. Inv. Policy Comm.*, 140 S. Ct. at 774.

238. *Id.*

239. *Guenther*, 2020 WL 5001809, at *1, *7.

240. *Intel Corp. Inv. Policy Comm.*, 140 S. Ct. at 777.

241. *Id.* at 778.

242. *Id.*

noted, however, that "actual knowledge" may be proved through any of the "usual ways," which includes "inference from circumstantial evidence" and evidence of "willful blindness."[243] "[A] willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts."[244] This language may be helpful in cases where "actual knowledge" appears to have been intentionally avoided.

C. *"If at first you don't succeed, try, try again. Then quit. No use being a damn fool about it."[245]: Attorneys' Fees—"Success" on the Merits?*

Courts have discretion to "allow a reasonable attorneys' fee and costs" in ERISA suits,[246] but this discretion is not unfettered.[247] "[A] fees claimant must show 'some degree of success on the merits.'"[248] As the decisions from this survey period prove, not all successes are created equal.

In *Ariana M. v. Humana Health Plan of Texas, Inc.*, for example, the Fifth Circuit ruled that Ariana M. was not entitled to an award of attorneys' fees even after she successfully convinced the court to change the standard of review, from arbitrary and capricious to *de novo*, and to remand her case to the district court.[249] In so holding, the court explained that "[s]ecuring a change in the standard of judicial review . . . is certainly a procedural success, but [is] not [considered to be a] success on the merits . . . ."[250]

In *Katherine P. v. Humana Health Plan, Inc.*, the Fifth Circuit again found Katherine P. was not entitled to attorneys' fees after persuading the court to vacate and remand a summary judgment decision entered in favor of Humana because this was a "purely procedural victor[y]."[251] The court noted that the reversal and remand to the district court simply allowed Katherine P. to proceed with her claim.[252] To be entitled to a fee award, the court found, a party must achieve a result that alters the parties' legal relationship or requires that the other party do something besides what it was already doing—which was litigating the case.[253] Under such standard,

243. *Id.*
244. Bouvy v. Analog Devices, Inc., Case No.: 19-cv-881 DMS (BLM), 2020 WL 3448385, at *1, *3 (S.D. Cal. June 24, 2020) (quoting Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 769-70 (2011)).
245. W.C. Fields, Public School Graduation Ceremony (1954).
246. 29 U.S. C. § 1132(g)(1); Katherine P. v. Humana Health Plan, Inc., 962 F.3d 841 (5th Cir. 2020) (Mem.).
247. Ariana M. v. Humana Health Plan of Texas, Inc., 792 F. App'x 287, 290 (5th Cir. 2019).
248. *Katherine P.*, 962 F.3d at 841 (quoting Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 255 (2010)).
249. *Ariana M.*, 792 F. App'x at 289.
250. *Id.*
251. *Katherine P.*, 962 F.3d at 841.
252. *Id.*
253. *Id. at* 841-42.

Katherine P. did not achieve "some degree of success on the merits" and, therefore, was not entitled to a fee award.[254]

A fee award under 29 U.S.C. § 1132(g)(1) applies solely to fees incurred in the judicial proceeding, not to fees incurred during the "administrative phase of the claims process."[255] In *Castillo v. Metropolitan Life Ins. Co.*, the Ninth Circuit held that attorneys' fees incurred during the administrative review process cannot be recovered as "other appropriate equitable relief" under ERISA.[256]

Even where there is success on the merits, courts have discretion to limit the amount of fees awarded. In *Spears v. Liberty Life Assurance Co.*,[257] Spears moved for attorneys' fees and costs under 29 U.S.C. § 1132(g)(1) after she secured two summary judgments in her favor. Liberty agreed Spears was entitled to some amount of fees "for the time spent on the federal court case and for the post remand administrative work,"[258] but argued the amount should be reduced because (1) Spears was not successful on all of her claims, (2) the amount of fees sought was more than three and a half times the damages awarded; and (3) many of the billing entries were "cryptic" and "uninformative."[259] Partially agreeing with the insurer, the court held that a "modest reduction" in fees was warranted because Spears was not as successful as she claimed.[260] It noted that Spears attempted to assert a breach of fiduciary duty claim five separate times, but these claims were ultimately dismissed.[261] The court further ruled that Spears could not have her attorneys' fees reimbursed for her "quixotic pursuit" of these claims "***after***" they were dismissed, and accordingly reduced the attorneys' fee award by ten percent.[262]

The court declined, however, to reduce the fee award based on the disparity between the amount of damages and fees, finding there was no legal support for that position and that the purpose of an attorneys' fee award is in part, to "encourage representation of plaintiffs in difficult cases where the likelihood of a large damages award is low."[263] Even while acknowledging that the litigation spanned almost a decade and noting that Spears's counsel had "doggedly advocated for her client without remuneration,"[264]

254. *Id.*; *Hardt*, 560 U.S. at 255.
255. Castillo v. Metro. Life Ins. Co., 970 F.3d 1224, 1228 (9th Cir. Aug. 17, 2020).
256. 970 F.3d 1224 (9th Cir. Aug. 17, 2020).
257. Civil Action No.: 3:11-cv-1807 (VLB), 2020 WL 2404973, at *6 (D. Conn. May 12, 2020).
258. *Id.*
259. *Id.* at *7.
260. *Id.*
261. *Id.*
262. *Id.* at *1 (emphasis in original).
263. *Id.* at *7.
264. *Id.*

the court ultimately further reduced the fees sought by an additional fifteen percent due to vague time entries.[265]

D. *"As a general rule, the most successful man in life is the man who has the best information"*[266]*—Statutory Penalties*

ERISA imposes sanctions for an administrator's failure or refusal to provide information "which [the] administrator is required by this subchapter to furnish to a participant."[267] The requirements are "strictly and narrowly construed" and penalties cannot be imposed for failure to provide documents other than those specifically enumerated in 29 U.S.C. § 1024(b)(4).[268] The documents administrators are required to provide under § 1024(b)(4) include the latest updated summary plan description, the latest annual report, any terminal report, and any bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.[269] A request for documents does not need to precisely name the documents sought, but it must provide "clear notice" of what is requested.[270]

In *Williamson v. Travelport, LP*,[271] Williamson sought penalties based on multiple written requests for documents. In one request, Williamson demanded "ALL of the material that I have previously requested" including "every document, plus sworn statements from witnesses with personal knowledge explaining or supplying facts as to which testimony would be necessary, which [Travelport] would present in court to prove conclusively the amount" of her pension.[272] The court noted this request sought documents that were not enumerated in § 1024(b)(4) and did not fit under that section's residual clause—"other instruments under which the plan is established or operated"—because they were not formal instruments governing the plan.[273] Accordingly, the court ruled that failing to provide this information did not trigger any penalties.[274] Williamson's request for all other materials she had previously requested was deemed too general and insufficient to provide the administrator with "clear notice" of what was requested.[275] Williamson also sought "'[e]arnings' and '[c]ompensation figures,' including various computations and 'underlying' data specific to

265. *Id.* at *8.
266. Benjamin Disraeli, Endymion 156 (1880).
267. 29 U.S.C. § 1132(c)(1); 29 U.S.C. § 1024(b)(4).
268. Williamson v. Travelport, LP, 953 F.3d 1278, 1293 (11th Cir. 2020); Bd. of Tr. of the CWA/ITU Negotiated Pension Plan v. Weinstein, 107 F.3d 143–47 (2d Cir. 1997).
269. 29 U.S.C. § 1024(b)(4).
270. *Williamson*, 953 F.3d at 1294.
271. *Id.*
272. *Id.* at 1295.
273. *Id.*
274. *Id.*
275. *Id.*

her claim," "the actual records from which Travelport extracted the false numbers it used to calculate [her] 'benefits,'" all documents and records and Plan documents supporting the dispute, and her "employment and claim-specific documents."[276] Notably, the court found that none of these other requests triggered the penalty provisions of § 1132(c) because they were not requests for the specifically enumerated documents under § 1024(b)(4).[277]

While this is not the first decision of its kind, as the court recognized, there have not been a surplus of decisions addressing what type of document requests trigger ERISA's penalty provision or expounding on the scope of the administrator's disclosure requirements under §§ 1132(c)(1) and 1024(b)(4).[278]

IV. HEALTH INSURANCE

One chapter of disputes concerning the Affordable Care Act (ACA) came to a close this survey period, while other chapters questioning the Act's continuing constitutionality and the enforceability of regulatory exemptions from the so-called contraceptive mandate are still being written.

A. *"A billion here, a billion there, sooner or later it adds up to real money"[279]—The bill comes due as the Supreme Court clears the way for insurers to recover $12 billion under the Affordable Care Act's risk corridors program*

The United States Supreme Court held that the federal government must pay up to $12 billion in so-called risk corridor payments to approximately fifty insurers that sold Qualified Health Plan (QHP) coverage on the ACA's Health Benefit Exchanges.[280]

The ACA's "Risk Corridors" program was conceived as a three-year program that would spread the risks of participation on Health Benefit Exchanges between and among the participating insurers and the Federal Government.[281] Under the program, which is found in § 1342 of the ACA, gains and losses experienced by insurers offering QHPs on the Exchanges would be evened out annually.[282] The program was administered by the United States Department of Health and Human Services (HHS). Depending on how a QHP's aggregate premiums compared to its allowable costs

276. *Id.* at 1296.
277. *Id.*
278. *Id.* at 1293.
279. This quote is commonly attributed to United States Senator Everett Dirksen, but see https://www.everettdirksen.name/print_emd_billionhere.htm (last visited Nov. 11, 2020).
280. Maine Cmty. Health Options v. United States, 140 S. Ct. 1308, 1355 (2020).
281. *Id.* at 1316.
282. *Id.*

each year between 2014 and 2016, a QHP would either pay money to or receive money from HHS.[283]

Funding for the Risk Corridors program quickly fell victim to political opposition to the ACA. Congress did not make a specific funding appropriation for the program in 2014,[284] but the Government Accountability Office (GAO) advised that HHS could make the program's 2014 "payments out" using the Program Management appropriation for the Centers for Medicare and Medicaid Services (CMS).[285] The GAO further advised that HHS could rely on the CMS Program Management appropriation for 2015 and 2016, but only if the appropriations language in those years was similar to the 2014 appropriations language.[286] Not surprisingly in light of the political fights surrounding the ACA, riders to Congress's CMS Program Management appropriations for 2015 to 2017 specifically stated that the funds appropriated could not be used to pay risk corridors payments.[287]

The program experienced a shortfall between "payments in" that CMS received and the "payments out" that were owed to insurers.[288] Between 2014 and 2016, the amounts owed as "payments out" outstripped the amounts received as "payments in" by $12 billion.[289]

Fifty or so insurers sued the federal government in the Court of Claims to recover the payments owed to them. The government argued, *inter alia*, that by expressly withholding appropriations for the risk corridor payments, Congress impliedly repealed the government's obligation to make such payments from funds other than those collected from insurers' "payments in."[290] The Federal Circuit agreed with the government, holding that Congress, by barring CMS from using the Program Management appropriation for risk corridors payments in fiscal year 2015, suspended the government's obligation to fund the risk corridors program beyond the sums it received from insurers' "payments in."[291] The Supreme Court's decision in *Maine Community Health Options v. United States* reversed the decision of the Federal Circuit.

The Court began by confirming that "[t]he Risk Corridors statute created a government obligation to pay insurers the full amount set out

283. Specifically, if a QHP issuer experienced a loss "such that the plan's 'allowable costs' are more than 103% of the plan's 'target amount' for that year," HHS would pay a portion of that loss to the issuer; while if it experienced a gain "such that the plan's 'allowable costs' are less than 97% of the plan's 'target amount' for that year, the issuer is directed to pay the HHS a certain amount of that gain." *Id.* (quoting 42 U.S.C. §§ 18062(b)).

284. Molina Healthcare of Cal., Inc. v. U.S., 133 Fed. Cl. 14, 30 (2017).

285. *Id.*

286. *Id.* at 24–25.

287. *Maine Cmty. Health Options*, 140 S. Ct. at 1317.

288. *Id.*

289. *Id.*

290. *Id.* at 1323.

291. *Id.* at 1318.

in § 1342's formula."[292] The statute made clear that once the insurers began their participation in the Health Benefit Exchanges, the government's obligation was "neither contingent nor limited by the availability of appropriations or other funds."[293] Congress did not impliedly repeal the government's obligation by failing to make appropriations for the program. Rather, Congress "merely appropriated a less[er] amount than that required to satisfy the government's obligation."[294] The obligation the statute created survived. It also was significant, the Court explained, that "the government had already begun incurring the prior year's obligation each time Congress enacted a rider" because "finding a repeal in these circumstances would raise serious questions whether the appropriations riders retroactively impaired [the] insurers' rights to payment."[295] Finally, the Court confirmed the insurers were entitled to sue the government in the Court of Federal Claims. The United States, of course, is immune from suit unless it waives its right to immunity. The Court's precedents hold that the government's immunity is deemed waived where a federal statute "can be fairly interpreted as mandating compensation by the Federal Government for . . . damages sustained."[296] Because the Risk Corridors statute could fairly be interpreted as mandating compensation for damages, the Court held that insurers were entitled to seek compensation from the government in the Court of Claims.[297]

B. *Is the whole greater than the sum of its parts? The Fifth Circuit says the ACA's Individual Mandate is unconstitutional but punts on whether it is inseverable from the rest of the ACA*

Did the Tax Cuts and Jobs Act of 2017[298] render the Individual Mandate in the ACA unconstitutional? If so, is that provision inseverable from the rest of the ACA so that the entire Act falls along with the Individual Mandate? The Northern District of Texas answered "yes" to both of those questions, as we reported last survey period. This survey period, a three-judge panel of the Fifth Circuit affirmed in part and remanded in part, with one dissent, and the Supreme Court accepted certiorari but did not hear arguments until after this survey period closed.

Twenty states (the "State Plaintiffs") and two private individuals (the "Individual Plaintiffs") sued the United States, HHS, the HHS Secretary (Alex Azar), the Internal Revenue Service, and the Acting Commissioner of

292. *Id.* at 1319.
293. *Id.* at 1323.
294. *Id.* at 1324 (internal quotations omitted).
295. *Id.*
296. *Id.* at 1328.
297. *Id.*
298. Pub. L. No. 115-97, 131 Stat. 2054 (2017).

Internal Revenue (collectively the "Federal Defendants") challenging the constitutionality of the ACA.[299] Sixteen states and the District of Columbia intervened as defendants (the "Intervenor Defendants").[300] The State and Individual Plaintiffs argued that the Tax Cuts and Jobs Act of 2017 (TCJA)[301] rendered the ACA's Individual Mandate unconstitutional. That conclusion, the plaintiffs claimed, was dictated by the relationship between (1) the ACA's Individual Mandate and its accompanying "shared responsibility payment," (2) the TCJA, which reduced the shared responsibility payment to $0, and (3) the Supreme Court's decision upholding the constitutionality of the Individual Mandate in *National Federation of Independent Business v. Sebelius* (*NFIB*),[302] on the limited grounds that the Individual Mandate was a valid exercise of Congress's Tax Power.[303]

The Individual Mandate and the "shared responsibility payment" were intended to work together. The Individual Mandate requires Americans to maintain what the ACA refers to as "minimum essential coverage."[304] The "shared responsibility payment" is a tax penalty that Congress imposed to encourage compliance with the Individual Mandate.[305] The TCJA, however, "reduced the ACA's shared-responsibility payment to zero, effective January 1, 2019."[306] In short, after the TCJA, the ACA required Americans to obtain minimum essential coverage but no longer imposed a monetary penalty for non-compliance. That was significant, the plaintiffs argued, because the constitutionality of the Individual Mandate's directive to obtain minimum essential coverage was upheld in *NFIB* only as an exercise of Congress's Tax Power. The plaintiffs reasoned that once the TCJA reduced the shared responsibility payment to $0, the Individual Mandate could no longer be considered an exercise of Congress's Tax Power. And if the Individual Mandate could no longer be justified as an exercise of Congress's Tax Power, the plaintiffs argued, there was no valid constitutional basis for the Individual Mandate's requirement to maintain minimum essential coverage.

The district court held that the Individual Mandate was unconstitutional.[307] And because it found that the Individual Mandate was "essential" to the ACA, it concluded that the Individual Mandate and the broader Act

299. Texas v. United States, 340 F. Supp. 3d 579 (N.D. Tex. Dec. 14, 2018) (*Texas I*), *stay granted*, Texas v. United States, 352 F. Supp. 3d 665 (N.D. Tex. Dec. 30, 2018) (*Texas II*), *appeal docketed*, No. 19-10011 (5th Cir. 2019).
300. *Id*. at 591.
301. Pub. L. No. 115-97, 131 Stat. 2054 (2017).
302. 567 U.S. 519 (2012) (*NFIB*).
303. *Id*.
304. 26 U.S.C. § 5000A(a) (Individual Mandate); *Texas I*, 340 F. Supp. 3d at 585.
305. *Texas I*, 340 F. Supp. 3d at 585.
306. *Id.* at 591.
307. *Id*. at 601–05.

were inseverable, which meant the entire ACA fell along with the Individual Mandate.[308]

A majority of the Fifth Circuit panel that heard the appeal agreed with the district court's holding that the Individual Mandate was unconstitutional.[309] It recounted that *NFIB* held that the Individual Mandate was not a legitimate exercise of Congress's Interstate Commerce power or its authority under the Necessary and Proper Clause,[310] but it was a legitimate exercise of Congress's taxing power. According to *NFIB*, the Individual Mandate, when read together with the ACA's shared responsibility payment, was a legitimate exercise of Congress's taxing power for four reasons: (i) together they produced revenue for the government; (ii) the shared responsibility payment was paid into the Treasury by taxpayers when they filed their tax returns; (iii) the amount of the shared responsibility payment was dependent on factors common to those for determining the amount of tax owed; and (iv) the requirement to pay the shared responsibility amount was part of the Internal Revenue Code and enforced by the IRS.[311] After the TCJA, the Fifth Circuit panel explained, "The four central attributes that once saved the statute because it could be read as a tax no longer exist."[312] The panel majority therefore affirmed the district court on this point, holding that Individual Mandate was unconstitutional in the wake of the TCJA because the Mandate was reduced to a naked statutory "command" for which there was no constitutional support.[313]

The panel did not rule on the district court's finding that the entire ACA was invalid because it and the Individual Mandate were inseverable. Instead, it remanded that portion of the district court's decision and directed the district court to "conduct a more searching inquiry into which provisions of the ACA Congress intended to be severable from the individual mandate."[314] The panel pointed out that that "[t]he ACA's framework of economic regulations and incentives spans over 900 pages of legislative text and is divided into ten titles."[315] When considering whether discrete sections of a "sprawling" statutory scheme like the ACA are inseverable, the

308. *Id.* at 619.

309. Texas v. United States, 945 F.3d 355, 393 (2019). Our discussion of *Texas v. United States* focuses only on the arguments surrounding the statutory provisions of the ACA. It bears noting that the ultimate decision in the case may turn on other arguments. In particular, there are significant constitutional standing arguments that we do not discuss because they are outside the scope of this Article.

310. *Id.* at 388 (citing Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012)).

311. *Id.* at 389.

312. *Id.* at 390.

313. *Id.* at 390, 393.

314. *Id.* at 390, 402.

315. *Id.* at 390, 396.

panel explained, the "[s]everability analysis is at its most demanding" and the district court's analysis was not sufficiently detailed.[316]

Judge King dissented. She disputed the majority's assertion that the Individual Mandate compelled anyone to purchase minimum essential health insurance coverage. She observed that a majority in *NFIB* agreed that the Individual Mandate offered individuals a "'lawful choice' between purchasing health insurance and paying the shared responsibility payment."[317] In zeroing out the shared responsibility payment, she reasoned, Congress gave people the option of obtaining coverage or not without adverse consequences. The majority's construction, however, was that by reducing the shared responsibility payment to $0, Congress converted the Individual Mandate from a "choice" into something that was mandatory. Judge King rejected that reasoning: "[I]t boggles the mind to suggest that Congress intended to turn a nonmandatory provision into a mandatory provision by doing away with the only means of incentivizing compliance with that provision."[318] The Individual Mandate is not a reflection of Congress exceeding its enumerated powers, Judge King found, because the law "does nothing." Congress only exercises its legislative power when it alter[s] the legal rights, duties and relations of persons."[319] Because the Individual Mandate does not do that, she explained, the statute does not exceed any of Congress's enumerated powers and, therefore, is not unconstitutional.[320] As for the severability issue, Judge King agreed with the majority's criticisms of the district court opinion but believed it was clear that the Individual Mandate and the rest of the ACA were not inseverable.[321]

The Supreme Court granted certiorari and was scheduled to hear oral arguments after the close of this survey period. We expect the Court will render a decision in the case before the end of the next survey period, and we look forward to reporting it.

C. *"And the Beat Goes On"*[322]*—The Supreme Court confirms statutory authority existed to promulgate the religious and moral exemption regulations to the ACA's Contraceptive Mandate, but the dispute continues*

The Supreme Court held this survey period that the departments that promulgated two interim final rules (IFRs) exempting certain employers from the ACA's so-called Contraceptive Mandate had authority to issue those

316. *Id.*
317. *Id.* at 390, 413–14.
318. *Id.* at 390, 415.
319. *Id.* at 390, 413.
320. *Id.*
321. *Id.* at 390, 418 ("Given the breadth of the ACA and the importance of the problems that Congress set out to address, it is simply unfathomable to me that Congress hinged the future of the entire statute on the viability of a single, deliberately unenforceable provision.").
322. The Whispers, And the Beat Goes on (Solar 1979).

rules. The rules, which are commonly referred to as the Moral Exemption Rule and the Religious Exemption Rule, represent the government's fourth attempt over two presidential administrations to accommodate religious objections to the Contraceptive Mandate. And the fight still is not over.

The ACA requires employers to offer a group health plan or group health insurance coverage that provides women with "preventive care and screenings" without "any cost sharing requirements."[323] The Act does not define what services and care are encompassed by the phrase "preventive care and screenings."[324] It left that task to the Health Resources and Services Administration (HRSA), an agency of HHS, stating that the coverage employers offer must include such preventive care and screenings "as provided for in comprehensive guidelines supported by the [HRSA]."[325] The HRSA issued guidelines that required health plans to provide coverage for all contraceptive methods and sterilization procedures approved by the Food and Drug Administration.[326] The Departments of Health and Human Services, Labor, and Treasury jointly administer the ACA provisions at issue, and they promulgated two interim regulations providing exemptions from the Contraceptive Mandate. Litigation over whether those rules reasonably accommodated the religious and moral objections some employers had to the Mandate was ongoing when the Obama administration ended and the Trump administration began. Shortly after the change of administrations, the Departments promulgated the Religious Exemption Rule and the Moral Exemption Rule.

The Religious Exemption Rule exempts any employer from the Mandate, so long as the institution objects to "[e]stablishing, maintaining, providing, offering, or arranging (as applicable) coverage, payments or a plan that provides coverage or payments for some or all contraceptives services, based on its sincerely held religious beliefs."[327] The Moral Exemption Rule exempts nonprofit organizations and for-profit entities with no publicly traded ownership interests that object to: "[e]stablishing, maintaining, providing, offering, or arranging (as applicable) coverage or payments for some or all contraceptive services, or for a plan, issuer, or third-party administrator that provides or arranges such coverage or payments, based on [their] sincerely held moral convictions."[328]

The Commonwealth of Pennsylvania filed suit seeking declaratory and injunctive relief, arguing that the rules were procedurally and substantively

323. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373 (2020).
324. *Id.*
325. *Id.* (citing 442 U.S.C. § 300gg-13(a)(4)).
326. *Id.* at 2374.
327. *Id.* at 2377.
328. *Id.*

invalid under the Administrative Procedures Act.[329] The district court found that Pennsylvania was likely to succeed on the merits and entered a preliminary nationwide injunction against the rules. The Third Circuit affirmed, finding that the statute that authorized HRSA to determine which services should be included in the definition of "preventive care and screenings" did not authorize the departments to create the exemptions reflected in the Rules.[330]

In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, a five-member majority of the Supreme Court, joined by the concurrence of two other justices, reversed.[331] The majority considered it significant that the ACA required employers to provide "such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by [HRSA],"[332] but at the same time was silent as to what coverages the HRSA's guidelines were required to contain. That silence, the majority explained, meant the HRSA "ha[d] virtually unbridled discretion to decide what counts as preventive care and screenings," and that meant the HRSA was empowered to identify and create exemptions from its own guidelines.[333]

Justice Ginsburg dissented and was joined by Justice Sotomayor. The dissent argued the majority's construction of the provision overlooked the statute's mandate that employers "shall . . . provide coverage for" the preventive care and screenings that the HRSA was given authority to define.[334] Because the ACA expressly required employers to provide coverage for preventive care and screenings, the HRSA could not create an exemption carving *some* employers out of the statutory mandate.[335] The HRSA's authority under the provision, according to the dissent, was limited to determining "the *type* of services group health plans and health insurance issuers must cover with respect to women."[336]

Justices Kagan and Breyer concurred in the judgment but did so because they viewed the parties' dispute over the proper construction of the statute as something that was most appropriately resolved by deferring to the reasonable interpretation by the implementing agency, citing the doctrine established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,

329. *Id.* at 2378.
330. *Id.* at 2379.
331. *Id.* at 2367. (Justice Thomas delivered the opinion of the Court, in which Chief Justice Roberts and Justices Alito, Gorsuch, and Kavanaugh joined. Justice Kagan, with whom Justice Breyer joined, concurred in the judgment.)
332. *Id.* at 2380.
333. *Id.*
334. *Id.* at 2404–05.
335. *Id.*
336. *Id.*

Inc.[337] Applying *Chevron* deference, Justices Kagan and Breyer would have deferred to the departments' reading of the statutory delegation to the HRSA.[338]

The Court's decision in *Little Sisters of the Poor* is not the end of the dispute. As the concurrence observed, the case was being remanded and, on remand, the parties were expected to litigate whether the rules were arbitrary and capricious.[339] The fight that remains concerns whether the departments that promulgated the rules "failed to draw a 'rational connection' between the problem [they have] identified and the solution [they have] chosen," or whether their collective "thought process reveals 'a clear error of judgment.'"[340] The concurrence outlined what it saw as the issues to be addressed in that dispute.

If the past is an accurate predictor of the future, we can look forward to reporting on decisions about the Contraceptive Mandate for many survey periods to come.

V. LIFE INSURANCE

In our discussion of life insurance cases this year, we focus on recent cases involving cost of insurance, stranger originated life insurance (STOLI), retention of premiums in STOLI cases, and state revocation-on-divorce statutes. Although STOLI cases are fewer and far between compared to years ago, these cases still arise, and it is important for life insurance practitioners to keep tabs on the most recent decisions. Whether an insurer will be allowed to retain premiums in cases of STOLI or fraud tends to be case-by-case, although courts do allow it in the appropriate circumstances, as discussed below. And revocation-on-divorce statutes continue to impact beneficiary designations when insureds die after divorce.

A. *"It's getting better all the time, can't get no worse"*[341]*—Cost of Insurance*

During this survey period, a number of courts addressed insurers' methods for calculating and increasing cost of insurance rates. In the two cases discussed here, different outcomes were reached based on different policy language.

In *Hancock v. Americo Financial Life & Annuity Insurance Co.*,[342] the Fourth Circuit affirmed the district court's decision to dismiss Hancock's putative class action suit claiming that Americo's premium and cost of insurance

337. 467 U.S. 837, 842–43 (1984).
338. *Id.*
339. *Id.*
340. *Id.*
341. The Beatles, Getting Better (EMI Studio Two 1967).
342. 799 F. App'x 179 (4th Cir. 2020).

increases related to Hancock's flexible premium adjustable life insurance policy constituted a breach of contract, a breach of the duty of good faith and fair dealing, and a violation of North Carolina's Unfair and Deceptive Trade Practices Act (UDTPA).[343] By its *de novo* review, the Fourth Circuit determined that the policy allowed the insurer to increase premiums in the event the cost of insurance exceeded the policy's cash value.[344] In so finding, the court rejected Hancock's argument that the policy—which provided for an initial minimum premium amount and a planned periodic premium—only allowed the monthly premium to be changed by the policyholder.[345] The Fourth Circuit also affirmed the district court's dismissal of Hancock's other two claims because they were premised on the same allegations as the invalid breach of contract claim and nothing more.[346]

In *Vogt v. State Farm Life Insurance Co.*,[347] however, the Eighth Circuit construed the subject policy's language regarding cost of insurance in the insured's favor.[348] The flexible premium adjustable whole life insurance policy at issue contained a cost of insurance provision that provided that the monthly cost of insurance rates were "based on the Insured's age on the policy anniversary, sex, and applicable class rates."[349] In the face of a class action challenging that provision, the district court denied State Farm's motion for summary judgment in which State Farm argued that the phrase "based on" allowed it to include other factors in its cost of insurance calculation.[350] The Eighth Circuit, on *de novo* review, examined the plain and ordinary meaning of the phrase "based on" as well as case law in other state and federal courts analyzing the same phrase, in which courts reached differing conclusions.[351] The Eighth Circuit ultimately concluded that the phrase was at least ambiguous, requiring it to be construed in favor of the insured.[352]

343. *Id.* at 180.
344. *Id.* at 181.
345. *Id.*
346. *Id.*
347. 963 F.3d 753 (8th Cir. 2020).
348. *Id.* at 763.
349. *Id.* at 761.
350. *Id.* at 761–62.
351. *Id.* at 763–64.
352. *Id.* at 763. Notably, *Vogt*'s class action litigation resulted in a $34 million jury verdict in the class's favor. Similarly, in *Bally v. State Farm Life Insurance Co.*, insureds brought a proposed class action regarding the same cost of insurance issue for the same type of State Farm life insurance policy. Bally v. State Farm Life Ins. Co., 335 F.R.D. 288, 294 (N.D. Cal. Apr. 2, 2020). During last survey period, the U.S. District Court for the Northern District of California denied the insurer's motion for summary judgment, finding, like the Eighth Circuit, that the phrase "based on" was ambiguous. *Id.*; *see also* Bally v. State Farm Life Ins. Co., Case No. 18-cv-04954-CRB, 2019 WL 3891149 (N.D. Cal. Aug. 19, 2019). This survey period, the Northern District of California granted the insurer's request to file an interlocutory appeal on the "based on" issue, Bally v. State Farm Life Ins. Co., No. 18-CV-04954-CRB, Dkt. No.

B. *"You keep all your money in a big brown bag inside a zoo / What a thing to do / Baby you're a rich man / Baby you're a rich man / Baby you're a rich man too"*[353]*—STOLI: Choice of Law and Who Gets to Keep the Premiums?*

This survey period, two courts in the Eastern District of New York analyzed choice of law issues between New York and New Jersey for purported STOLI policies. In *Lincoln National Life Insurance Co. v. Inzlicht-Sprei*[354] and *Dukes Bridge, LLC v. Security Life of Denver Insurance Co.*[355] the district court concluded based on each case's specific factual scenarios that New York law applied, and as such, the respective policies were not STOLI policies.[356] In both cases, the courts implied that had the respective choice of law analyses determined that New Jersey law applied, the respective policies would have been held to be STOLI policies.[357] Notably, in *Dukes Bridge*, the district court ultimately found, on other grounds, that the life insurer was not required to pay the $10 million death benefit under the subject policy.

Addressing summary judgment motions in an interpleader action where $20 million in policy proceeds were on deposit with the court, the district court in *Inzlicht-Sprei* conducted a "center of gravity" analysis, determining that both the place of contracting and place of performance for the life insurance policy at issue were in New York.[358] The court examined multiple New York contacts related to the policy, e.g., that the signatories to the policy lived and worked in New York, the insured underwent her medical examination in New York, the premiums were billed to the owner/beneficiary trust at a New York address, the premiums were paid from the trust's New York bank account, and the premium financing agreement was executed in New York.[359] The court also identified several New Jersey contacts related to the policy, e.g., that the application stated it was signed in New Jersey, that the owner/beneficiary trust had a New Jersey address, and that the sales agent was licensed in New Jersey, but ultimately determined the New York contacts outweighed these factors.[360] In particular, the court noted that none of the signatories to the policy remembered signing the

99 (N.D. Cal. Nov. 25, 2019), which the Ninth Circuit denied, *see* Bally v. State Farm Life Ins. Co., No. 18-CV-04954-CRB, Dkt. No. 104 (N.D. Cal. Jan. 27, 2020), and the Northern District of California granted the insured's motion for class certification. *Bally*, 335 F.R.D. at 294. It remains to be seen whether further proceedings in the Northern District of California will mirror those in Missouri and the Eighth Circuit.

353. The Beatles, Baby, You're a Rich Man (Capitol Records 1967).

354. 2020 WL 1536346 (E.D.N.Y. Mar. 31, 2020).

355. 2020 WL 1908557 (E.D.N.Y. Apr. 17, 2020).

356. *Lincoln Nat'l Life Ins. Co.*, 2020 WL 1536346, at *16; *Dukes Bridge, LLC*, 2020 WL 1908557, at *34, *48.

357. *Lincoln Nat'l Life Ins. Co.*, 2020 WL 1536346, at *14; *Dukes Bridge, LLC*, 2020 WL 1908557, at *31.

358. *Lincoln Nat'l Life Ins. Co.*, 2020 WL 1536346, at *15.

359. *Id.*

360. *Id.*

policy application in New Jersey.[361] Thus, the *Inzlicht-Sprei* court held that the policy was not a STOLI policy under New York law under the principles outlined in *Kramer v. Phoenix Life Insurance Co.*, and found that Wells Fargo was entitled to the policy proceeds as the last owner of the policy.[362]

In *Dukes Bridge*, the district court took a slightly different route and conducted an extensive analysis of prior choice of law rulings in the case, a potential choice of law provision in a verification completed during the application process that stated the parties intended the subject policy to be governed by New Jersey law, the parties' behavior that demonstrated that they intended New Jersey law to govern the policy, and New York Insurance Law Section 3103[363] that requires policies delivered or issued for delivery in New York to a New York resident to be governed by New York law.[364] Ultimately, the district court concluded that the parties implicitly elected New Jersey law to govern the policy by, *inter alia*, executing the verification; signing the application, the verification, and the policy delivery receipt in New Jersey; and using a policy form that included references to New Jersey law.[365] The district court further concluded, however, that New York Insurance Law Section 3103 was a statement of substantive law, rather than a codification of state choice-of-law rules, so it superseded any election of law by the parties.[366] And, after applying New York law, the district court held that the policy at issue had an insurable interest at its inception and thus was not a STOLI policy.[367]

Despite this finding, the *Dukes Bridge* court rescinded the policy based on substantial material misrepresentations about the insured's other insurance and found the writing agent liable for fraud.[368] These rulings raised the question of whether the insurer was entitled to retain the premiums collected on the policy or must return them.[369] Although the district court acknowledged that rescission of a life insurance policy typically results in restoration of the status quo—i.e., the insurer pays the premiums back to the insured party—it found that equitable principles may allow the insurer to retain premiums.[370] Here, because the claimant purported to be a far-removed successor-in-interest to the original premium financing entity (i.e., it did not pay any of the premiums), the insured did not pay any of

361. *Id.*
362. *Id.* at *13, *16; *see* Kramer v. Phoenix Life Ins. Co., 940 N.E.2d 535, 536-37 (N.Y. 2010).
363. N.Y. Ins. Law § 3103(b).
364. *Dukes Bridge, LLC*, 2020 WL 1908557, at *34–39.
365. *Id.* at *33–36.
366. *Id.* at *40–42.
367. *Id.* at *42–48.
368. *Id.* at *57, *63–64.
369. *Id.* at *72.
370. *Id.* at *72–73.

the premiums, and the writing agent committed fraud, the court found the most equitable result was to allow the insurer to retain premiums in what was a clear case of fraud against the company.[371]

In *Sun Life Assurance Co. of Canada v. U.S. Bank National Ass'n*,[372] on the other hand, the district court did not allow the insurer to retain premiums.[373] After a jury found in favor of the securities intermediary for the policy owner on its promissory estoppel claim, the court awarded the securities intermediary damages in the amount of premiums paid to the insurer.[374] In so holding, the district court concluded that the insurer's hands were "not spotless" because it developed a list of suspected STOLI policies but failed to notify the policyowners that the policies' validity might be challenged.[375] Thus, the court held that if the insurer retained premiums, it would be unjustly enriched.[376]

C. *The best things in life are free / But you can keep 'em for the birds and bees / Now give me money (that's what I want) / That's what I want (that's what I want) / That's what I want (that's what I want) yeah / That's what I want*[377]*—Divorce and Beneficiary Designations*

Cases involving life insurance policy beneficiary designations and divorce cropped up regularly this survey period in various district and circuit courts. As shown below, revocation-on-divorce statutes, which are a frequent issue, can greatly impact the outcome in such cases.

In *Snead v. Wright*,[378] Snead's ex-wife sued the insured's long-term girlfriend Wright, the life insurer Transamerica, and a wealth management company to obtain annuity policy proceeds.[379] Although the ex-wife was named the original beneficiary under the subject annuity policy issued in 2003 and she was divorced from Snead in 2005, not until the Friday evening before his death in 2017 did Snead submit a change of beneficiary form to change the beneficiary of the annuity policy to Wright.[380] In their motion to dismiss the ex-wife's complaint, Transamerica and the wealth management company argued that the ex-wife's beneficiary designation had been revoked by the couple's divorce pursuant to Alaska's revocation-

371. *Id.* at *72–76. This case was handled by authors Elizabeth G. Doolin and Julie F. Wall and contributor Kaitlyn E. Luther.

372. C.A. No. 17-75-LPS, 2019 WL 8353393 (D. Del. Dec. 30, 2019).

373. *Id.* at *3.

374. *Id.* at *1, *3.

375. *Id.* at *4.

376. *Id.*

377. The Beatles, Money (That's What I Want) (Anna Records 1963).

378. 427 F. Supp. 3d 1133 (D. Alaska Dec. 3, 2019).

379. *Id.* at 1136. The wealth management company maintained Snead and his ex-wife's retirement and other investment accounts, including an investment account that held the annuity policy. *Id.* at 1139.

380. *Id.* at 1135–36.

on-divorce statute, Alaska Statutes § 13.12.804.[381] The ex-wife, on the other hand, argued that the express terms of the divorce decree awarded her the annuity policy, which would rebut the presumption under § 13.12.804 that her designation was revoked.[382] The court reviewed the divorce decree and concluded that nothing in it specifically mentioned the annuity policy; in fact, the court found that the investment account in which such policy was held was awarded to Snead, not his ex-wife.[383] Because the ex-wife could not rebut the presumption that the divorce revoked her designation, the district court granted Transmerica's and the wealth management company's motion to dismiss.[384]

In *Genworth Life & Annuity Insurance Co. v. Leonelli-Elmer*,[385] Genworth interpled the subject life insurance policy proceeds, naming the Leonelli-Elmer and two sons from a prior marriage as defendants.[386] When the insured Elmer died, his divorce proceedings with Leonelli-Elmer were still pending.[387] Notably, Massachusetts's rules of court place an automatic restraining order on beneficiary changes during the pendency of a divorce.[388] Although Elmer moved the probate court to lift the automatic restraining order, the probate court had not ruled on the matter by the time he died.[389] Elmer also executed a durable power of attorney the day before he died, naming one of his sons as his agent, and his son completed a change of beneficiary from Leonelli-Elmer to Elmer's sons in the hours before his death.[390] Genworth advised the son, however, that the power of attorney did not give him the power to make beneficiary changes.[391] After Genworth exited the case, Leonelli-Elmer moved for summary judgment, requesting to receive the policy proceeds.[392] The court concluded that Leonelli-Elmer should be awarded the policy proceeds because the Elmer was restrained from making any beneficiary change during the pendency of their divorce.[393]

In *Rose v. Midland National Life Insurance Co.*,[394] the Eighth Circuit affirmed the district court's decision that the Rose's beneficiary designation

381. *Id.* at 1138.
382. *Id.*
383. *Id.* at 1139.
384. *Id.* at 1140.
385. Civil Action No. 19-CV-10083-RWZ, 2020 WL 4720048 (D. Mass. Aug. 12, 2020).
386. *Id.* at *1.
387. *Id.*
388. *Id.*
389. *Id.*
390. *Id.*
391. *Id.*
392. *Id.*
393. *Id.*
394. 954 F.3d 1117 (8th Cir. 2020).

was revoked by her divorce from the insured.[395] Although Rose claimed that the insured agreed to orally modify their divorce decree to include his continuing to pay premiums on the life insurance policy and keep her as its beneficiary, both courts found that Rose did not provide proof of the oral modification.[396] New Jersey's revocation-on-divorce law automatically revokes a beneficiary designation after a divorce unless the divorce decree, a court order, or a contract relating to the division of the marital estate expressly states otherwise.[397] As Rose could only provide her own affidavit regarding the purported oral modification in her suit against her ex-husband's estate and Midland, and as her affidavit could not change the express terms of the divorce decree, her beneficiary designation was deemed revoked upon the final divorce judgment.[398]

In *Baker v. Baker*,[399] the Fourth Circuit reversed the district court's decision to award life insurance policy proceeds to a contingent beneficiary, the insured's daughter from a prior marriage, because the court determined the divorce decree between the insured and the primary beneficiary, the ex-wife, was ambiguous and needed to be reexamined by the district court.[400] West Virginia does not have a revocation-on-divorce statute, so an ex-spouse would remain a life insurance beneficiary by default unless they expressly waived the right.[401] The divorce decree between the insured and his ex-wife contained two relevant provisions: one in which the wife "relinquishes any and all right to any life insurance policies" and one which states the husband "may change the beneficiary" of any life insurance policy which he "presently has on his life."[402] The district court based its decision on the first provision, holding that the ex-wife's waiver in the divorce decree was unambiguous and awarding the policy proceeds to the contingent beneficiary.[403] But the Fourth Circuit disagreed, finding that the two provisions read together made the divorce decree ambiguous as to whether the ex-wife waived her interest in the policy proceeds.[404] As such, the court remanded the case to the district court to determine whether the ambiguity meant the ex-wife did not waive her right to the policy proceeds or whether extrinsic evidence should be considered.[405]

395. *Id.* at 1117–18.
396. *Id.* at 1119.
397. *Id.* at 1118.
398. *Id.* at 1119.
399. 793 F. App'x 181 (4th Cir. 2019).
400. *Id.* at 182–83.
401. *Id.* at 184–85.
402. *Id.* at 183.
403. *Id.* at 184.
404. *Id.* at 186–87.
405. *Id.* at 188.

VI. CONCLUSION

What will next year's survey period bring? We predict more certainty about the viability of the ACA, continued debates about the nature of accidental death, and new ways to torture practitioners with ERISA arcana. We will continue to follow the cases and concepts discussed in this article over the next survey period and let you know, for example, whether the willful blindness exception to the "actual knowledge" requirement of ERISA's statute of limitations under 29 U.S.C. § 1113(2) is heavily litigated and how the pending Affordable Care Act issues are resolved. We wish our readers continued health and well-being as we look forward to a brighter 2021. By then, we hope you will be traveling the world again—although much more carefully than the insureds in some of our decisions reported this year—as "not all those who wander are lost."[406]

406. J.R.R. Tolkien, The Lord of the Rings: The Fellowship of the Ring (Houghton Mifflin 1954).

RECENT DEVELOPMENTS IN INSURANCE COVERAGE LAW

Damian J. Arguello, Aaron Le Marquer, James Breese, and Timothy M. Thornton, Jr.[*]

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I. INTRODUCTION

Damian J. Arguello

This article explores (1) the disparate ways that the United Kingdom and the United States have dealt with business income insurance coverage for the COVID-19 global pandemic; (2) the effect of consent-to-settle provisions in Massachusetts; and (3) California's adoption of vertical exhaustion in excess liability insurance cases.

II. COVID-19: THE INSURANCE COVERAGE POSITION IN THE UNITED KINGDOM AND THE UNITED STATES

Aaron Le Marquer and James Breese

The devastation that the outbreak of Covid-19 has brought to commercial policyholders is significant on both sides of the Atlantic. Insurers' responses to the claims for business interruption (BI) losses that have followed have been similarly impactful in both jurisdictions. Arguably, however, that is where the similarities end. The way in which policyholders are pursuing these claims—and the courts' approaches to them—are very different in the United Kingdom and the United States.

A. *The Financial Conduct Authority's Test Case*

In the United Kingdom, the Financial Conduct Authority (FCA), which regulates insurers, took the interventionist step of seeking a declaration from the court for a Test Case as to how non-damage BI extensions would respond, if at all, to claims for losses arising from Covid-19. This step was welcomed by policyholders in the United Kingdom given that the selected coverage issues are common to a significant proportion of the market, and over 370,000 policyholders were estimated to be affected by the outcome of the case. The clarity remains outstanding, however, as the case proceeds to the Supreme Court in late 2020.

While the Test Case could not, and was not intended to, resolve all aspects of possible BI disputes, it does look to resolve some key contractual uncertainties as well as issues relating to causation. Subject to the final outcome as determined by the Supreme Court, it may be that the FCA has helped narrow the scope of the disputes between insureds and insurers regarding BI.

B. *Legislative Changes in the United States*

The position described above has not been replicated in the United States. In fact, despite thousands of lawsuits relating to BI losses as a result of

Covid-19,[1] the Judicial Panel on Multidistrict Litigation (JPML) declined to consolidate them into a single global MDL proceeding.[2] The JPML reached this decision, given only "superficial" commonality and an absence of commonality in terms of the factual issues.[3] The JPML therefore felt that a consolidation of these claims could ultimately be inefficient, although there may yet be a consolidation of claims on a per insurer basis.[4] For the time being, however, each case will continue to be decided on its own merits, and it seems unlikely at this stage that there will be a test case to provide a binding authority on the common issues across all of those suits.

The efforts to assist policyholders on a collective basis have instead come from the legislature. Several bills under consideration in Congress look to create a scheme that ensures that, in certain cases, SMEs are indemnified for their BI losses arising from Covid-19. In return, insurers will be provided with state-backed reinsurance through a mechanism similar to the Pool Reinsurance Company Limited (Pool Re) in the United Kingdom.

The bills remain under consideration and have been met with some resistance from those looking to uphold the foundations of the U.S. Constitution. Article I of the U.S. Constitution prevents statutory changes that may "impair" contractual obligations.[5] As in the United Kingdom, the wait for policyholders therefore goes on.

C. *Legal Juxtapositions*

1. United States

In the United States, the BI claims have generally been pursued on the basis that Covid-19 has caused damage to property, which is required in order to satisfy the policy trigger. The courts have generally found in favor of insurers on that issue, but not in every case.

In *Studio 417, Inc. v. Cincinnati Insurance Co.*,[6] the court denied an insurer's motion to dismiss, finding that the loss of a possession, deprivation, and the inability to be able to use the premises for its intended purpose can amount to physical loss or damage, which were undefined terms in the policy. This holding, however, is something of an anomaly, given the long line

1. Hannah Smith, *A Closer Look: Coronavirus Insurance Lawsuit Trends*, NU Prop. Cas. 360 (Sept. 4, 2020).
2. Alison Frankel, *JPML Rejects Nationwide Consolidation of Business Insurance Cases. Now What?* Reuters (Aug. 13, 2020).
3. Andrew G. Simpson, *Consolidation of COVID Business Loss Suits Denied; But Grouping by Insurer Eyed*, Ins. J. (Aug. 13, 2020).
4. *See* Frankel, *supra* note 2 (noting that "variations in policy language for businesses across different industries in different states 'will overwhelm any common factual questions.'").
5. U.S. Const. art. i, § 10.
6. 478 F. Supp. 3d 794 (W.D. Mo. Aug. 12, 2020).

of cases in which U.S. courts found that Covid-19 was incapable of causing physical damage to property, which is invariably the trigger for coverage.[7]

2. United Kingdom

The position of the majority in the United States is consistent with the prevailing view in the United Kingdom, as implicitly accepted by the FCA in its decision only to include "non-damage" BI extensions in the Test Case. More recently, this view has been confirmed by the Commercial Court in its recent judgment in *TKC London Limited v. Allianz Insurance Plc*.[8]

In that case, the claimant pursued its claim on the basis that temporary loss of use of property due to Covid-19 closure could amount to "loss of property."[9] The court, however, preferred the insurer's analysis and stated as follows:

> "[L]oss" here is similarly intended to have a physical aspect. . . . [T]hat "loss" cannot sensibly be interpreted as including mere temporary loss of use of property.[10]

It therefore remains the position in the United Kingdom that the only claims with realistic prospects of success will be those under non-damage BI extensions (e.g., Notifiable Disease or Non-Damage Denial of Access extensions). Notwithstanding the difficulties that the FCA Test Case has caused for some of those wordings, the prospects of a claim for BI losses succeeding is still greater if these extensions are operative, as opposed to being left to argue that Covid-19 has caused damage to property, for which at present there appears to be scant authority.

D. *Present Position in the United Kingdom*

The current outcome of the FCA Test Case has resulted in some clear winners and losers.[11] The winners are those insureds with disease-type wordings, provided that the wording is not limited to a specified list of diseases

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7. *See*, *e.g.*, Uncork & Create LLC v. Cinn. Ins. Co., 498 F. Supp. 3d 878 (S.D. W. Va. 2020); Turek Enters., Inc. v. State Farm Mut. Auto. Insur. Co., 484 F. Supp. 3d 492 (E.D. Mich. 2020); Pappy's Barber Shops, Inc. v. Farmers Grp., Inc. 487 F. Supp. 3d 937 (S.D. Cal. 2020).

8. TKC London Limited v Allianz Insurance Plc [2020] EWHC 2710 (Comm) (UK), *available at* https://insure.cooley.com/2020/10/26/property-lost-tkc-london-ltd-v-allianz-insurance-plc-2020-ewhc-2710.

9. *Id.*

10. *Id.*

11. *E.g.*, *Covid-19 Business Interruption Update—FCA Challenges* Orient Express v. Generali, Fenchurch Law Ltd. (July 14, 2020), https://www.lexology.com/library/detail.aspx?g=76fa5eea-5c07-4eb7-9ee6-9219595d2bb4; *see also* Leon Taylor, *UK Supreme Court Hands Down Judgment in the FCA's COVID-19 Non-Damage Business Interruption Insurance Test Case*, DLA Piper (Jan 18, 2021), https://www.dlapiper.com/en/uk/insights/publications/2021/01/uk-supreme-court-judgment-in-the-fca-covid-19-business-interruption-insurance; *UK Supreme Court Ruling on FCA Business Interruption Test Case Handed Down*, Debevoise & Plimpton: Debevoise in Depth (Jan. 18, 2021).

given that the list will not include Covid-19. In relation to such disease wordings, the court found that the national occurrence of Covid-19 was the single cause of the loss and that the individual outbreaks across the country were indivisible parts of it. This conclusion means that there will be coverage, provided that an insured can demonstrate that the disease occurred within the radius specified in the policy (typically twenty-five miles), but the coverage is not limited to losses caused only by the occurrence of disease within that radius. Provided that the trigger conditions are met, the policy will respond to all BI losses caused by the national pandemic, the government's response, and the general public's reaction.

In contrast, the losers are those with prevention of access-type wordings. For those insureds, the court generally found that the extensions provided only a narrow, localized form of coverage. The court did not apply the same wide interpretation of "vicinity" and "neighborhood" that it did for the disease-type wordings. Consequently, as the judgment stands, the pandemic, or nationwide responses to it, will in most cases not be sufficient to trigger the policy.

On issues of causation, and the application of trends clauses, the court found largely in favor of policyholders, rejecting insurers' arguments that they were entitled to deny or reduce claims on the basis that losses were not proximately caused by a narrowly drawn insured peril. The court found that the pandemic, the government's response, and resultant changes in consumer activity all formed part of a single indivisible cause of loss, rather than being independent (or interdependent) concurrent causes of loss. Specifically, the court not only distinguished the contentious *Orient Express v Generali* case,[12] which first formalized the "wide area damage" principle, but went as far as to say that it had been wrongly decided.

As the *Orient Express* case has been relied upon by insurers as a fundamental principle underpinning the adjustment of BI claims since the decision was first handed down in 2010, this aspect of the judgment has far-reaching consequences that go beyond the current Covid-19 landscape. Unsurprisingly then, the issue forms the focus of appeals filed by six of the insurers filed at the UK Supreme Court, which are expected to be heard before the end of 2020. The Supreme Court's decision is expected to bring some much-needed certainty to the issue and, as such, will be eagerly awaited by policyholders and insurers alike.

E. *Comment*

It appears that policyholders on both sides of the Atlantic continue, for the time being, to have to adopt a "wait and see" approach. Whether it be the introduction of new legislation in the United States or the need for a

12. Orient Express v Generali, [2010] EWHC 1186 (Comm) (U.K.), *available at* https://www.pinsentmasons.com/out-law/guides/orient-express-hotels-v-generali.

determination from the Supreme Court in the United Kingdom, the only certainty is that insureds are unlikely to see a great deal of proactivity from insurers for the time being.

Insurers in both countries continue to decline claims for BI losses, and that landscape appears unlikely to change to any great extent until some point in 2021 or beyond. Without overcoming the initial hurdles as to coverage, policyholders have not even been able to properly articulate their cases in respect to the quantification of claims and, for example, why the claims should not be aggregated and the relief provided by the government should not be deducted from the indemnity provided by insurers. While we hope that Covid-19 can be overcome soon enough, the consequences it leaves behind for insurance markets may rumble on.

III. IN A PAIR OF OPINIONS, CALIFORNIA ADOPTS VERTICAL EXHAUSTION METHODOLOGY

Timothy M. Thornton, Jr.

In *Montrose Chemical Corp. of California. v. Superior Court*,[13] the California Supreme Court addressed the issue of vertical exhaustion. Montrose manufactured the insecticide DDT at its facility from 1947 to 1982. In 1990, the United States and the state of California sued Montrose for environmental contamination allegedly caused by Montrose's operation of its facility. Montrose entered into partial consent decrees in which it agreed to pay for environmental cleanup. Montrose expended more than $100 million in the cleanup and asserted future liability of a similar magnitude. It sought coverage under its excess liability insurance in effect from 1961 to 1985. Primary insurance had been exhausted.

The court defined *attachment point* as the level of loss that must be reached before an excess insurer's coverage obligation begins.[14] The court categorized the policies' approach to describing the attachment point as fourfold:

1. Policies with a schedule of underlying insurance listing all of the underlying policies in the same policy period including and dollar amount.
2. Policies which reference a specific dollar amount of underlying insurance in the same policy period and which refer to a schedule of underlying insurance on file with the insurer.

13. 460 P.3d 1201, 1204 (2020) (*Montrose III*).
14. *Id.* at 1204 (citing Restatement of the Law, Liability Insurance § 39, cmt. d (Am. Law. Inst.)).

3. Policies which reference a specific dollar amount of underlying insurance in the same policy period and identify some of the underlying insurers.
4. Policies which reference a specific dollar amount of underlying insurance that corresponds with the combined limits of the underlying policies in that policy period.[15]

All of the excess policies required that "other insurance" must be exhausted before the excess policies would be triggered. The court looked not just at policy conditions labeled "other insurance," but instead applied a functional analysis and found such "other insurance" provisions variously in the following:

- the insuring agreement (promising to pay "loss" defined in part as sums paid in damages "after making deductions for all . . . other insurances . . . other than the underlying insurance and excess insurance purchased specifically to be in excess of this policy"[16]);
- the definition of *retained limit* (defined as the total limits or underlying insurance and the limits of "any other underlying insurance"[17]);
- the loss payable provision (stating that the policy will pay ultimate net loss as sums paid "after making deductions for all . . . other insurance (other than recoveries under the underlying policies, policies of co-insurance, or policies specifically in excess hereof)"[18]);
- the limits provision (the insurance applies "only after all underlying insurance has been exhausted"[19]); and
- any other insurance condition (if other insurance applies, "this policy shall be in excess of and shall not contribute with such other insurance"[20]).

Montrose sought a declaration that (1) it could seek indemnification from an excess policy if it showed that the directly underlying insurance in the same period was exhausted; (2) it was not required to show that all policies in all other policy periods with lower attachment points were exhausted; and (3) Montrose could select the manner in which to allocate its liabilities across the policies.

The court described this as a rule of "vertical exhaustion" or "elective stacking."[21] This rule is contrasted with the rule of "horizontal exhaustion."

15. *See id.* at 1205.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 1205–06.

Under horizontal exhaustion, Montrose could access an excess policy only after it exhausted other policies with lower attachment points from every triggered policy period.

The trial court found for the insurers and held that excess policies required horizontal exhaustion in the context of multi-year injury or damage. The court of appeal affirmed, concluding that the plain language of many of the excess policies attach only upon exhaustion of all available insurance. Shortly after that, another court of appeal disagreed with the court of appeal in *Montrose* and determined that vertical exhaustion was appropriate given the policy language and California case law.[22]

The Supreme Court granted review in *Montrose* and held that a rule of vertical exhaustion is appropriate. It began with a review of California insurance law principles. First, California follows a continuous injury trigger of coverage. Second, the state follows an "all sums" rule so that coverage extends to all harm caused by a covered occurrence, even if some of the harm results beyond the policy period. Third, the state follows an "all sums with stacking indemnity" principle which effective stacks coverage from different policy periods for form "one giant 'uber-policy.'"[23] Montrose argued for a rule of vertical exhaustion under which "an insured would be permitted to access any higher layer excess policy once it has exhausted the directly underlying excess policy covering the same period."[24]

The court observed that the insurer's proposed rule of horizontal exhaustion was not unreasonable, but that it was not the only possible interpretation. While the policies clearly required exhaustion of underlying insurance, the policies did not clearly and explicitly state that Montrose must exhaust insurance purchased for different policy periods. Thus, the policies could be interpreted as requiring only exhaustion of directly underlying insurance policies, or as also requiring exhaustion of underlying insurance in other policy periods.

The court then considered other language in the policy to interpret the language in the context of the whole agreement. It noted that language making the policy excess to other insurance except excess insurance purchased specifically to be excess of that policy could be read to require exhaustion of every other policy at every attachment point, including even higher attachment points. This was not the reading argued for by the insurers who contended that "other insurance" meant "other underlying insurance," but the insurers could not explain why the reference to "other insurance" could not also mean "other directly underlying insurance."[25]

22. State v. Cont'l Ins. Co., 223 Cal. Rptr. 3d 716 (Ct. App. 2017).
23. *Montrose III*, 460 P.3d at 1207.
24. *Id.* at 1209.
25. *Id.* at 1210.

This was a clue to the court that the "plain language . . . is not adequate to resolve the dispute in the insurers' favor."[26]

The court noted the historical reason for "other insurance" clauses was to prevent multiple recoveries when more than one policy provided coverage. The court stated that such clauses "have not generally been understood as dictating a particular exhaustion rule for policyholders seeking to access successive excess insurance policies in cases of long-tail injury."[27] The use of other insurance clauses or the equitable doctrine of contribution affects apportionment among insurers, however, and not between the insured and the insurer.[28] These observations from *Dart Industries, Inc. v. Commercial Union Insurance Co.*[29] undermine the insurers' claim that "other insurance" clauses clearly and explicitly call for a rule of horizontal exhaustion.[30]

The court found that other policy language suggested that the exhaustion requirements were meant to only apply to directly underlying insurance. First, the policies explicitly stated an attachment point, generally by reference to a dollar amount. Horizontal exhaustion would in effect raise the attachment point significantly above that stated dollar amount. For example, one policy attached excess of $30 million each occurrence and in the aggregate, but horizontal exhaustion would increase the attachment point for this policy to upwards of $750 million. Second, the schedules of underlying insurance only refer to underlying insurance in the same policy period.[31] In sum, the court found that the other insurance clauses, when considered in light of other policy language and in light of the historical role of such clauses, were most naturally read to allow a vertical exhaustion approach.

Finally, to the extent that the policy remained ambiguous, the court would resolve ambiguities to protect the objectively reasonable expectations of the insured. This outcome would favor a rule of vertical exhaustion. The court noted some practical difficulties of a horizontal exhaustion rule. The layers are not uniform in amount across time. Instead, the policies have their own distinct exclusions, terms, and conditions. Given these facts, the court asked how horizontal exhaustion would apply. The first layer policy in 1984 reached as high as the thirteenth layer in 1974. The court asked, "In which layer is the 1984 policy?" Some policies have lower attachments points but higher coverage limits, and the policies do not say how this policy should apply to a policy from another period. This seems to be criticizing the effect of a "layer by layer" approach, which neither party

26. *Id.*
27. *Id.* at 1211.
28. *Id.*
29. 52 P.3d 79 (Cal. 2002).
30. *Montrose III*, 460 P.3d at 1211.
31. *Id.* at 1212.

argued in this case, where the parties argued for a lower attachment point approach.[32]

Further outlining practical difficulties of the horizontal exhaustion approach, the court noted that if a lower layer insurer claimed an exclusion applied, then a court could not say if the excess policy would apply until it had decided whether the exclusion applied. Such a rule would put the insured to considerable expense and delay of proving coverage under all other lower layers of coverage before it could access coverage under the excess policy.[33]

As to the argument of unfairness to the insurer picked by the insured to respond, the court pointed out that the selected insurer could seek equitable contribution from other insurers. This option moves the administrative task of spreading the loss from the insured to the insurers, which is not obviously unfair in the court's estimation.[34]

Finally, the court distinguished the leading case on horizontal exhaustion in California— *Community Redevelopment Agency v. Aetna Casualty & Surety Co.*[35]—as a dispute regarding contribution among primary and excess insurers, and not a dispute between excess insurers and their insured.

A few months after *Montrose III* was decided, the court of appeal decided another excess insurance case. In *SantaFe Braun*, *Inc. v. Insurance Co. of North America*,[36] the insured, Braun, sought coverage for numerous asbestos-related claims under various excess policies. The trial court applied the horizontal exhaustion doctrine and entered judgment for the excess insurers, finding that Braun had failed to establish that the primary insurance and that, in some cases, lower layer excess insurance had been exhausted. The court of appeal reversed.[37]

Braun had tendered these asbestos-related claims to its primary and excess insurers. The primary insurers agreed in writing with Braun to defend and settle the claims while the primary insurers resolved allocation among themselves. The primary insurers later entered into an agreement paying the limits of their policies into a trust that would continue to pay defense costs and claims on behalf of Braun. Subsequently certain excess insurers settled with Braun.

The court of appeal noted that *Montrose III* had not answered the question here—whether, in a continuous loss case with multiple primary policies, all of those primary policies covering all triggered time periods must be exhausted (i.e., horizontal exhaustion) before the first level excess

32. *Id.*
33. *Id.*
34. *Id.* at 1214.
35. 57 Cal. Rptr. 2d 755 (Ct. App. 1996).
36. 265 Cal. Rptr. 3d 692 (Ct. App. 2020), *review denied*, (Sept. 30, 2020).
37. *Id.* at 694.

policies are triggered, or whether coverage under the excess policies is triggered once the directly underlying primary policies specified in each excess policy are exhausted (i.e., vertical exhaustion).[38]

The court in *SantaFe Braun* found the language of the policies to be comparable to the language interpreted in *Montrose III*. The excess insurers argued that the fundamental "qualitative differences" between primary and excess policies required horizontal exhaustion at the primary level. The specific differences noted were that primary coverage is "first dollar" coverage, has an immediate obligation to respond, receives significantly higher premiums and offers lower limits, and has the right to control the defense and settlement. The court of appeal disagreed with these arguments. It felt these differences applied whether a rule of horizontal or vertical exhaustion applied. Addressing the premium issue, the court stated that premiums were calculated as a percentage of the underlying premium, and that the risk assessment was based upon the scheduled underlying limits and not based on cumulative limits of underlying coverage in other years of coverage which would be "speculative and unpredictable."[39]

The court first considered five first layer excess policies. These policies attached "only after the primary . . . insurers have paid or have been held liable to pay the full amount of their respective ultimate net loss liability" as scheduled on the policy.[40] Further, the policies provided that the limit of the insurers' liability under these policies would be the "amount of ultimate net loss as will provide the assured with total limits" scheduled on the policy as the "total limits."[41] The schedule identified certain primary insurance policies and their limits, and also referred to "and any and all policies arranged by or on behalf of the assured as renewals, replacements or otherwise."[42] The policies defined the excess insurer's "ultimate net loss" as the amount payable "after making deductions . . . for other valid and collectable insurances, excepting however the . . . primary and underlying excess [policies]. . . ."[43] Finally the policies incorporated "other insurance" conditions from the primary policies, which provided that the policies would be "excess of such other valid and collectable insurance."[44]

Two of these policies provided that they were triggered upon the exhaustion of specified scheduled policies plus "any and all policies arranged by or on behalf of the assured as renewals, replacements or otherwise."[45]

38. *Id.* at 699.
39. *Id.* at 701.
40. *Id.* at 699.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 701.

These two policies, however, did not contain definitions of *ultimate net loss* contained in the other designated first level excess policies. The court found that this language was comparable to that interpreted in *Montrose III*. The court held that, absent explicit policy language to the contrary, the insured "becomes entitled to the coverage it purchased from the excess carriers once the primary policies specified in the excess policy have been exhausted."[46]

Another group of higher-level excess insurance policies promised to pay "all sums which the assured shall be obligated to pay or incurs as costs and/or expenses. . . ."[47] These policies also provided that the insurers would only be liable "for the excess of . . . the amount covered under assured's [primary] liability policies," it being agreed that those underlying primary policies "may have anniversary dates other than 1st July."[48] (Presumably, this date was the anniversary of these higher-level excess policies.) The policies did not have schedules of underlying insurance and included a generally worded "other insurance" clause (presumably an excess other insurance clause). The court rejected the excess insurers' arguments premised upon the "other insurance" clauses. It held that "the reference . . . to underlying primary insurance by date supports the conclusion that exhaustion is required only of primary policies that overlap with the policy period of the excess policies."[49] The matter was remanded to allow the insured to offer proof of exhaustion of underlying policies in light of the vertical exhaustion ruling.

Together, these two cases place California in the vertical exhaustion camp. Because California often serves as a bellwether for other states on coverage issues, it will be interesting to see if other states adopt the reasoning of *Montrose* and *SantaFe Braun*.

46. *Id.*
47. *Id.* at 702.
48. *Id.*
49. *Id.* at 702–03.

RECENT DEVELOPMENTS IN INSURANCE REGULATION

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I. INTRODUCTION

Zeshawn H. Mumtaz

This article discusses many of the emerging and novel developments that have come to light in the insurance regulation landscape. Insurance regulators have provided unique responses to the COVID-19 pandemic, have made significant efforts to combat race discrimination in the sale of insurance, and have also facilitated the adoption of new laws in response to cybersecurity and data privacy concerns. Insight is also provided on some of the latest techniques now being used to manage legacy business and on litigation resulting from the COVID-19 pandemic. This article commences by discussing the goals and responsibilities of the Federal Insurance Office along with its annual report.

II. FEDERAL INSURANCE OFFICE 2019–2020

Anthony J. Macauley

The Federal Insurance Office (FIO) was created in the U.S. Treasury Department pursuant to the Dodd-Frank Act of 2010.[1] The office must complete a yearly annual report and FIO's 2020 150 page report was published on September 30, 2020.[2] It was longer than usual due in part to a lengthy discussion of the effects of COVID-19 on insurance.[3] FIO's analysis next year will more completely reflect the impact of COVID-19.[4] Charts and financial reports at the end of the document detail the financial health of the industry in 2019.[5] The main themes covered by the report are evaluation of regulation, systemic risk, international agreements, and economic growth.[6]

The U.S. insurance regulatory structure is unique, as property-casualty and life insurance regulation is largely left to the fifty individual states, the District of Columbia, and the five U.S. territories. The National Association of Insurance Commissioners (NAIC) is the voluntary organization of their chief insurance officials. FIO consults with NAIC regarding important international and domestic issues.

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1. Federal Insurance Office Act of 2010 (FIO Act), 31 U.S.C. § 313(n)(2).
2. Federal Insurance Office [FIO], Annual Report on the Insurance Industry (2020), https://home.treasury.gov/system/files/311/2020-FIO-Annual-Report.pdf [hereinafter FIO Annual Report].
3. *Id.* at 9–42.
4. *Id.* at 147.
5. *Id.* at 102–47.
6. *Id.* at 1; *see also id.* at 1 n.3 (discussing origins of these themes).

FIO's primary role is monitoring the insurance industry; it has minimal regulatory authority.[7] One of its goals is to identify gaps in regulation which could contribute to a systemic crisis. It also monitors the extent to which the industry underserves the poor, people of color, and particular communities.[8] FIO advises the Treasury Secretary and the FIO Director serves as a non-voting member of the Financial Stability Oversight Counsel (FSOC).[9] FIO could recommend to FSOC that an insurer should be designated as subject to regulation as a non-bank financial company and supervised by the Federal Reserve.[10]

FIO assists the Treasury Secretary with administration of the Terrorism Risk Insurance Program (TRIP).[11] FIO coordinates federal efforts and develops federal policy on international insurance matters.[12] FIO represents the United States in the International Association of Insurance Supervisors (IAIS) and the FIO Director works with the U.S.-U.K. and the U.S.-E.U. bodies overseeing international insurance.[13]

The United States has recently entered into "covered agreements" with both the United Kingdom and the European Union. States are supposed to ratify and codify these covered agreements. There are consequences if a sufficient number of states do not do so.

FIO is monitoring the states' progress. FIO is supposed to report if state insurance measures are pre-empted by covered agreements. An annual preemption report is written every year. To date, although the reports issue annually, there has been no pre-emption to report.[14]

The new Economic Growth, Regulatory Relief, and Consumer Protection Act (2018)[15] directs the Treasury and Federal Reserve to report annually to Congress their global insurance efforts and their efforts to increase transparency at IAIS meetings.[16] The 2018 Act requires the Treasury Secretary, Federal Reserve Chairman, and the FIO Director to complete a study and submit a report to Congress on the impact of any international insurance capital standard on consumers and U.S. markets before they consent to any international capital standard.[17] In September 2019, Treasury and the Federal Reserve submitted their first annual report to Congress on

7. 31 U.S.C. § 313.
8. FIO, Annual Report, *supra* note 2, at 2.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. FIO, Annual Preemption Report (2020), https://home.treasury.gov/system/files/311/2020-FIO-Preemption-Report.pdf.
15. Economic Growth, Regulatory Relief, and Consumer Protection Act, 132 Stat. 1296 (2018).
16. FIO, Annual Report, *supra* note 2, at 3.
17. *Id.*

their efforts with global regulatory and supervisory forums, which include IAIS, the Financial Stability Board (FSB) and the Organization for Economic Co-Operation and Development (OECD).[18]

FIO Director, Steven Seitz appeared with a Federal Reserve associate and Maine's top regulator Tom Sullivan at a U.S. Senate hearing on "Developments in Global Insurance Regulatory and Supervisory Forums."[19] Throughout the year FIO focused on IAIS, the Insurance Capital Standard (ICS) and the Holistic Framework for the Assessment and Mitigation of Systemic Risk.[20]

On December 20, 2019, President Trump signed the reauthorization of the Terrorism Risk Insurance Program up to December 31, 2027.[21] FIO will continue to assist the Treasury Secretary in administering the program.

FIO was to analyze the availability and affordability of terrorism risk insurance for places of worship in addition to its previous reporting requirements.[22] FIO published a report on the effectiveness of TRIP.[23] FIO conducted its own data call in connection with TRIP, which had been required under TRIP's predecessor, TRIA. All insurers participating in TRIP with some exemptions were required to submit information.[24]

FIO worked with the United Kingdom regarding the U.S.-U.K. Insurance Dialogue Project. FIO worked with the E.U.-U.S. Insurance Dialogue Project of which FIO was a founder and Steering Committee member. The E.U.–U.S. group published reports involving cyber security, cyber insurance, and big data.[25] FIO participated in NAIC' committee meetings and its annual meeting. FIO continued to work with NAIC on the Common Framework of Internationally Active Insurance Groups (ComFrame), ICS, and the Holistic Framework. Issues considered were financial crimes and corporate governance.[26]

FIO devotes thirty-two pages (Section II) of its September 2020 report to COVID-19.[27] It looks separately at the life and health and property and casualty sectors. It predicts COVID-19 losses will be manageable for most insurers.[28] The outlook for the industry, however, is negative compared to 2019.[29] The report examines insurers', state regulatory, and international

18. *Id.* at 4.
19. *Id.*
20. *Id.* at 5.
21. Terrorism Risk Insurance Program Reauthorization Act of 2019, Pub. L. No. 116-94, 133 Stat. 2534 (2019).
22. FIO, Annual Report, *supra* note 2, at 6.
23. *Id.*
24. *Id.* at 7.
25. *Id.*
26. *Id.* at 8.
27. *Id.* at 9–42.
28. *Id.* at 9.
29. *Id.* at 10.

responses to the pandemic. It discusses World Bank Cat Bonds, other risk solutions for pandemics, long-term care insurance, retirement income, annuities, standards of conduct, and insure tech.[30] The financial overview section of the report first examines the domestic market, financial performance, life and health, property and casualty, and overall market performance. Then it discusses capital market activity, mergers, acquisitions, alternative risk transfer and the international market.

The report concludes:

> The COVID-19 pandemic likely will continue to affect the insurance industry through the remainder of 2020, as discussed in greater detail above .... FIO will continue to monitor the effects of the pandemic, civil disruptions, natural hazards, weather-related events like the wildfires on the West Coast, and other relevant developments on the U.S. insurance industry, policyholders, and consumers. Full year 2020 insurance industry results will be reviewed by FIO in its 2021 annual report.[31]

CONCLUSION

Years before the 2008 financial crisis and Dodd-Frank some federal insurance legislation was introduced which purported to modernize our state based system. It did not pass. When the crisis occurred and a very few large insurance companies were recognized as sources of systemic risk, in response Dodd-Frank included insurance services in the class of non-bank financial services companies which it sought to subject to greater federal oversight.

Dodd-Frank extended the reach of federal law and regulation over insurance but mainly regarding systemic risk. Dodd-Frank is most concerned about insurance with respect to the significant financial dealings and wherewithal of the largest players. FIO grew out of Dodd-Frank. It is a federal office. It is an office in Treasury. It has some power of financial oversight. What it actually does, however, is observe, understand, participate, lead, cooperate, recommend, and report on the most significant developments in insurance regulation on behalf of our United States government and therefore all Americans. This section of our committee's annual survey article summarizes FIO's 2020 report not just to offer a glimpse of the activities of FIO but also to expose you and remind you of the fascinating, complex, interrelated, important, and changing world of insurance regulation.

30. *Id.* at 88–101.
31. *Id.* at 147.

III. NATIONAL ORGANIZATIONS AND STATE DEPARTMENTS RESPOND TO RACIAL INEQUALITY IN THE INSURANCE INDUSTRY

Gregory Lestini and Russell S. Buhite

A. *National Insurance Organizations Respond to Racial Inequity in the Insurance Industry*

In addition to state insurance departments throughout the country, major institutional organizations have been taking a closer look at systemic racism and equity issues in the insurance industry. From trade organizations to Congress, experts and industry executives are taking a closer look at how insurance can and has left Black, Indigenous & People of Color ("BIPOC") behind.

The National Association of Insurance Commissioners ("NAIC") and the National Conference of Insurance Legislators ("NCOIL") are both addressing this area, though with somewhat different approaches. Notably, however, the focus of both organizations in this area is to focus on the impact systemic racism has had on BIPOC in America when it comes to insurance coverage and availability.

1. NAIC

Since February 2020, and in response to the interest from member regulators, NAIC Chief Executive Officer Michael Consedine has taken public, specific and targeted steps to address issues of inequity in insurance. These efforts have focused on both the organization internally and the industry as a whole.

In fact, then NAIC President Director Ray Farmer (SC) noted the country had "seen the deaths of Ahmaud Arbery, Breonna Taylor and George Floyd and felt the pain the country is feeling over the loss of their lives" at the start of his Opening Session remarks at the summer 2020 national meeting.[32] He went on to say the NAIC needs to "lead by example," and called on "commissioners to not only promote diversity within the insurance sector, but to address racial inequality in the development and access of insurance products."

The NAIC announced the creation of a commissioner-level "Special Committee on Race and Insurance" staffed by the NAIC's CEO and COO. Commissioners held a Special Session on Race & Insurance on August 13, 2020 at the NAIC virtual summer meeting. NAIC billed the meeting as, "a formal public kick-off" to intentional efforts focused on racism in the, "design, pricing and sale/access of insurance products" and identifying

32. Press Release, Nat'l Ass'n of Ins. Comm'ns [NAIC], NAIC Statement on Congressional Action Relating to COVID-19 (Mar. 25, 2020), https://content.naic.org/article/notice_summer_2020_opening_session_prepared_remarks.htm.

ways to promote diversity, equity and inclusion in the insurance industry, generally.[33] The session featured panels on the history of racism in insurance, the current challenges to equity in the system, and how to increase diversity and inclusion into the future. *Id.* This special session served as a precursor to a more organized effort by the Executive Committee. The Special Committee planned to continue its work in the Spring of 2021.

In September 2020, the NAIC appointed Evelyn Boswell as its first ever Diversity, Equity & Inclusion ("DE&I") officer. Among her many duties, Ms. Boswell will oversee all DE&I efforts for NAIC and lead a new DE&I Council for the Association. With experience throughout human resources organizations in corporations around Kansas City, Missouri, where NAIC is headquartered, Ms. Boswell brings a breadth of experience outside of the insurance industry.

On September 17, 2020, the NAIC held the first public meeting of the Special Committee on Race and Insurance. That work will take the form of five different "workstreams," including focusing on the various lines of insurance. Then President Farmer, described these workstreams:

a. **Workstream One:**
Research / analyze level of diversity and inclusion within and access to the insurance industry and insurance products. Make recommendations on action steps. . . .

b. **Workstream Two:**
Research / analyze level of diversity and inclusion within the NAIC and state insurance regulator community. Make recommendations on action steps. . . .

c. **Workstream Three:**
Examine and determine which practices or barriers exist in the insurance sector that potentially disadvantage people of color and/or historically underrepresented groups in the Property and Casualty line of business. Make recommendations on action steps. . . .

d. **Workstream Four:**
Examine and determine which practices or barriers exist in the insurance sector that potentially disadvantage people of color and/or historically underrepresented groups in the Life Insurance and Annuities lines of business. Make recommendations on action steps. . . .

33. NAIC, Race & Insurance, A Candid Dialogue on the Role of the Insurance Sector in Addressing Racial Inequality and Promoting Diversity in the Insurance Industry (Aug. 13, 2020), https://content.naic.org/sites/default/files/inline-files/V2%20PROGRAM_Special%20Session%203%20-%20Race%20and%20Insurance%20Candid%20Dialogue%208.13.2020_0.pdf.

e. **Workstream Five:**
Examine and determine which practices or barriers exist in the insurance sector that potentially disadvantage people of color and/or historically underrepresented groups in the Health Insurance line of business. Make recommendations on action steps. . . .[34]

It is expected that the Special Committee will coordinate its work with many existing NAIC committees including, but not limited to, Big Data and Accelerated Underwriting Working Groups and the Innovation and Technology Task Force.

In addition to the work of the Special Committee, the Association adopted guiding principles on artificial intelligence in August of this year.[35] The language includes, in part, AI actors should proactively engage in responsible stewardship of trustworthy AI in pursuit of beneficial outcomes for consumers and to avoid proxy discrimination against protected classes. The guiding principles are intended, "to establish consistent high-level guiding principles for AI actors." The guidance focuses on fair and ethical behavior, accountability on the part of "AI actors," compliance, by those actors, with all state insurance laws, and transparency and responsible disclosures to the public on how AI actors use the technology and information.

Proxy discrimination has been described as, "a particularly pernicious subset of disparate impact . . . it involves a facially neutral practice that disproportionately harms members of a protected class."[36] Although met with questions from the industry regarding the broadness of the guidance and a lack of clear definitions, NAIC leadership decided it was important to address proxy discrimination through this set of guiding principles based on the extensive use of big data through AI and machine learning in underwriting.

2. NCOIL

The National Conference of Insurance Legislators, for its part, is focusing efforts on racism's impact on underwriting. Accordingly, the conference formed the Special Committee on Race in Insurance Underwriting. In announcing the new initiative, NCOIL Chairman and Indiana State Representative Matt Lehman said, "After careful deliberations with my fellow officers, we all determined that NCOIL needs to take a more active role

34. NAIC, President's Newsletter (Oct. 2020), https://content.naic.org/newsletter/president_newsletter_2020104_farmers_files_october_presidents _newsletter.htm

35. Nat'l Ass'n of Ins. Comm'rs (NAIC) Principles on Artificial Intelligence (AI) (2020), https://content.naic.org/sites/default/files/inline-files/AI%20principles%20as%20Adopted%20by%20the%20TF_0807.pdf.

36. Anya E.R. Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 Iowa L. Rev. 1257 (2020).

in framing the discussions around race and insurance underwriting that can have a huge impact on both policyholders and the insurance industry as a whole."[37] NCOIL named New York Senator Neil Breslin as chairman of the committee. The committee planned to meet, initially, at NCOIL's 2020 Annual Meeting currently scheduled for December in Tampa, FL. The charge for the committee is to:

a. Take testimony;
b. Discuss and define the term "proxy discrimination"; and,
c. Discuss the wisdom of certain underwriting rating factors including, but not necessarily limited to, zip codes and levels of education.

In the committee's initial announcement, Senator Breslin emphasized the importance of state legislators in addressing the issues of race and inequity in underwriting, invoking the history of the McCarran-Ferguson Act. "The Committee will study race-related issues in insurance underwriting and work to maintain the proper constitutional jurisdiction of State legislatures over the significant public policy issues related to regulating the business of insurance," according to Senator Breslin.[38]

B. *U.S. Congress*

The 116th Congress similarly demonstrated its emphasis on diversity, equity and inclusion in insurance and in 2019, announced the formation of the Committee on Financial Services Subcommittee on Diversity and Inclusion. Chaired by Congresswoman Joyce Beatty (OH-6), this committee has explored diversity, equity and inclusion issues in all aspects of financial services, including insurance.

The September 18, 2020 virtual hearing focused on "Holding Financial Regulators Accountable for Diversity and Inclusion: Perspectives from the Offices of Minority and Women Inclusion" featuring testimony from the Directors of the Offices of Minority and Women Inclusion throughout the federal government's various financial services regulators.[39] This

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37. Nat'l Council of Ins. Legislators (NCOIL), NCOIL Announces Creation of Special Committee on Race in Insurance Underwriting (Sept. 25,2020), http://ncoil.org/2020/09/25/ncoil-announces-creation-of-special-committee-on-race-in-insurance-underwriting.

38. Following the drafting of this article, the NCOIL Special Committee met and, in March 2021, the NCOIL Property & Casualty Committee and, subsequently, the Executive Committee adopted an updated Property/Casualty Insurance Modernization Act that included a definition for *proxy discrimination*. NCOIL, *NCOIL Special Committee on Race in Insurance Underwriting Holds Virtual Interim Meeting: Adopted Definition of "Proxy Discrimination*,*"* (Mar. 8, 2021), http://ncoil.org/2021/03/09/ncoil-special-committee-on-race-in-insurance-underwriting-holds-virtual-interim-meeting-adopted-definition-of-proxy-discrimination.

39. *Virtual Hearing—Holding Financial Regulators Accountable for Diversity and Inclusion: Perspectives from the Offices of Minority and Women Inclusion Before the Subcomm. on Diversity & Inclusion*, 116th Cong. (Sept. 8, 2020), https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=406865.

Congressional subcommittee is another indication of the financial services' collective focus on diversity, equity and inclusion issues.

As the events of 2020 have impacted all aspects of life, the insurance industry has been no different. While diversity, equity and inclusion has been a focus of many insurance companies and departments of insurance over the last several years, the murder of George Floyd and the events that followed have brought into sharp focus the need to reexamine systemic racism in financial services. The activities of various state departments of insurance, the NAIC, NCOIL and the U.S. Congress illustrate the seriousness with which the insurance industry is examining DE&I issues and forecasts many changes that are likely to come to the industry in the next several years.

C. *State Departments of Insurance Efforts to Combat Race Discrimination in the Sale of Insurance*

The Center for Economic Justice (CEJ), in a June 18, 2020 letter to the NAIC entitled "To Address Societal Systemic Bias and Inherent Racism in Insurance by Explicit Recognition of Disparate Impact as Unfair Discrimination in Insurance," called on insurers and state insurance regulators to recognize clearly the impact of discrimination against protected classes in the sale of insurance.[40] As illustrated below, some state departments of insurance have already taken steps in recent years to address these concerns and others are taking on this challenge in 2020.

Recently, several departments have undertaken studies to determine the causes and extent of disparate impact on citizens of color of certain insurance underwriting practices following George Floyd's death and the resulting protests around the country. What they have found, for example, is that auto insurance carriers use common underwriting practices such as judging applicants not just on their driving records, but on credit scores, education, occupation, income, and other economic factors. These factors, which have been shown to have a discriminatory effect on minority populations by causing them to pay higher premiums, have led states to introduce regulations aimed at eliminating discriminatory pricing in auto, home, and other personal lines coverages.

To aid in review of such practices, several states[41] have used reports issued by The Consumer Federation of America (CFA) demonstrating

40. Center for Economic Justice, Center for Economic Justice's Call to Insurers and Insurance Regulators (June 19, 2020), https://consumerfed.org/wp-content/uploads/2020/06/CEJs-Call-on-Insurers-and-Regulators-to-Address-Systemic-Bias-and-Inherent-Racism-in-Insurance.pdf.

41. *See, e.g.*, *Consumer Federation of America in Support of Oregon HB 2043 Before the Or. Comm. on Bus. & Lab.* (Feb. 24, 2021) (statement of Douglas Heller, Consumer Fed'n of Am.), http://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/7823;

through a disparate impact analysis that auto insurance rating factors tied to a person's socio-economic status have the effect of raising premiums for lower income customers despite their clean driving record.[42] While carriers never ask customers about their race, they use pricing tools based on socio-economic factors as proxies for race and, as a result, disproportionately harm persons of color when applying for auto coverage. *Id.*

In California, thirty years after banning "redlining" and other forms of overt discriminatory practices, their Department found that many insurance companies were still using group discounts to "cherry pick" members so as to deny coverage disproportionately to people of color and low-income motorists. Their study also found that 75% of motorists living in underserved communities were not in an "affinity group" qualifying for group discounts, and only 28% of those living in areas with the lowest number of college degrees received discounts.[43] As a result, California has proposed regulations to ensure that group discounts are offered equally regardless of race, sex, national origin, genetic information, marital status, sexual orientation, primary language, immigration status, occupation, education, or income. *Id.*

Other socio-economic factors have received attention. In 2017, the New York Department of Financial Services issued a regulation that largely prohibited the use of education level or occupation in rating.[44] Michigan, in 2019, followed suit and also outlawed the use of such factors.[45]

Credit scoring of insurance applicants has also been the target of regulatory action for years and has received renewed attention recently through the enactment in 2019 and 2020 of new laws addressing this practice. California, like many states, already prohibits an application from carrying identification, or requirement therefor, of an applicant's race, color,

Press Release, Consumer Fed. of Am., Delaware Insurance Bill: "State of the Art" in Consumer Protection (Mar. 23, 2017), https://insurancenewsnet.com/oarticle/delaware-insurance-bill-state-of-the-art-in-consumer-protection (discussing Del. HB 80).

42. Consumer Fed. of Am., CFA Studies on the Plight of Low- and Moderate-Income Good Drivers in Affording State-Required Auto Insurance (2021), https://consumerfed.org/cfa-studies-on-the-plight-of-low-and-moderate-income-good-drivers-in-affording-state-required-auto-insurance [hereinafter CFA Studies]; Press Release, Consumer Fed. of Am., Systemic Racism in Auto Insurance Exists and Must Be Addressed by Insurance Commissioners and Lawmakers (June 17, 2020), https://consumerfed.org/press_release/systemic-racism-in-auto-insurance-exists-and-must-be-addressed-by-insurance-commissioners-and-lawmakers.

43. See Press Release, Ricardo Lara, Ins. Comm'r, Cal. Dep't of Ins., Department of Insurance Proposes Major Course Correction on Auto Insurance Group Discounts (Dec. 23, 2019), www.insurance.ca.gov/0400-news/0100-press-releases/2019/release101-19.cfm.

44. N.Y. State Dep't of Fin. Servs., Second Amendment to 11 NYCRR 154 (Insurance Regulation 150) (Nov. 27, 2017), https://dfs.ny.gov/system/files/documents/2020/11/rf150a2txt.pdf.

45. Mich. Comp. Laws § 500.2111.

religion, national origin, or ancestry.[46] California has also prohibited the use of credit scores to determine how much drivers should pay for insurance.[47] Several other states, including Hawaii, Massachusetts, Maryland, Michigan, Oregon, Utah, and Washington, have recently introduced legislation prohibiting insurers from using credit scores to determine how much consumers should pay for auto and other personal lines insurance. A number of these bills have already passed.[48]

Another practice that has garnered attention is "price optimization." California had found that lower-income customers were less likely to shop around for competitive rates in part because of lower financial literacy. This market data caused carriers to raise premiums for those drivers in the belief that they would be more likely to stay with the same carrier rather than shop around.[49] As a result, California has banned "price optimization,"[50] whereby a carrier evaluates consumer data, or competitor's prices, to determine if an applicant is likely to shop around.[51] Following California's lead, Pennsylvania, Indiana, Missouri, Maryland, and Ohio have also banned

46. Cal. Ins. Code § 679.72.

47. Cal. Code Regs. tit. 10, § 2360.0(b); Cal. Ins. Code § 1861.05(a).

48. Haw. Rev. Stat. § 431:10C-207; Mass. Gen. Laws ch. 175, §4E (2011) (forbidding auto insurance companies from using credit information or credit-based insurance scores when setting rates, underwriting a new policy, or renewing an auto policy); Md. Code Ann., Ins. §§ 27-501(e-1), (e-2); Mich. Comp. Laws Ann. § 500.2162 (eff. July 1, 2020); Or. Rev. Stat. § 746.661; Utah Code Ann. § 31A-22-320; Letter from Mike Kreidler, Wash. State Ins. Comm'r, to Insurance Industry Executives (July 14, 2020), https://www.insurance.wa.gov/sites/default/files/documents/letter-to-insurance-industry-executives-on-credit-scoring-final.pdf (urging CEOs to end discrimination and racial inequities by supporting his proposal to ban the unfair practice of using credit scoring in setting prices for auto, homeowner's, renter's, and life insurance).

49. CFA Studies, *supra* note 42.

50. In general terms, "price optimization" insurance is described as "the practice of charging higher rates based on the likelihood that a person will not shop around for a lower price. Insurers create algorithms based on all kinds of personal data, including loyalty to other service providers and shopping behavior, but not your driving habits." *See* Kadya Norman, *How Auto Insurers Use Your Nondriving Habits to Raise Prices*, NerdWallet (Jan. 20, 2020), https://www.nerdwallet.com/blog/insurance/price-optimization/#:~:text=Price%20optimization%20is%20the%20practice%20of%20charging%20higher,and%20shopping%20behavior%2C%20but%20not%20your%20driving%20habits. In a recent case, Farmers Insurance was charged with violation of California Proposition 103 for allegedly engaging in such practices. Harvey Rosenfield, *Farmers Insurance Is Caught Overcharging Its Most Loyal Customers in Violation of Proposition 103*, Consumer Watchdog (May 16, 2019), https://www.consumerwatchdog.org/courtroom/farmers-insurance-caught-overcharging-its-most-loyal-customers-violation-proposition-103.

51. Cal. Dept. of Ins., Notice Regarding Unfair Discrimination in Rating: Price Optimization (Feb. 18, 2015), http://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/upload/PriceOptimization.pdf; *see also* Stevenson v. Allstate Ins. Co., Case No.: 15-cv-04788-YGR, 2016 WL 1056137, at *1 (N.D. Cal. 2016) (plaintiff asserting that Allstate improperly used elasticity of demand as an unapproved rating factor when pricing auto insurance for its customers and potential customers—a practice known in the insurance industry as "price optimization").

"price optimization" in the past five years.[52] Enacted by California voters on November 8, 1988, Proposition 103 requires that auto insurance rates be based primarily on a driver's safety record, miles driven and driving experience. It requires all automobile rating factors be approved by the Department of Insurance and prohibits discriminatory rating factors unrelated to a motorist's risk. The initiative applied the state's consumer protection, civil rights and antitrust laws to insurance for the first time and authorizes consumers to challenge violations of the law in the courts or at the Department of Insurance, requiring insurance companies to pay consumers' attorney's fees for such challenges.[53] The California Department of Insurance has released proposed regulations to reform how insurance companies offer group discounts based on occupation, education, and other arbitrary factors that historically have not been available to drivers in less-affluent and more diverse communities. If adopted, this would be the first major change to the use of so-called "affinity group" discounts since California voters approved Proposition 103.[54]

Through efforts to ban insurance underwriting practices such as "price optimization," credit-scoring, consideration of an applicant's occupation, education level, and other socio-economic factors, state insurance departments have taken steps recently to address and eliminate disparate impact on citizens of color of these insurance underwriting practices. Departments of insurance have long banned considerations of race, color, religion, national origin, or ancestry in offering coverage and setting rates. These new measures seek to root out more subtle practices that have been identified by groups as having discriminatory impacts.

52. Pa. Bull., Insurance Dept., Price Optimization Notice 2015-06 (Aug. 22, 2015), http://www.pacodeandbulletin.gov/Display/pabull?file=/secure/pabulletin/data/vol45/45-34/1559.html; Fla. Informational Memorandum, OIR 15-04M (May 14, 2015), https://www.floir.com/siteDocuments/OIR-15-04M.pdf ("Use of Price Optimization in Premium Determination"); Ind. Dept. Ins. Bulletin 219 (July 20, 2015), https://www.in.gov/idoi/files/Bulletin_219.pdf; Maryland, Bulletin 14-23, Unfair Discrimination in Rating: Price Optimization (Oct. 31, 2014), https://insurance.maryland.gov/Insurer/Documents/bulletins/bulletin-14-23-unfair-discrimination-in-rating.pdf; Mo. Dep't of Ins., Fin. Insts. & Prof. Reg., Ins. Bull. 16-02 (Jan. 12, 2016), https://insurance.mo.gov/laws/bulletin/documents/Bulletin16-02.pdf; *see also* NAIC, Casualty Actuarial and Statistical (C) Task Force (2021), https://content.naic.org/cmte_c_catf.htm.

53. Proposition 103 applies to "all insurance on risks or on operations in this state, except those listed in Section 1851." Cal. Ins. Code § 1861.02. California Insurance Code section 1851 lists reinsurance, life insurance, title insurance, certain types of marine insurance, disability insurance, workers' compensation insurance, mortgage insurance, and insurance transacted by county mutual fire insurers. *Id.* § 1851.

54. Cal. Dep't of Ins., Workshop Draft Text of Regulation (Dec. 23, 2019), http://www.insurance.ca.gov/0250-insurers/0500-legal-info/0300-workshop-insurers/upload/Group-Insurance-Plans-Under-Insurance-Code-Section-1861-12-Proposed-Regulation-Text-2.pdf.

IV. CYBERSECURITY AND DATA PRIVACY

Daniel A. Cotter

A. *New York Cybersecurity Regulation*

On March 1, 2017, 23 NYCRR 500[55] became effective. The New York Cybersecurity Regulation applies to anyone "operating under a license, registration, charter, certificate, permit, accreditation or similar authorization under" the banking law, insurance law, or financial services law of the State of New York. Until last summer, no known enforcement action had been initiated by New York pursuant to 23 NYCRR 500. That all changed on July 21, 2020, when the New York Department of Financial Services ("NYDFS") filed an action against First American Title Insurance Company.[56]

According to the statement of charges: "From at least October 2014 through May 2019, due to a known vulnerability on Respondent's public-facing website (the "Vulnerability"), these records were available to anyone with a web browser."[57] The records included "bank account numbers and statements, mortgage and tax records, Social Security numbers, wire transaction receipts, and drivers' license images."[58] The charges allege that even after learning of the Vulnerability in 2018, First American did not remediate it for a period of time. The charges refer to journalist Brian Krebs report that First American "had exposed 885 million documents — dating as far back as 2003 and many containing NPI—by rendering the documents openly accessible to the public."[59]

After setting out the facts in detail, the NYDFS charged First American with violations of: 1) 23 NYCRR 500.02 (maintenance of cybersecurity program), 2) 23 NYCRR 500.03 (written policy or policies), 3) 23 NYCRR 500.07 (limit user access privileges), 4) 23 NYCRR 500.09 (periodic risk assessment), 5) 23 NYCRR 500.14(b) (cybersecurity awareness training), and 6) 23 NYCRR 500.15 (implantation of controls, including encryption).

55. N.Y. Comp. Codes R. & Regs. tit. 23, § 500 (2017).

56. *See Added Reason to Be Aware of the New York State Department of Financial Services Cybersecurity Regulations*, JDSupra (Oct. 13, 2020), https://www.jdsupra.com/legalnews/added-reason-to-be-aware-of-the-new-45139; New York Department of Financial Services filed an amended complaint in the case. *In re* First Am. Title Ins. Co., Amended Statement of Charges and Notice of Hearing (Mar. 10, 2021), https://www.dfs.ny.gov/system/files/documents/2021/03/ea20200721_first_american_notice.pdf.

57. *In re* First Am. Title Ins. Co., Amended Statement of Charges and Notice of Hearing, at 2, ¶ 2.

58. *Id.* ¶ 1.

59. *Id.* at 13, ¶ 33.

NY DFS's regulated entities, and insurers in other jurisdictions which have enacted versions of the NAIC cybersecurity model law, will watch this action closely. The NYDFS often has been a leader in the development and enforcement of laws that have spread to other states. Businesses who fall under the oversight of the NYDFS should review their cyber policies and practices to ensure they are in good shape in light of the regulations that have been in place for more than three years and have begun to be enforced by the NYDFS.

B. *NAIC Model Insurance Data Security Model Law*

In late 2017, after much discussion and in large part based on the New York Cybersecurity Regulation, the NAIC adopted the Model Insurance Data Security Model Law.[60] Prior to this survey period, eight states had adopted the Model Law (often with modifications).[61] During the survey period, three additional states adopted the Model Law: Virginia on March 10, 2020;[62] Indiana on March 20, 2020;[63] and, Louisiana on June 11, 2020.[64] At least five other states are considering adopting the Model Law.[65] Insurance regulators continue to focus on cybersecurity and privacy obligations of those companies they regulate.

V. INSURANCE BUSINESS TRANSFERS AND DIVISIONS

Daniel A. Cotter

A. *Restructuring Mechanisms (E) Working Group*

The National Association of Insurance Commissioners ("NAIC") formed the Restructuring Mechanisms (E) Working Group in 2018 to, among other objectives, take a look at the states and current legislation and review "the perceived need for restructuring statutes and the issues those statutes are designed to remedy. Also, consider alternatives that insurers are currently employing to achieve similar results."[66] At the initial meeting of

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60. NAIC, Insurance Data Security Model Law (2017), https://content.naic.org/sites/default/files/inline-files/MDL-668.pdf.

61. The eight states are South Carolina, Ohio, Michigan, Mississippi, Alabama, Connecticut, New Hampshire, and Delaware.

62. Va. Code Ann. §§ 38.2-621 to 38.2-629 (2020).

63. Ind. Code Ann. §§ 27-2-27-1 to 27-2-27-32 (2020).

64. La. H.B. 614 (2020), http://legis.la.gov/legis/BillInfo.aspx?sessionid=19RS&billtype=HB&billno=614.

65. NAIC, Implementation of Model Act #668 Insurance Data Security Model Law (June 16, 2020), https://content.naic.org/sites/default/files/inline-files/Model_%23668_Map06.17.20.pdf.

66. NAIC, Restructuring Mechanisms E Working Group at 1(1) (2021), https://content.naic.org/cmte_e_res_mech_wg.htm#:~:text=2020%20Charges,employing%20to%20achieve%20similar%20results.

the Working Group, many states were learning about IBTs and divisions and other mechanisms for the first time, with much voiced opposition to the mechanisms. That opposition has softened to a large extent, but some groups and companies have expressed reservations and concerns. For example, the National Conference of Insurance Guaranty Funds ("NCIGF") adopted its "Position Statement on Restructuring"[67] on October 1, 2019. The NCIGF position stated in part:

> Again, where the original company was a member of one or more guaranty funds and potential claimants and policyholders had been covered by a guaranty fund prior to the transaction, care should be taken to make sure that those same claimants and policyholders are covered by a guaranty fund after the transaction. This may require guaranty fund laws and/or other insurance laws to be amended in each of the states where the original company was a member of a guaranty fund before the transaction becomes final.[68]

B. *Insurance Business Transfers*

For decades, the insurance industry has wrestled with how to effectively and finally resolve run-off and discontinued books of insurance business.[69] In 2004, the Association of Insurance & Reinsurance Run-Off Companies ("AIRROC") was formed to better enable insurers to address issues of legacy business.[70] Traditional options, such as commutations and loss portfolio transfers ("LPTs"), might not provide the finality that the insurer with legacy issues seeks. In its most recent survey of the global insurance runoff market, PWC reported that U.S. P&C run-off liabilities were estimated to be $348 billion, representing nearly half the size of the global legacy market.[71] United States insurance companies with such run-off business are looking for effective exit solutions to facilitate operational and capital efficiencies and gain legal finality.

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67. Nat'l Conf. of Ins. Guaranty Funds (NCIGF), NCIGF Position Statement on Restructuring Adopted by NCIGF Board (Oct. 1, 2019), https://www.ncigf.org/wp-content/uploads/2019/12/Adopted-Restructuring-Position-Statement.pdf.

68. *Id.*

69. *See, e.g.*, AIRROC Leveraging Legacy Liabilities, Introduction to Run-Off (Feb. 6, 2019), https://www.naic.org/documents/cmte_e_res_mech_sg_190523_c_2.pdf. On that webinar, Jonathan Bank, an attorney at Locke Lord, spoke of his experience in 1974 at his employer, Teledyne, with run-off. The world is an incredibly small place: I spent five years at Argonaut Group, to which Banks refers, and five years at Unitrin, another Teledyne spinoff. Bank is a great attorney and friend, and I also started my career at Lord Bissell & Brook, the predecessor to Locke Lord.

70. AIRROC, About AIRROC (2021), https://www.airroc.org/about-Airroc#:~:text=The%20Association%20of%20Insurance%20%26%20Reinsurance,solutions%20to%20their%20common%20problems.

71. PWC Global, Global Insurance Run-off Survey 2021 (2021), https://www.pwc.com/gx/en/industries/financial-services/publications/global-insurance-run-off-survey.html.

In life insurance, Moody's May 2018 analysis estimated that insurers had more than $420 billion of annuity, life insurance, long-term care and other liabilities publicly designated as "legacy" or "run-off" that are targeted for an exit transaction. An exit transaction is one in which the insurer is getting out of the runoff or legacy business via transferring it to a separate entity.[72]

In recent years, a growing number of states have enacted legislation to provide legacy or run-off options for the insurer holding the business. Two primary concepts have developed: the insurance business transfer ("IBT") option, and the division framework. This section addresses both, as well as some nuances among the states in terms of the process and what lines are covered. A division is separating a book of business internally and intra-company, whereas an IBT is a transfer of the book to a third party.

1. Part VII Transfers

In the UK, IBTs are permitted under Part VII of the UK Financial Services and Markets Act 2000.[73] There have been more than two hundred Part VII transfers under the Act since it became effective.[74] The Part VII has been used as a model and justification for developments in the United States.

2. Rhode Island and IBTs

In 2002, shortly after the Act became effective in the UK, Rhode Island addressed transfer of legacy business when it enacted the Voluntary Restructuring of Solvent Insurers Act (the "RI Commutation Act"), which prescribed a process for a Rhode Island-domiciled "Commercial Run-Off Insurer"[75] to extinguish its outstanding liabilities pursuant to a court-ordered commutation plan, with the approval of 50% of policyholder creditors representing at least 75% of claim value.[76] In 2016, the Rhode Island Department of Business Regulation (the "Department") introduced Insurance Regulation 68, which provides a new IBT mechanism that allows for the transfer of blocks of U.S. property casualty business from any insurer (the "Transferring Company") into a Rhode Island-domiciled Commercial Run-Off Insurer as defined under the RI Commutation Act (the "Assuming

72. Greg Iacurci, *Insurers Are Selling off Old Annuity Business—What Advisers Need to Know* (May 23, 2018), https://www.investmentnews.com/insurers-are-selling-off-old-annuity-business-what-advisers-need-to-know-74330.

73. Financial Services and Markets Act 2000, UK Public General Acts, 2000 c. 8, https://www.legislation.gov.uk/ukpga/2000/8/contents.

74. For an excellent summary of Part VII transactions that have occurred, see Sidley Austin LLP, United Kingdom Proposed Part VII FSMA Insurance Business Transfer Schemes As at 4 September, 2020, at 2, https://www.sidley.com/~/media/publications/part-vii-transfers.pdf.

75. A "commercial run-off insurer" is an insurer whose business includes only the reinsuring of non-life business and/or the insuring of any line of business other than life, workers' compensation and personal lines.

76. R.I. Gen. Laws § 27-14.5-1.

Company"). Unlike the RI Commutation Act, which provides for a whole-company commutation, Regulation 68 enables a Transferring Company to novate books of business to the Assuming Company. In order to effectuate a Regulation 68 transfer, a number of steps must take place:

a. Approval of the transfer by the domiciliary state of the cedant;
b. An independent expert report on the impact of the transfer on policyholders;
c. Independent actuarial evaluation of the adequacy of the reserves being transferred and the sufficiency of the assuming company's assets;
d. Approval by the Rhode Island Department of Insurance;
e. Notification of all affected policyholders; and,
f. Review and approval by the Providence County Superior Court.[77]

To date, no insurer has completed the Regulation 68 IBTs process.

3. Oklahoma Follows Suit

In May 2018, Oklahoma followed suit, enacting its own IBTs law.[78] The Oklahoma law became effective November 2018, and is most closely aligned with UK's Part VII transfer regime. The law does not require policyholder consent. The Oklahoma law includes property, casualty, life, health and any other line the Oklahoma commissioner finds acceptable. In addition, Oklahoma's law is not restricted to run-off. On October 15, 2020, the Oklahoma County District Court for the State of Oklahoma, issued its Judgement and Order of Approval and Implementation of the IBT Plan ("Order") filed by Providence Washington Insurance Company, applicant, and the transferring insurer and Yosemite Insurance Company, the assuming insurer.

4. NCOIL Adopts Model IBTs Law

At its spring meeting in March 2020, NCOIL adopted an IBTs model law[79] based on the Oklahoma's 2018 IBTs legislation. In November 2019, Oklahoma Commissioner Glen Mulready approved Provident Washington Insurance Co.'s IBT plan for submission to the court for review and potential approval.[80]

77. 230 R.I. Code R. 20-45-6, Reg. R27-68-001 (issued Sept. 5, 2004, amended Aug. 18, 2015).
78. 2018 Okla. Stat. ch. 36, § 1681.
79. Nat'l Council of Ins. Legislators, NCOIL Adopts Business Transfer Model Act (Mar. 31, 2020), http://ncoil.org/2020/03/31/ncoil-adopts-insurance-business-transfer-model-act.
80. *Oklahoma Commissioner Oks Rhode Island Insurer's Business Transfer Plan*, Ins. J. (Nov. 26, 2019), https://www.insurancejournal.com/news/southcentral/2019/11/26/549694.htm.

5. Vermont and Arizona

In 2014, Vermont enacted legislation allowing transfers in limited circumstances.[81] Under the Legacy Insurance Management Act ("LIMA") of 2014, non-admitted insurers can transfer closed books of commercial non-admitted insurance policies or reinsurance. A closed book is one in run-off in excess of five years. Vermont's LIMA requires notice to all policyholder and reinsurance counterparties, who can then decide to opt out. Those who object are excluded from the transfer. LIMA requires only regulatory approval and a court order and then once approved, has the full force and effect of a statutory novation.

C. *Division Laws*

Unlike IBTs, where the legacy business is transferred to another insurer, in a corporate division, an insurer divides into two or more insurance companies and, depending on the state, creates isolated blocks of business for potential sale to third parties. Because the business is not transferred to an outside insurer, unlike the court approval common in the IBTs laws, a division does not require court approval. The reasoning behind that difference is that the division results in the same company still owning the divided company. In the transfer, a new company steps in for the transfer and so additional concerns of fairness and policyholder treatment are at stake.

The allocation of assets and liabilities for the blocks of business divided between the resulting insurers after the corporate division occurs without policyholder consent, and in the states that have enacted division laws, generally no court approval is required. The division, like a merger, is effected by operation of law, and some have compared to the process akin to a reverse merger.[82] In 2017, Connecticut enacted its division law requiring an insurer to first submit a plan of division that must set forth certain elements prescribed by statute and be approved by the insurance commissioner.[83] Since 2017 four other states have enacted division laws very similar to Connecticut's:

a. Illinois (2018);[84]
b. Michigan (2018);[85]
c. Iowa (2019);[86] and
d. Georgia (2019).[87]

81. Vt. Stat. Ann. tit. 8, § 7111.
82. Pennsylvania has long had a general corporation division law that applies to all businesses in Pennsylvania. Several years ago, Brandywine used the statute to effectuate a division.
83. Conn. Gen. Stat. ch. 698, § 38a-156r.
84. 215 Ill. Comp. Stat. § 5/35B-1.
85. Mich. Comp. Laws § 500.5500 (2018).
86. 2019 Iowa Acts 5211.1.
87. 2019 Ga. Laws 19 (May 2, 2019).

Each state has its own variation of the requirements for approving a division and the lines of business subject to the act. The Illinois Division Act allows but does not require the Insurance Department Director to hold a hearing to determine the appropriateness of the plan, and the dividing insurer may also request a hearing. Whether a hearing is conducted or not, the Director is directed to review a plan consistent with the provisions in 215 ILCS 5/35B-25(b).[88] The division, like a merger, is effected by operation of law. In a division, the same insurance group still has the divided company(ies), and in Illinois, like most states, the division is limited to intra-state transactions.

An insurer generally would prefer to have an IBT, because the risk is novated and transferred to a third party. The division is moving a book of business to another company within the holding company system, so does not bring finality.

D. *Conclusion*

The insurance industry has long struggled with issues of run-off blocks or lines of business and how to administer those legacy policies while operating as a go forward entity with active policyholders. Both IBTs and divisions provide insurers with some additional tools to work toward such finality, with IBTs if approved providing true finality. Late 2020 or early 2021 might see some transactions getting to the finish line, with the amount of division amongst various constituencies still to be determined.[89] Several

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88. Illinois law, 215 Ill. Comp. Stat. Ann. 5/35B-25(b), provides the following:

> (b) The Director shall approve a plan of division unless the Director finds that:
>
> (1) the interest of any class of policyholder or shareholder of the dividing company will not be properly protected;
>
> (2) each new company created by the proposed division, except a new company that is a nonsurviving party to a merger pursuant to subsection (b) of Section 156, would be ineligible to receive a license to do insurance business in this State pursuant to Section 5;
>
> (3) the proposed division violates a provision of the Uniform Fraudulent Transfer Act;
>
> (4) the division is being made for purposes of hindering, delaying, or defrauding any policyholders or other creditors of the dividing company;
>
> (5) one or more resulting companies will not be solvent upon the consummation of the division; or
>
> (6) the remaining assets of one or more resulting companies will be, upon consummation of a division, unreasonably small in relation to the business and transactions in which the resulting company was engaged or is about to engage.

89. For an excellent summary of some of the IBTs and division laws that have been enacted and advocating for them, see ProTucket Ins. Co., Paper on Issues Relating to Its Licensing and Accreditation, https://www.naic.org/documents/cmte_e_res_mech_sg_190523_c_3.pdf (last visited May 5, 2021).

states have given the insurers such tools and frameworks for addressing their legacy books.

VI. THE COVID-19 PANDEMIC AND ENSUING ISSUES

Briana Montminy, Christian Brito, Fred Karlinsky, and Timothy Stanfield

A. *Business Continuity Plans*

Not since the 1918 influenza pandemic has the United States experienced a pandemic like COVID-19, that resulted in many states issuing stay at home orders, and most businesses telling their corporate employees to work from home. As a result, insurance companies were bombarded with requests from state regulators requesting updated business continuity plans addressing the pandemic's impact, both from an operational standpoint and in regards to investment income. As a result, the states agreed to put their individual data requests on hold and work through the NAIC to develop and coordinate a single request, so the insurers could focus on their insureds.

The first part of the NAIC survey focused on how prepared insurers were for COVID-19 and how insurers were addressing the various challenges they now faced due to COVID-19. Many insurers and third-party administrators were faced with transitioning employees, who worked only at the office, to now work at home full-time due to the stay at home orders and/or to limit having employees in a confined space. The transition to work at home included: making sure employees had the technological capabilities at home, determining which employees would check the mail and/or fax machine at the office and send the information to the appropriate person, determining which employees would answer incoming calls to the various departments, and protecting the personal and confidential information of the insureds.

With the increased use of digital technology by employees working at home, maintaining cybersecurity was a front and center issue for insurance companies. Companies had to ensure that the company had a VPN or other encryption tools to secure their data. Carriers also had to address security issues with employees using personal devices, and making sure documents on those personal devices are preserved according to their company's document preservation policy.

Departments of insurance recognized the challenges that insurers were facing when the pandemic broke, and several departments issued orders extending deadlines for insurers to respond to claims and/or complaints/requests from the departments. For example, the West Virginia Insurance Commissioner issued an Emergency Order on March 13, 2020, recognizing

that insurance adjusters may be now working from home, which will affect the adjudication and resolution of claims.[90] The Order urged insurers to use digital technology, such as telephone, email, fax, mobile applications, satellite imagery or 3D mapping when possible to adjudicate claims. While the Emergency Order also suspended the normal time limits for adjudicating claims, it urged insurers to use the digital technology to strive to meet the normal timeframes for adjustment and resolution of claims. The Order acknowledged that in-person adjudication may still be necessary for some claims and that in those instances, it may not be possible to meet the normal time limits. The second part of the NAIC survey on business continuity plans centered around an insurer's assessment of the financial impact of COVID-19 on the insurance industry. It was expected that there would be a negative impact on the premium volumes for all lines of business, and an increase in the claims expenses for certain lines of business (including but not limited to business interruption and property insurers, life and disability insurance claims).

B. *COVID-19 Coverage Litigation Update*

When businesses suffer a loss, they will often look to their insurance carriers for insurance coverage to cover their loss. As a result of the pandemic, private businesses (restaurants, stores, hotels, airlines, etc.) have all suffered economic losses. As soon as states began to issue stay at home orders, insurance companies started to anticipate and analyze what type of claims they may receive from their insureds and whether the policies would provide coverage for those claims. One of the claims that insurance companies anticipated was private businesses seeking to recover COVID-19 losses under their business interruption and property insurance policies.

According to the University of Pennsylvania Carey Law School's "COVID Coverage Litigation Tracker" service, more than 1,500 lawsuits over the availability of insurance coverage for pandemic-related business losses have been filed in state and federal courts throughout the country as of February 15, 2021.[91] Early on in the Summer of 2020, insurance carriers were successful in getting these lawsuits dismissed.[92] However, a few orders were issued in the Fall of 2020 that gave policyholders some hope.

90. W. Va. Offs. Of the Ins. Comm'r, Emergency Order 20-EO-01 "COVID-19 Insurance Emergency" (Mar. 13, 2020), www.wvinsurance.gov/COVID-19.

91. Tom Baker, *Covid Coverage Litigation Tracker*, Ins. L. Ctr., Penn Law (2021), https://cclt.law.upenn.edu.

92. Scism, Leslie, *Insurance Firms Gain Early Lead in Coronavirus Legal Fight with Businesses*, Wall St. J. (Sept. 1, 2020), https://www.wsj.com/articles/insurers-gain-early-lead-in-covid-19-legal-fight-with-businesses-11598965200.

As of March 2021, approximately 1,500[93] cases have been filed, and while many have been resolved on motions to dismiss, there have not been any reported appellate court decisions yet in state or federal court.

Thus far, insurers have largely prevailed on motions to dismiss claims for "business interruption" coverage on the basis that either (a) the insured had not adequately alleged facts to support "direct physical damage/loss" which is a requirement in most policies; and/or (b) that certain "virus," "bacteria," or "communicable disease" exclusions (which are also common) bar coverage. One recent illustrative opinion comes from U.S. District Judge Thomas W. Thrash in the case of *Henry's Louisiana Grill, Inc. v. Allied Insurance Co. of America*, No. 1:20-cv-2939-TWT, 2020 WL 5938755 (N.D. Ga. Oct. 06, 2020). Judge Thrash granted Allied Insurance Co. of America's motion to dismiss on the grounds that the plaintiff, Henry's (a Cajun eatery), did not adequately allege a "physical loss of or damage to" the insured's property as the policy required. Henry's Policy also contained an exclusion for "Virus or Bacteria," thus, in order to avoid the exclusion, the insured consistently averred that there was never "any virus located at, on, or in [its] premises." Instead, the insured pointed to a mid-March 2020 executive order issued by Georgia Governor Brian Kemp that declared a "Public Health State of Emergency" in response to the pandemic. According to the insured, the decision to close its dining room was made as a "direct response" to the executive order. The insured further argued its dining area suffered a "physical change" in that the space was no longer "physically available to patrons".

The *Henry's* court rejected this argument, stating:

> Every physical element of the dining rooms — the floors, the ceilings, the plumbing, the HVAC, the tables, the chairs — underwent no physical change as a result of the order. The only possible change was an increased public and private perception of the existing threat, which cannot be deemed a physical change that rendered the property unsatisfactory. The Plaintiffs' construction would potentially make an insurer liable for the negative effects of operational changes resulting from any regulation or executive decree, such as a reduction in a space's maximum occupancy.

The court likewise rejected the insured's bid for "civil authority" coverage. The court noted that while the executive order at issue "advised" residents to stay at home, it did not directly limit access to private business or inhibit their operations.

Conversely, a number of policyholders have survived motions to dismiss based in large part on the trial court's conclusion that the insured

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93. The number of cases filed is likely more than 1,500 given the unknown state court cases that have not been included in the count. *See* Baker, *supra* note 91.

adequately set forth a "plausible" claim of having suffered a "direct physical loss." [94] Other policyholder victories on motions to dismiss have hinged in part on the court's decision that parts of the policy are ambiguous and that the record before it was incomplete.[95]

Most notably, a group of restaurants in North Carolina won partial summary judgment on the declaratory judgment count in the case of *North State Deli, LLC d/b/a Lucky's Delicatessen, et al. v. The Cincinnati Insurance Co. et al.*, No. 20-CVS-02569 (N.C. Super. Ct. Durham Cnty. Oct. 07, 2020). "The "all-risk" policies at issue provided business interruption coverage for "direct losses" that were not otherwise "excluded or limited" in the policy. The policies defined "loss" to mean "accidental physical loss or accidental physical damage." The court held that the presence of the disjunctive "or" term in the definition of "loss" indicated "physical loss" and "physical damage" had separate and distinct meanings. The court explained:

> Applying [dictionary] definitions reveals that the ordinary meaning of the phrase "direct physical loss" includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions. In the context of the Policies, therefore, "direct physical loss" describes the scenario where business owners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property. This is precisely the loss caused by the Government [stay-at-home and business "suspension"] Orders. Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. These decrees resulted in the immediate loss of use and access without any intervening conditions. In ordinary terms, this loss is unambiguously a "direct physical loss," and the Policies afford coverage.

As of March 2021, seven courts have granted summary judgment in favor of policyholders and ten courts have granted summary judgment in favor of the insurer.[96] An insurer is far more likely to win a motion to dismiss in federal court compared to a state action.[97]

94. Studio 417, Inc. v. Cincinnati Ins. Co., Case No. 6:20-cv-03127-SRB (W.D. Mo. Aug. 12, 2020), https://www.insurancejournal.com/app/uploads/2020/08/studio-417-v-cincinnati-insurance.pdf (noting that the term *loss* was not defined in the policy so the court looked at the ordinary meaning of the term, which encompasses "the act of losing possession" and "deprivation").

95. Urogynecology Specialist of Fla. LLC v Sentinel Ins. Co., No. 6:20-cv-01174-ACC-EJK (M.D. Fla. Sept. 24, 2020).

96. *See* Baker, *supra* note 91.

97. *See id*.

C. *Proposed State Legislation and Regulation*

In an effort to help local businesses, legislation was introduced in some states [98] that would require insurers operating in their states to, provide coverage to businesses for their COVID-19 losses regardless of whether their insurance policy actually provided coverage for such losses. The proposed legislature varies by state and each legislature placed some limits on the proposed law, including limits in regards to size of the businesses awarded such coverage, monetary caps, time limits, reimbursement mechanisms for insurers to recoup some of these payments, and some procedural requirements. To date, none of these proposed laws have been enacted.

The Nevada Department of Business and Industry, Division of Insurance issued a notice informing all property and casualty insurance companies offering business interruption coverage that the Department "will not approve any new policy or endorsement language containing exclusions of coverage that specifically mention COVID-19, viruses, or pandemics."[99]

D. *State Regulatory Responses to COVID-19 Vary Nationwide*

The COVID-19 pandemic has presented an unprecedented global challenge unlike anything the world has experienced in more than a century. State insurance regulators have attempted to address the financial hardships caused by shelter-in-place or stay-at-home orders, and mandated business shutdowns to help insureds maintain coverage and access benefits. Regulatory responses at the state level ranged from expanding the benefits that insureds may access, encouraging or requiring insurers to refund a portion of premiums if risk profiles had significantly changed, to prohibitions on cancelling policies.

E. *State Regulatory Responses to COVID-19 Related to Rebates and Premium Relief*

Some of the most common responses to the COVID-19 pandemic have involved efforts by state insurance regulators to provide insurance premium relief to insureds. In some instances, these efforts have been focused on providing premium rebates to reflect reductions in exposures caused by state shelter-in-place orders. In other instances, these efforts have delayed

98. Massachusetts introduced S.D. 2888 (Apr. 6, 2020); New York introduced A10226 (Mar. 27, 2020); New Jersey introduced A.3844 (Mar. 16, 2020); Ohio introduced H.B. 589 (Mar. 24, 2020); Pennsylvania introduced S.B. 1114 (Apr. 15, 2020); and South Carolina introduced S.B. 1188 (Apr. 8, 2020).

99. State of Nevada, Dept. of Bus. & Indus. Div. of Ins., Notice of Property and Casualty Insurance Disallowance of New Exclusions Related to COVID-19, Viruses, or Pandemics, https://doi.nv.gov/uploadedFiles/doinvgov/_public-documents/News-Notes/NVDOI_Statement_on_Virus_and_Pandemic_Exclusions.pdf (last visited May 5, 2021).

or prohibited the cancellation or non-renewal of policies for non-payment of premium.

On one end of the spectrum of regulatory relief for premiums during COVID-19, the state of New Jersey Department of Insurance issued a bulletin on May 5, 2020, requiring initial premium refunds or other adjustments to all adversely-impacted New Jersey policyholders with coverage under private passenger automobile insurance, commercial automobile insurance, workers' compensation insurance, commercial multiple-peril insurance, commercial liability insurance, medical malpractice insurance, and "any other line of coverage where the measures of risk have become substantially overstated as a result of the COVID-19 pandemic."[100] Insurers were able to comply with the bulletin by "providing a premium credit, reduction, return of premium, dividend or other appropriate premium adjustment, based on the reclassification of exposures to comport with current exposures, or the reduction of the exposure base (miles driven, payroll, receipts, etc.) to reflect actual or anticipated exposure." Other states, like New Hampshire, issued bulletins acknowledging premium reductions provided by automobile insurers in response to hardships suffered in relation to COVID-19 and affirmed those will not consider the actions to be unfairly discriminatory practices.[101] Orders of this nature are somewhat unusual in relation to the setting of insurance premium due to the traditional use of historical claims data to determine exposure and premium. As state regulatory responses to COVID-19 are evaluated in the future, it will be interesting to see the impact of these mandatory premium reductions on the marketplace.

It should be no surprise that workers' compensation carriers have received a great deal of attention because of reduced working hours due to business closing caused by the COVID-19 pandemic. If businesses were not deemed "essential" and were unable to operate during shelter-in-place orders, then the business's potential exposure to workers' compensation risk is reduced or eliminated. States including Nevada issued bulletins and orders requesting workers' compensation carriers to consider reductions in exposure in order to provide premium relief to businesses. Nevada encouraged workers' compensation insurers to "consider the impact on rates of any idling of workers by insured employers."[102] Nevada further requested that insurers "conduct an audit in order to determine whether the insured is entitled to any adjustment in premium due to the idling, furloughing, laying off, or other dismissal of workers" if requested by an

100. N.J. Bull. No. 20-22 (May 12, 2020).
101. N.H. Bull. No. 20-030-AB (Apr. 20, 2020).
102. Nev. Notice (May 8, 2020).

insured.[103] An additional interesting aspect of the notice issued by Nevada was encouragement to insurers "to allow self-auditing, self-reporting, and/or virtual audits in lieu of physical audits to the extent that physical audits are impracticable."[104] This encouragement is a clear attempt to allow the market to function while providing flexibility so that social distancing and other disease prevention protocols can be followed.

Premium relief also took the form of prohibitions against cancellation and non-renewals as a result of non-payment of premium. The Mississippi Department of Insurance issued a bulletin providing a 60-day moratorium on the cancellation and non-renewal of policies for the non-payment of premiums.[105] Mississippi issued a bulletin clarifying that insurers could issue notices of cancellation and non-renewal for non-payment of premiums during the moratorium period, but if a notice of cancellation or non-renewal was issued during the moratorium period, any notice periods required by statute or the policy could begin to run, but in no event could a cancellation or non-renewal for non-payment be effective until after the 60-day moratorium period expired.[106] Ohio's Superintendent of Insurance issued a similar order for insurers in Ohio to provide their insureds with at least a 60-day grace period to pay insurance premiums so that insurance policies would not be cancelled for nonpayment of premium during the state of emergency ordered by Ohio's Governor.[107] The order made clear that insurers are not required to waive any premiums.

In addition to issuing regulatory orders to provide insureds premium relief, some regulators also considered regulatory impacts on insurers. The Maryland Department of Insurance issued a bulletin allowing insurers that provided premium grace periods to request a permitted accounting practice to waive the Statutory Accounting Principle that requires an insurer to non-admit premium receivable assets over 90 days past due.[108] The bulletin also stated that this "permitted accounting practice will be effective for the year 2020," and "The number of days past due that will be allowed as an admitted asset will be based on an insurer's grace period." In this bulletin the Department recognized that orders issued to provide relief to consumers may also lead to regulatory issues for insurers.

103. *Id.*
104. *Id.*
105. Miss. Bull. 2020-3 (Mar. 25, 2020).
106. Miss. Bull. 2020-4 (Apr. 1, 2020).
107. Ohio Bull. 2020-07 (effective Mar. 30, 2020).
108. Md. Bull. No. 20-14 (Mar. 26, 2020).

F. *State Regulatory Responses to COVID-19 Related to Immunity from Liability*

Immunity from liability related to the COVID-19 pandemic is an evolving topic. As the pandemic unfolded there was an initial emphasis on providing immunity from liability to essential workers and providers of goods, which morphed into increasing interest in providing immunity from liability for business seeking to reopen after mandatory shutdowns and shelter-in-place orders.

The COVID-19 pandemic demonstrated that the United States' health care system was unprepared in both knowledge and equipment to confront this public health crisis. Policymakers across the country wanted to provide tools and legal protections for those called on to respond to this pandemic. The District of Columbia enacted the Coronavirus Support Emergency Amendment Act of 2020 to provide an exemption from liability for healthcare workers, donors of time, donors of professional services, donors of equipment, donors of supplies, and a contractor or subcontractor on a DC government contract in a civil action for damages resulting in the care of treatment of COVID-19.[109] The Kansas Legislature passed legislation providing immunity from civil liability for healthcare providers and designers, manufacturers, labelers, sellers, distributers, providers, or people who donate qualified products in response to the COVID-19 pandemic.[110] These policies were adopted to ensure healthcare services and essential goods would continue to be available without fear of litigation.

Louisiana addressed liability for groups that may not be first in mind when considering this area, and provided limitations of liability from civil damages for public and private school districts and postsecondary institutions "for injury or death resulting from or related to actual or alleged exposure to an infectious disease."[111] Louisiana also addressed restaurants that provided food-to-go during the COVID-19 pandemic. The law provides that no owner, operator, employee, contractor, or agent of a restaurant which is in substantial compliance with applicable COVID-19 procedures established by a federal, state, or local agency will "have civil liability for injury or death due to COVID-19 infection transmitted through the preparation and serving of food and beverage products by the restaurant during the COVID-19 public health emergency."[112] The law does not provide immunity if the injury or death due to COVID-19 was caused by gross negligence or willful and wanton misconduct.

109. D.C. Council Bill B23-0757, 23rd Council (2020).
110. Kan. HB 2016 (2019).
111. La. HB 59 (1st Spec. Sess. (2020).
112. La. SB 508, Reg. Sess. (2020).

Mississippi perhaps took one of the broadest approaches. The Mississippi Back-to-Business Liability Assurance Act provides that an essential business, or agent of that essential business, will not be held liable for civil damages for any injuries or death resulting from actual or alleged exposure or potential exposure to COVID-19 in the course of the performance of its "functions or services in the time before applicable public health guidance was available."[113]

G. *How State Regulators Are Dealing with Natural Disasters Like Wildfires and Hurricanes in Light of COVID-19*

As the pandemic continued, the wildfire season and the Atlantic hurricane season approached. Regulators faced the reality of increasing policyholder needs in an environment where COVID-19 protocols impeded standard operating procedures. The first challenge that regulators faced before wildfire and hurricane season was ensuring that consumers could access coverage. Testing centers and fingerprint vendors necessary for the licensure and renewal of insurance producers were among the millions of businesses shuttered during the pandemic. Insurance agencies needed to renew their existing producers and on-board new producers to ensure consumers could receive answers to questions and purchase necessary coverages.

Florida Department of Financial Services issues over 100,000 licenses annually. As testing centers began to close, the department had no mechanism to waive statutory testing requirements for producer licensing. In response, Florida's Chief Financial Officer issued a Directive allowing temporary residential licenses for Life and Variable Annuity Contracts, Health, and Personal Lines.[114] Obtaining a temporary license still requires meeting state license qualifications, except the state licensing examination requirement is waived. The temporary licenses expires six months after the date of issuance, or upon issuance of a permanent license of the same type and class, whichever occurs first.

Mississippi insurance adjusters whose continuing education compliance periods ended in March, April, May, or June 2020, were instructed to contact the Mississippi Insurance Department to request an extension for completing continuing education requirements in order to meet license requirement for renewals.[115] This includes Mississippi nonresident adjusters with Mississippi as the Designated Home State. The Mississippi Department of Insurance will work with these licensees to ensure that they are given an appropriate opportunity to meet their CE requirements.

113. Miss. SB 3049, Reg. Sess. (2020).
114. Fla. Chief Fin. Officer Directive 2020-07 (Apr. 17, 2020).
115. Miss. Bull. 2020-5 (Apr. 1, 2020).

VII. CONCLUSION

Zeshawn H. Mumtaz

The COVID-19 pandemic will continue to force the creation of novel responses from insurance regulators, it will create distinctive litigation, and it will also continue to economically impact the insurance industry. As more and more Americans work remotely due to the COVID-19 pandemic, unique regulatory issues will likely be filtered out in reference to cybersecurity and data privacy. The continuing discussions created by various interest groups and entities such as the National Association of Insurance Commissioners will deliver additional transparency of systemic issues of great importance to the insurance industry. In essence, the issues presented in this article will continue to evolve over time. This evolution will be driven by the constantly changing environmental, political, and public policy demands and from the resulting reactions of insurance regulators, insurers, policyholders, and other players in the insurance game.

RECENT DEVELOPMENTS IN INTELLECTUAL PROPERTY LAW

Chris Nichols[*]

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The following is a review of selected opinions rendered over the past year on the intellectual property front having a particularly meaningful impact on U.S. patent, trademark and copyright laws. These opinions broadly implicate judicial review of certain aspects of patent proceedings, venue issues, trademark damages, the eligibility of certain "generic.com" terms for protection, and the ability of certain government actors to sue or be sued in copyright.

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I. PATENT LAW

This year the Supreme Court addressed whether decisions of the Patent Trial and Appeal Board (PTAB) of the United States Patent and Trademark Office (USPTO) to institute *inter partes* review (IPR) proceedings are subject to judicial review. The Federal Circuit addressed whether the presence of a defendant's computer servers in the forum district created a "regular and established place of business" for purposes of establishing venue under 28 U.S.C. § 1400(b), the patent venue statute.

II. U.S. SUPREME COURT

A. *Judicial Review of PTAB's Decision to Institute an IPR*

In *Thryv, Inc. v. Click-to-Call Technologies, LP*,[1] the U.S. Supreme Court overruled the Federal Circuit in a 7-2 decision, holding that PTAB decisions about whether to apply the time bar of 35 U.S.C. § 315(b) of the America Invents Act of 2012 (AIA) to IPR proceedings are final and not appealable.

When the USPTO is presented with a request to institute IPR proceedings, it must decide whether to institute review.[2] 35 U.S.C. § 314, provides, among other things, that if the request comes more than one year after the filing of a suit against the requesting party for patent infringement, then "[a]n inter partes review may not be instituted."[3] "The determination by the [USPTO] Director whether to institute an inter partes review under this section shall be final and nonappealable."[4]

Thryv. Inc. (Thryv) filed a request for institution of IPR proceedings to reconsider the validity of the granted claims of a patent owned by Click-to-Call Technologies, LP (Click-to-Call).[5] Several years prior to Thryv's request, a predecessor of Click-to-Call asserted the same patent against a predecessor of Thryv in a complaint, which was ultimately dismissed without prejudice.[6] In response to Thryv, Click-to-Call argued that the USPTO could not institute IPR proceedings because the earlier filed complaint dismissed without prejudice triggered the one year time bar of 35 U.S.C. § 315(b).[7] The PTAB disagreed with Click-to-Call and instituted the IPR proceedings, reasoning that a complaint dismissed without prejudice does not trigger the time bar of 35 U.S.C. § 315(b).[8] As a result of

1. Thryv, Inc. v. Click-to-Call Techs., LP, 140 S. Ct. 1367 (2020).
2. 35 U.S.C. § 314.
3. *Id.* § 315(b).
4. *Id.* § 314(d).
5. *Thryv*, 140 S. Ct. at 1371.
6. *Id.* at 1371.
7. *Id.*
8. *Id.*

the IPR proceedings, thirteen claims of Click-to-Call's patent were held obvious or lacking novelty, and thus canceled.[9]

Click-to-Call appealed, and the Federal Circuit reversed, treating the PTAB's application of 35 U.S.C. § 315(b) as judicially reviewable, and concluding that the earlier complaint triggered the time bar of 35 U.S.C. § 315(b) thereby vacating the PTAB's decision.[10] Thryv then petitioned the Supreme Court for review of the Federal Circuit's decision, which the Supreme Court granted, on the question of whether the time determinations of the PTAB are subject to judicial review.[11]

The Supreme Court reversed the Federal Circuit's decision, holding that decisions by the PTAB about whether to apply the time bar of 35 U.S.C. § 315(b) are final and not appealable.[12] In doing so, the Court relied on its precedent in *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2137, 2137 (2016), stating that "[w]e need not venture beyond *Cuozzo*'s holding that § 314(d) bars review at least of matters 'closely tied to the application and interpretation of statutes related to' the institution decision . . . for a § 315(b) challenge easily meets that measurement. . . . Because § 315(b) expressly governs institution and nothing more, a contention that a petition fails under § 315(b) is a contention that the agency should have refused 'to institute an inter partes review' [under § 314(d)]."[13] The majority further noted that allowing appeal of the decisions on the merits by the PTAB in IPR proceedings and vacating them based upon time bar issues may "wast[e] the resources spent resolving patentability and leav[e] bad patents enforceable."[14]

The majority rejected Click-To-Call's argument that § 314(d)'s prohibition against appeals applied only to the PTAB's substantive determination of whether to institute an IPR proceeding under § 314(a). The majority explained that *Cuozzo* extended § 314(d) to appeals grounded in "statutes related to" decisions to institute proceedings.[15] The majority further noted that "every decision to institute is made 'under' § 314 but must take account of specifications in other provisions—such as the § 312(a)(3) particularity requirement at issue in *Cuozzo* and the § 315(b) timeliness requirement at issue here."[16]

Justice Gorsuch, along with Justice Sotomayor in part, dissented, noting that the majority's view permits a politically guided agency's decisions

9. *Id.*
10. *Id.* at 1372.
11. *Id.*
12. *Id.* at 1370.
13. *Id.* at 1373.
14. *Id.* at 1374.
15. *Id.* at 1375.
16. *Id.*

"to stand immune from judicial review."[17] The minority opinion further stated that "the *only* thing § 314(d) insulates from judicial review is '[t]he determination' made 'by the Director' 'under this section'—that is, a determination discussed *within* § 314. Nothing in the statute insulates agency interpretations of other provisions *outside* § 314, including those involving §315(b)."[18]

B. *Federal Court*

1. Venue Under 28 U.S.C. § 1400(b)

In *In re: Google LLC*, [19] the Federal Circuit addressed whether the presence of a defendant's computer servers in the forum district, located in leased space from local internet service providers, created a "regular and established place of business" for purposes of establishing venue under the patent venue statute, 28 U.S.C. § 1400(b).

Super Interconnect Technologies LLC (SIT) filed a patent infringement suit against Google LLC (Google) in the Eastern District of Texas. 28 U.S.C. § 1400(b) provides that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."[20] SIT alleged venue was proper because Google committed acts of infringement in the Eastern District of Texas and had a regular and established place of business there.[21] Google's business in question included providing online advertising and video services to people residing in the Eastern District of Texas.[22]

SIT's allegation of proper venue was based on the presence of several Google Global Cache (GGC) servers in the Eastern District, which serve as local caches for Google's data.[23] The GGC servers were not hosted by datacenters owned by Google. Rather, Google contracted with certain internet service providers (ISPs) in the district, namely Cable One and Suddenlink, to host its GGC servers within the ISPs' datacenters.[24] Both SIT and Google agreed that no Google employee performed installation of, performed maintenance on, or physically accessed any of the GGC servers hosted by either ISP.[25] Google moved to dismiss for improper venue,

17. *Id.* at 1378.
18. *Id.* at 1380.
19. *In re:* Google LLC, 949 F.3d 1338 (Fed. Cir. 2020).
20. 28 U.S.C. § 1400(b).
21. *In re: Google*, 949 F.3d at 1340.
22. *Id.*
23. *Id.*
24. *Id.* at 1340.
25. *Id.* at 1341.

but the district court denied that motion.[26] Google then petitioned for a writ of mandamus ordering the district court to dismiss the case for lack of venue.[27]

The Federal Circuit granted Google's petition, holding that venue was improper in the Eastern District of Texas under the patent venue statute.[28] In reaching its decision, the Federal Circuit relied on its prior holding in *In re Cray*, *Inc.* where it held that a "regular and established place of business" under the patent venue statute must be: (1) "a physical place in the district;" (2) "regular and established;" and (3) "the place of the defendant."[29]

While the Federal Circuit found that the GCC servers met the physicality requirement of the first prong of the *Cray* test, it also found that the servers did not constitute a place of business because "a 'regular and established place of business' requires the regular, physical presence of an employee or other agent of the defendant conducting the defendant's business at the alleged 'place of business.'"[30]

Here, the parties agreed that there were no Google employees conducting business at the server facilities. Thus the court focused on whether the ISPs acted as Google's agents.[31] In determining that the ISPs did not qualify as Google's agents, the court found that the provision of internet services by the ISPs were not sufficient to establish an agency relationship, and that the ISPs one-time server installation services did not qualify as the conduct of a "regular and established" business.[32] The court also determined that the ISPs' obligation to perform occasional maintenance activities at Google's request did not give rise to an agency relationship for venue purposes because those types of activities "are merely connected to, but do not themselves constitute, the defendant's conduct of business in the sense of production, storage, transport, and exchange of goods or services."[33]

In reaching its holding, the court specifically noted that "we do not hold today that a 'regular and established place of business' will always require the regular presence of a human agent, that is, whether a machine could be an 'agent.'"[34] The court ultimately directed the district court to dismiss or transfer the suit.[35]

26. *Id.*
27. *Id.*
28. *Id.* at 1347.
29. *Id.* at 1343 (citing *In re* Cray, Inc., 871 F.3d 1355, 1360 (Fed. Cir. 2017)).
30. *Id.* at 1343–45.
31. *Id.* at 1345.
32. *Id.* at 1345–46.
33. *Id.* at 1346–47.
34. *Id.* at 1347.
35. *Id.*

III. TRADEMARK LAW

This year, the Supreme Court was active on the trademark front addressing issues such as the showing necessary to award a defendant's profits for trademark infringement and whether the addition of a generic top-level domain (*e.g.*, ".com") to a generic term couple creates a protectable trademark.

A. *Supreme Court Cases*

1. Profit Award for Trademark Infringement Under the Lanham Act

In *Romag Fasteners, Inc. v. Fossil, Inc.*,[36] the Supreme Court, in a unanimous decision, resolved a circuit split, holding that a plaintiff in a suit for trademark infringement does not have to show that a defendant willfully infringed the plaintiff's trademark as a precondition to a profits award.

Romag Fasteners, Inc. (Romag) sells certain magnetic fasteners that may be used in leather goods such as handbags.[37] Fossil, Inc. (Fossil) designs, markets, and distributes fashion accessories, including handbags.[38] Some years ago, the parties inked an agreement allowing Fossil to use Romag's magnetic fasteners in Fossil's handbags and other product offerings.[39] Romag found that certain Fossil handbags were being sold with counterfeit magnetic fasters, and Fossil was doing little to prevent it, so Romag sued.[40] At trial, a jury agreed with Romag, finding that Fossil acted in "callous disregard" of Romag's rights, but rejected Romag's claims that Fossil acted "willfully."[41] Accordingly, the jury declined to award Fossil's profits to Romag, and the Second Circuit affirmed because it was one of a handful of circuit courts that only allowed an award of defendant's profits if infringement is willful.[42] Not all circuit courts require such a showing.[43]

In resolving the split among the circuit courts, the Supreme Court ruled that a plaintiff in a suit for trademark infringement does not have to show that a defendant willfully infringed the plaintiff's trademark as a precondition to a profits award.[44] In reaching this conclusion, the Court looked to the section of the Lanham Act governing remedies for trademark infringement and dilution.[45] The Court noted that § 1117(a) requires a showing of willfulness as a precondition to an award of profits under § 1125(c) for

36. Romag Fasteners, Inc. v. Fossil, Inc., 140 S. Ct. 1492 (2020).
37. *Id.* at 1494.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 1497.
45. *Id.* at 1494–95.

trademark dilution.[46] But, the Court stated, similar language was missing from the text of § 117(a) with respect to trademark infringement under § 1125(a).[47]

The Court noted that its usual practice of not reading into statutes words that are not there was particularly relevant here where other parts of the Lanham Act included express language about a defendant's mental state, but the sections relevant to Romag's claim did not.[48] Therefore, the court ruled that willfulness is not a precondition to recovering profits from a party that engaged in trademark infringement.[49] However, the Court also stated that "willfulness" remains an important factor for courts to consider when weighing an award of profits, stating "a trademark defendant's mental state is a highly important consideration in determining whether an award of profits is appropriate."[50] In other words, courts can award profits as trademark infringement damages without a showing of willfulness, but such an award is within the discretion of the court to which the defendant's mental state is a "highly important consideration."

2. Capability of a "Generic.com" to Function as a Protectable Mark

In *USPTO v. Booking.com B.V.*,[51] the Supreme Court in an 8-1 decision rejected the USPTO's per se rule that "generic.com" terms are always generic, holding that (1) "Booking.com" was not generic for federal registration purposes, and (2) whether such a term functions as a mark, "depends on whether consumers in fact perceive that term as the name of a class or, instead, as a term capable of distinguishing among members of the class."

Booking.com B.V. (Booking), the operator of a website that allows customers to book hotel accommodations, filed a civil action against the USPTO challenging the Trademark Trial and Appeal Board's (TTAB) decision denying its applications to register "Booking.com" as a trademark.[52] The USPTO refused to register "Booking.com" because it is a generic name for online hotel-reservation services, and thus incapable of serving as a mark.[53] The USPTO's view was that when a generic term is combined with a generic top-level domain like ".com," the combination that results is generic.[54] Put differently, the Court interpreted the USPTO's position to

46. *Id*. at 1495.
47. *Id*.
48. *Id*.
49. *Id*.
50. *Id*. at 1497.
51. U.S. Pat. & Trademark Off. v. Booking.com B.V., 140 S. Ct. 2298, 2307 (2020).
52. *Id*. at 2303.
53. *Id*.
54. *Id*.

mean that every "generic.com" term is generic according to the USPTO, absent extraordinary circumstances.[55]

The district court found that while the term "booking" alone is generic, "Booking.com" is not generic.[56] The United States Court of Appeals for the Fourth Circuit affirmed the district court's decision that "Booking.com" was eligible for registration.[57] The USPTO petitioned the Supreme Court for certiorari.[58]

In reaching its decision, the Supreme Court outlined three guiding principles for generic determinations: (1) a "generic" term names a "class" of goods or services, rather than any particular feature or exemplification of the class, (2) the distinctiveness inquiry of a compound word is based on the meaning as a whole and not its parts in isolation, and (3) the relevant meaning of a term is its meaning to consumers.[59]

Under the above principles, the Court stated that the determination of whether "Booking.com" is generic turns on whether that term, when viewed as a whole, "signifies to consumers the class of online hotel-reservation services."[60] For example, the Court explained that if "Booking.com" were generic, it might "expect that a consumer, searching for a trusted source of online hotel-reservation services, could ask a frequent traveler to name her favorite 'Booking.com' provider."[61]

Here, based on the evidence provided by Booking in support of its claim of acquired distinctiveness of this mark, which the USPTO no longer disputed, the Court found that "Booking.com" is not generic and affirmed the judgement of the Court of Appeals for the Fourth Circuit.[62] The Court rejected the USPTO's argument that "no matter how much money and effort the user of a generic term has poured into promoting the sale of its merchandise . . . , it cannot deprive competing manufacturers of the product of the right to call an article by its name."[63] The Court stated that such an argument was in error because it assumed that "generic.com" terms must always be generic.[64]

In reaching its holding, the Court noted that it was not automatically classifying "generic.com" terms as non-generic. Rather, whether such a term functions as a mark "depends on whether consumers in fact perceive

55. *Id.* at 2305.
56. *Id.* at 2304.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 2304–05.
62. *Id.* at 2305.
63. *Id.* at 2306.
64. *Id.* at 2307.

that term as the name of a class or, instead, as a term capable of distinguishing among members of the class."[65]

In a dissenting opinion, Justice Breyer noted that "Booking.com" is simply an internet booking service, which is the generic product that Booking and its competitors sell in the marketplace.[66] The dissent stated that making such terms eligible for trademark protection would "lead to a proliferation of 'generic.com' marks, granting their owners a monopoly over a zone of useful, easy-to-remember domains," which would tend to inhibit free competition in the relevant market.[67] The Court in the main opinion addressed the dissent's concern, noting that infringement doctrines such as likelihood of confusion and fair use would restrict the scope of protection accorded to "generic.com" marks and thus protect such effects.[68]

IV. COPYRIGHT LAW

The Supreme Court addressed some interesting copyright issues this year focused on copyright law's implications for the government itself, such as whether the States have sovereign immunity from copyright infringement suits, and whether governmental authorities can themselves copyright the materials that they create.

A. *Supreme Court Copyright Cases*

1. Sovereign Immunity of the States in Copyright Infringement Cases

In *Allen v. Cooper*,[69] the Supreme Court in a unanimous decision affirmed the judgment of the Court of Appeals for the Fourth Circuit, holding that Congress lacked authority to repeal the states' sovereign immunity from copyright infringement suits in the Copyright Remedy Clarification Act (CRCA) of 1990, and thus individuals are precluded from suing states for copyright infringement.[70]

The dispute in *Allen* arose when, in 1996, a marine salvage company discovered the wreckage of the Queen Anne's Revenge, Blackbeard's famous ship, which had sat undisturbed for nearly 300 years.[71] The salvage company hired a videographer named Frederick Allen (Allen) to document the salvage operation.[72] For over ten years, Allen took videos and photos of divers' efforts to salvage the ship's various parts including its

65. *Id.*
66. *Id.* at 2309.
67. *Id.* at 2315–16.
68. *Id.* at 2307–08.
69. Allen v. Cooper, 140 S. Ct. 994 (2020).
70. *Id.* at 998–1000.
71. *Id.* at 999.
72. *Id.*

guns, anchors, and other remains. Allen registered copyrights in all of the videos and photos.[73]

The state of North Carolina posted several of Allen's videos online and put one of Allen's photographs in a newsletter.[74] When North Carolina refused to admit any wrongdoing, Allen brought suit against North Carolina in federal court for copyright infringement.[75] North Carolina moved to dismiss the suit, arguing that under the doctrine of sovereign immunity it was not liable for copyright infringement.[76] In response, Allen argued that the CRCA was an exception to North Carolina's sovereign immunity, and, therefore, North Carolina could be held liable for copyright infringement.[77] The CRCA, 17 U.S.C. § 511(a), provides that a state "shall not be immune, under the Eleventh Amendment [or] any other doctrine of sovereign immunity, from suit in Federal court" for copyright infringement.[78]

The district court sided with Allen, holding that the CRCA properly abrogated North Carolina's immunity for suits for copyright infringement.[79] But, on interlocutory appeal, the Court of Appeals for the Fourth Circuit reversed, holding that under the logic of an earlier case, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), the CRCA was unconstitutional.[80] Allen then appealed to the Supreme Court, which granted his petition for review because the Court of Appeals had held a federal statute invalid.[81]

The Supreme Court affirmed the Court of Appeals, holding that Congress lacked authority to repeal the states' sovereign immunity from copyright infringement suits through the CRCA, and thus individuals are precluded from suing states for copyright infringement.[82] In reaching its decision, the Court explained that there are two requirements that must be met before a federal court can hear a lawsuit against a non-consenting state.[83] First, "Congress must have enacted 'unequivocal statutory language' abrogating the States' immunity from the suit."[84] Second, "some constitutional provision must allow Congress to have thus encroached on the States' sovereignty."[85]

73. *Id.*
74. *Id.* at 999.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 1000.
80. *Id.*
81. *Id.*
82. *Id.* at 998–99.
83. *Id.* at 1000–01.
84. *Id.* at 1000 (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 56 (1996)).
85. *Id.* at 1001 (citing Kimel v. Fla. Bd. of Regents, 120 S. Ct. 631 (2000)).

Although the CRCA easily met the first requirement, the Court stated that it did not meet the second requirement, relying heavily on *Florida Prepaid*, in which the Court held that the Patent Remedy Act did not validly strip the States of sovereign immunity with respect to patent infringement suits.[86] The Court noted that based on *Florida Prepaid*, together with *stare decisis*, the Intellectual Property Clause of Article I of the Constitution did not provide the authority to abrogate the sovereign immunity of the States.[87] Further, following a review of the legislative record of the CRCA, the Court held that the CRCA did not validly abrogate state sovereign immunity on the basis of due process under Section 5 of the Fourteenth Amendment, because it lacked the necessary congruence and proportionality between constitutional injury sought to be prevented or remedied and the statutory means adopted.[88] Thus, according to the Court, the CRCA suffered from the same deficiencies that doomed the Patent Remedy Act in *Florida Prepaid*, and as a result held that states retain their sovereign immunity against copyright infringement suits.[89]

2. Extent to Which Governmental Authorities Can Copyright Materials

In *Georgia v. Public.Resource.Org, Inc.*,[90] the Supreme Court, in a close 5-4 decision, affirmed the ruling of the Eleventh Circuit, holding that under the government edicts doctrine, the annotations beneath the statutory provisions in the Official Code of Georgia Annotated (OCGA) are ineligible for copyright protection.[91] By way of background, under 17 U.S.C. § 102(a), the Copyright Act grants protection for "original works of authorship."[92] But, under the government edicts doctrine, officials empowered to speak with the force of law cannot be the authors of the works they create in the course of their official duties.[93]

The OCGA includes a set of annotations that appear below each statutory provision summarizing certain judicial decisions, opinions of the attorney general, and other related reference materials.[94] The OCGA is put together by the Code Revision Commission, which is a state entity of Georgia.[95] The Commission retained Matthew Bender & Co. to prepare

86. *Id.*
87. *Id.* at 1003.
88. *Id.* at 1003–04.
89. *Id.* at 1007.
90. Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498 (2020).
91. *Id.* at 1513.
92. 17 U.S.C. § 102(a).
93. *Public.Resource.Org*, 140 S. Ct. at 1505.
94. *Id.* at 1504.
95. *Id.*

the set of annotations under a work-for-hire agreement, which placed the ownership of the copyright in the state of Georgia.[96]

Public.Resource.Org (PRO) placed the entire code, including annotations, on the Internet without permission.[97] The state of Georgia filed suit for copyright infringement against PRO, arguing that although the laws themselves were in the public domain, the annotations were not.[98] The district court ruled for the Commission, holding that because the annotations had not been enacted into law, they were eligible material for copyright protection.[99] However, the Eleventh Circuit reversed, rejecting the eligibility of the Commission's copyright under the government edicts doctrine.[100] The Supreme Court granted certiorari.[101]

The Supreme Court affirmed the Eleventh Circuit decision, holding that the annotations do not qualify as copyrightable material.[102] In arriving at its decision, the majority relied on three nineteenth century cases involving the copyright status of judicial opinions.[103] From those cases, the majority derived that the main principle behind the government edicts doctrine is that no person can own the law.[104] The majority explained that the doctrine gives effect to that principle in the copyright context through construction of the statutory term "author," and that under the Copyright Act judges cannot be the "author[s]" of "whatever work they perform in their capacity" as lawmakers.[105] The majority reasoned that legislators, like judges, have the authority to make law, and thus it naturally follows that legislator also cannot be "authors."[106] Moreover, just like judges, the majority explained that the doctrine applies to whatever work legislators perform in their capacity as legislators, including explanatory and procedural materials they create in the discharge of their legislative duties.[107]

The majority applied the above framework and determined that Georgia's annotations do not qualify as copyrightable material because (1) the author of the annotations qualifies as a legislator because under 17 U.S.C. § 201(b) the sole "author" of the annotations is the Commission, which serves as an arm of the legislature of the state of Georgia; and (2) the Commission creates the annotations in the discharge of its legislative duties.[108]

96. *Id.* at 1505.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 1505–06.
101. *Id.* at 1506.
102. *Id.*
103. *Id.*
104. *Id.* at 1507.
105. *Id.*
106. *Id.*
107. *Id.* at 1508.
108. *Id.* at 1508–10.

The majority further stated that the annotations provide important practical guidance to the public, which, if copyrightable, would be behind a paywall and only be available to those who can afford or are able to access the official annotated version.[109] Accordingly, the majority rejected certain arguments stated in the dissent that the annotations and other legislative commentary should be treated differently from state laws.[110]

V. CONCLUSION

As evidenced by the above cases, the U.S. Supreme Court and federal courts issued a variety of important decisions across a range of areas of intellectual property law over the past year. We will be monitoring with interest the extent to which courts around the country implement the decisions, particularly with respect to whether courts begin awarding profits as trademark infringement damages, and whether other certain "generic.com" type marks are deemed capable of functioning as a mark for federal registration purposes. We look forward to reporting on these and other significant developments in intellectual property law in next year's article.

109. *Id.* at 1512–13.
110. *Id.* at 1524.

RECENT DEVELOPMENTS IN INTERNATIONAL LITIGATION

Mark E. Wojcik[*]

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This article surveys selected developments in international litigation during 2020.

I. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunity Act (FSIA)[1] provides the sole basis for asserting jurisdiction over foreign nations in United States courts.[2] The FSIA grants foreign nations, their political subdivisions, and their agencies and instrumentalities "immunity from suit in the United States (called jurisdictional immunity) and grants their property immunity from

1. 28 U.S.C. §§ 1602–1611.
2. Jenner v. Arab Bank PLC, 138 S. Ct. 1386, 1426 (2018); Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993); Rukoro v. Federal Republic of Germany, 976 F.3d 218, 223 (2d Cir. 2020).

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attachment and execution in satisfaction of judgments."[3] The FSIA "establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state."[4]

"Under the FSIA, a foreign state is immune from the jurisdiction of courts [in the United States] unless one of several enumerated exceptions to immunity applies."[5] These exceptions include, for example, an exception for when a foreign entity is engaged in a "commercial activity carried on in in the United States by the foreign state" or "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," and the lawsuit relates directly to that commercial activity.[6] Another exception to the FSIA allowed suits against state sponsors of terrorism. "If a suit falls within one of these exceptions, the FSIA provides subject-matter jurisdiction in federal district courts."[7]

In 2020, the U.S. Supreme Court ruled unanimously that amendments made to the FSIA in 2008 allowed plaintiffs to seek punitive damages from a state sponsor of terrorism for actions that arose before the FSIA was amended. Specifically, the Supreme Court held that plaintiffs could use the FSIA to sue the Republic of Sudan for its support of al Qaeda in the 1988 bombings of the U.S. embassies in in Kenya and Tanzania.

Opati v. Republic of Sudan[8] involved lawsuits filed after al Qaeda operatives simultaneously bombed the U.S. embassies in Kenya and Tanzania. More than 200 people died and thousands more were injured in these attacks. When victims and their families were finally able to have their day in court, they proved that the Republic of Sudan "had knowingly served as a safe haven" near the embassies, that Sudan had provided al Qaeda with hundreds of Sudanese passports, and that Sudan allowed the passage of weapons and money to al Qaeda's cell in Kenya. "[A]fter adding a substantial amount of prejudgment interest to account for the many years of delay, the district court awarded a total of approximately $10.2 billion in damages, including roughly $4.3 billion in punitive damages to plaintiffs who had brought suit" using the 2008 amendments to the FSIA, which allowed punitive damages against state sponsors of terrorism.[9] Sudan appealed, arguing that amendments made in 2008 should not apply to events that

3. Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 829 (2018).
4. Terenkian v. Republic of Iraq, 694 F.3d 1122, 1127 (9th Cir. 2012) (quoting Republic of Argentina v. Weltover, 504 U.S. 607, 610 (1992)).
5. Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1053 (2019); *see also* Genetic Veterinary Scis., Inc. v. Laboklin GMBH & Co. KG, 933 F.3d 1302, 1312 (Fed. Cir. 2019).
6. 28 U.S.C. § 1608(a)(2); *see, e.g.*, *Genetic Veterinary Scis.*, 933 F.3d at 1312
7. *Harrison*, 139 S. Ct. at 1053.
8. 140 S. Ct. 1601 (2020).
9. *Id.* at 1607.

took place in 1998.[10] The U.S. Court of Appeals for the District of Columbia agreed with the Republic of Sudan and held that although the amended FSIA allowed for punitive damages, Congress did not clearly state that the amendments applied to conduct that took place before the FSIA was amended.[11] The Supreme Court vacated the federal appellate court opinion, finding that the plaintiffs could pursue their punitive damage claim against Sudan. The Supreme Court held unanimously that "Congress was as clear as it could have been when it authorized plaintiffs to seek and win punitive damages for past conduct . . . ."[12]

In another FSIA case decided in 2020, the Second Circuit affirmed the dismissal of a putative class action against the Federal Republic of Germany seeking damages "for the enslavement and genocide of the Ovaherero and Nama peoples in what is now Namibia, as well as for property they alleged Germany expropriated from the land and peoples."[13] Finding no applicable exception in the FSIA, the court in *Rukoro v. Federal Republic of Germany* concluded that "[t]he terrible wrongs elucidated in Plaintiffs' complaint must be addressed through a vehicle other than the U.S. court system." A petition for writ of certiorari is pending before the U.S. Supreme Court.

II. INTERNATIONAL ORGANIZATIONS IMMUNITIES ACT

"The International Organizations Immunities Act [(IOIA)] of 1945 grants international organizations such as the World Bank and the World Health Organization the 'same immunity from suit . . . as is enjoyed by foreign governments.'"[14] When the IOIA was enacted in 1945, however, "foreign governments enjoyed virtual immunity" in the courts of the United States.[15] Until 1952, the U.S. State Department "generally held the position that foreign states enjoyed absolute immunity from all actions in the United States."[16] Today, however, sovereign immunity is subject to several exceptions.[17] A foreign state is not immune from jurisdiction today if an

10. *Id.*
11. Owens v. Republic of Sudan, 864 F.3d 751 (D.C. Cir. 2017).
12. *Opati*, 140 S. Ct. at 1608. The Supreme Court found that "Congress proceeded in two equally evident steps: (1) It expressly authorized punitive damages under a new cause of action; and (2) it explicitly made that new cause of action available to remedy certain past acts of terrorism. Neither step presents any ambiguity . . . ." *Id.* at 1609.
13. Rukoro v. Federal Republic of Germany, 976 F.3d 218, 221 (2d Cir. 2020).
14. Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 764 (2019) (quoting 22 U.S.C. § 2808a(b)); *see also Construction and Application of International Organizations Immunities Act, 22 U.S.C.A. §§ 288 et seq. (IOIA)*, 43 A.L.R. Fed. 2d 659 (2010 & Supp. 2020).
15. *Jam*, 139 S. Ct. at 765.
16. Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 829 (2018).
17. *Jam*, 139 S. Ct. at 765

exception to immunity applies under the FSIA.[18] Exceptions include cases based upon commercial activities that the foreign state carried out in the United States and cases against foreign states that have been designated as a state sponsor of terrorism and damages are sought based on acts of terrorism.[19]

In 2019, the U.S. Supreme Court ruled in *Jam v. International Finance Corporation*[20] that because the IOIA "grants international organizations the 'same immunity' from suit 'as is enjoyed by foreign governments' at any given time," the FSIA "governs the immunity of international organizations."[21] Resolving a split between the federal circuit courts, the U.S. Supreme Court stated that the IOIA was "best understood to make international organization immunity and foreign sovereign immunity continuously equivalent"[22] and that "[t]he IOIA should . . . be understood to link the law of international organization immunity to the law of foreign sovereign immunity, so that the one develops in tandem with the other."[23] There appear to have been no new cases under the IOIA in 2020.

III. ALIEN TORT STATUTE

The Alien Tort Statute ("ATS") provides federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[24] The ATS was first passed in 1789 and it largely remained unused until plaintiffs began to challenge actions of U.S. multinational corporations that caused harm around the world. These ATS cases alleged human rights violations and environmental damage.

Following some successes using the ATS in lower courts, a series of decisions from the U.S. Supreme Court seemed to close off further use of the ATS as a tool to remedy human rights violations and to protect the environment. First, in *Sosa v. Alvarez-Machain*,[25] the Supreme Court held that the ATS should be limited to only a modest number of international law violations such as "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[26] Second, in *Kiobel v. Royal Dutch Petroleum*

18. Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1053 (2019).
19. *Rubin*, 138 S. Ct. at 822.
20. 139 S. Ct. 759 (2019).
21. *Id.* at 772. The Supreme Court vote was 7-1, with Justice Breyer dissenting. Justice Kavanaugh did not take part in the consideration or decision of the case.
22. *Jam*, 139 S. Ct. at 768.
23. *Id.* at 769.
24. 28 U.S.C. § 1350.
25. 542 U.S. 692 (2004).
26. *Id.* at 724.

Company,[27] the Supreme Court ruled that the ATS applied only to violations of international law occurring within the United States. And third, in *Jesner v. Arab Bank PLC*,[28] the Supreme Court held that courts should not extend ATS liability to foreign corporations without further Congressional authorization. The Supreme Court's decisions in *Sosa*, *Kiobel*, and *Jesner* severely limited the reach of the ATS.

In 2019, a federal circuit court's denial of rehearing *en banc* restored some hope for using the ATS to remedy human violations. The case involved child slaves who were forced to harvest cocoa in the Republic of Côte d'Ivoire (the Ivory Coast).[29] The child slaves "were forced to work on Ivorian cocoa plantations for up to fourteen hours per day six days a week, given only scraps of food to eat, and whipped and beaten by overseers."[30] The children and others "were locked in small rooms at night and not permitted to leave the plantations, knowing that children who tried to escape would be beaten or tortured."[31] The children filed ATS claims against Nestlé USA, Inc., Archer Daniels Midland Company, Cargill Incorporated Company, and Cargill Cocoa, alleging that these corporations aided and abetted child slavery by providing financial and technical assistance to Ivorian farmers.[32] Because the allegations also indicated domestic conduct within the United States, the Ninth Circuit allowed the former child slave to proceed with their ATS claims against the corporations for aiding and abetting child slavery.[33] After the Ninth Circuit denied rehearing en banc,[34] the case was appealed to the U.S. Supreme Court.[35] Oral argument in *Nestlé USA, Inc., v. Doe I* was held on December 1, 2020.[36]

27. 569 U.S. 108 (2012).

28. 138 S. Ct. 1386 (2018).

29. Doe I v. Nestlé USA, Inc., 766 F.3d 1013, 1016 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 798 (2016).

30. *Id.* at 1017.

31. *Id.*

32. *Id.* at 1016. "The financial assistance includes advanced payment for cocoa and spending money for the farmers' personal use. The technical support includes equipment and training in growing techniques, fermentation techniques, farm maintenance, and appropriate labor practices." *Id.* at 1017.

33. Doe I v. Nestlé, S.A., 929 F.3d 623 (9th Cir. 2019).

34. *See* Perry Cooper, *Nestle Won't Get Full Ninth Circuit Review of Slave Labor Case*, Bloomberg L. (July 5, 2019), *available at* https://biglawbusiness.com/nestle-wont-get-full-ninth-circuit-review-of-slave-labor-case.

35. Nestlé USA, Inc., v. Doe I, No. 19-416.

36. An audio recording of the oral argument is available online at https://www.supremecourt.gov/oral_arguments/audio/2020/19-416. The transcript of the oral argument is available online at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-416_3ebh.pdf.

IV. HAGUE SERVICE CONVENTION

The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Service Convention")[37] is a multilateral treaty that gives litigants an easy and reliable way to serve legal documents in other countries that are parties to the treaty, without having to use consular or diplomatic channels. In 2020, the number of contracting parties to the Hague Service Convention increased to 78 with the additions of Austria,[38] Nicaragua,[39] and the Philippines.[40]

V. HAGUE EVIDENCE CONVENTION

The Hague Convention of 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention")[41] is a multilateral treaty that allows requests for evidence to be sent between countries without recourse to consular and diplomatic channels. In 2020, the number of contracting parties increased to 63 with the addition of Viet Nam.[42]

VI. OBTAINING DISCOVERY FOR USE IN FOREIGN OR INTERNATIONAL TRIBUNALS

Federal law allows an "interested person" to obtain discovery in the United States for use before a foreign or international tribunal.[43] 28 U.S.C. § 1782 allows a federal district court to facilitate the taking of testimony or collection of evidence from a person who resides or is found in that district.[44] "The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . . ."[45] A person may not be compelled to testify or produce evidence in violation of any legally applicable privilege.[46]

A court can deny a section 1782 application when the applicants cannot show that they can use the evidence that they seek to obtain. Likewise, if a foreign or international tribunal would reject the evidence obtained through section 1782, there is no reason for a federal district court to grant discovery under section 1782.

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37. T.I.A.S. No. 6638, 20 U.S.T. 361.
38. The Hague Service Convention entered into effect for Austria on September 12, 2020.
39. The Hague Service Convention entered into effect for Nicaragua on February 1, 2020.
40. The Hague Service Convention entered into effect for the Philippines on October 1, 2020.
41. T.I.A.S. No. 7444, 23 U.S.T. 2555.
42. The Hague Evidence Convention entered into effect for Viet Nam on May 3, 2020.
43. 28 U.S.C. § 1782.
44. *Id.*
45. *Id.*
46. *Id.*

The federal circuit courts have split on the issue of whether the statutory language "foreign or international tribunals" extends to private international arbitration tribunals. Normally discovery is not even available in an arbitration, but section 1782(a) might provide a way to obtain discovery if the evidence sought is in the United States. The Second,[47] Fifth,[48] and Seventh[49] Circuits hold that section 1782(a) cannot be used to aid private international arbitration proceedings. The Fourth[50] and Sixth[51] Circuits hold that it can be used for private international arbitration proceedings.[52] On March 22, 2021, the U.S. Supreme Court granted certiorari to resolve the circuit split as to whether federal district courts have the discretion to order discovery for private international arbitration proceedings.[53]

VII. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

In 2020, the number of state parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[54] increased to 165 with the additions of Ethiopia,[55] the Republic of Palau,[56] Seychelles,[57] and the Kingdom of Tonga.[58] In 2021, the Convention will enter into effect for Belize, Malawi, and Sierra Leone.

VIII. HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

Unlike the U.N. Convention on Recognition and Enforcement of Foreign Arbitral Awards of that requires the recognition and enforcement of foreign arbitration awards, no international treaty mandates the recognition of foreign court judgments in courts of the United States. However, if

47. *See In re* Application of Hanwei Guo for an Order to Take Discovery for Use in a Foreign Proceeding Pursuant to 28 U.S.C. § 1782, 965 F.3d 96 (2d Cir. 2020); Nat'l Broad. Co. v. Bear Sterns & Co., 165 F.3d 184 (2d Cir. 1999).

48. *See* Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880 (5th Cir. 1999).

49. *See* Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020).

50. *See* Servotronics, Inc. v. Boeing Co., 954 F.3d 209 (4th Cir. 2020).

51. *See* Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710 (6th Cir. 2019).

52. *See id.* at 720 ("American jurists and lawyers have long used the word 'tribunal' in its broader sense: a sense that includes private, contracted-for commercial arbitral panels.").

53. Servotronics, Inc. v. Rolls-Royce PLC, No. 20-794 (U.S. Mar. 22, 2021). The question presented is "[w]hether the discretion granted to district courts in 28 U.S.C. 1782(a) to render assistance in gathering evidence for use in 'a foreign or international tribunal' encompasses private commercial arbitral tribunals, as the Fourth and Sixth Circuits have held, or excludes such tribunals without expressing an exclusionary intent, as the Second, Fifth, and . . . Seventh Circuit have held."

54. June 10, 1958, 21 U.S.T, 2517, 330 U.N.T.S. 38.

55. The Convention entered into effect for Ethiopia on November 22, 2020.

56. The Convention entered into effect for Palau on June 29, 2020.

57. The Convention entered into effect for Seychelles on May 3, 2020.

58. The Convention entered into effect for Tonga on September 10, 2020.

ratified by the United States, the Hague Convention on Choice of Court Agreements ("HCCCA")[59] would require U.S. courts to recognize foreign judgments from countries that are parties to the treaty.

The HCCCA was concluded in 2005 and entered into force on October 1, 2015.[60] Under Article 5 of the HCCCA, if parties enter into an exclusive choice of court agreement, the designated court will have jurisdiction over the dispute to which that agreement applies.[61] Article 6 requires courts in other Contracting States to dismiss or suspend proceedings in favor of the court designated.[62] Article 8 provides for recognition and enforcement of the foreign court judgment.[63] Article 9 allows for only limited exceptions to enforcement, such as lack of capacity or that judgment was obtained by fraud.[64] And unless the judgment was a default judgment, the recognizing court is bound by the findings of facts made by the designated court.[65]

As of December 2020, the HCCCA is in effect for 31 countries: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Montenegro, the Netherlands, Poland, Portugal, Romania, Singapore, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom (which in 2020 acceded to the HCCCA in its own right after leaving the European Union).[66] The treaty is also in effect for the European Union as such.[67] The People's Republic of China, the Republic of North Macedonia, Ukraine, the United States, and most recently Israel have signed the HCCCA but not yet ratified it.[68]

The first case under the HCCCA was brought in Singapore in 2018,[69] where an entity sought to enforce a judgment of the High Court of Justice

59. Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 (2005).

60. Hague Conference on Private International Law, *Convention of June 30, 2005 on Choice of Court Agreements: Status Table*, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98; *see also* H. Scott Fairley & John Archibald, *After the Hague: Some Thoughts on the Impact on Canadian Law of the Convention on Choice of Court Agreements*, 12 ILSA J. Int'l & Comp. L. 417 (2006).

61. 44 I.L.M. at 1296 (art. 5).

62. *Id.* (art. 6).

63. *Id.* at 1296–97 (art. 8).

64. *Id.* at 1297 (art. 9).

65. *Id.* (art. 8(2)).

66. *Treaty Status Table*. The United Kingdom of Great Britain and Northern Ireland expressed its consent for it and the island of Gibraltar to be bound by the HCCCA, subject to certain declarations. *Id.*

67. *Id.*

68. *Id.*

69. Hague Conference on Private International Law, *News & Events: First Case Under the Choice of Court Convention*, https://www.hcch.net/en/publications-and-studies/details4/?pid=6616&dtid=55.

of England in the High Court of Singapore.[70] Relying on the Singaporean law that gave domestic effect to the HCCCA, the court granted the enforcement application.[71]

IX. SINGAPORE CONVENTION ON MEDIATION

The United Nations Convention on International Settlement Agreements Resulting from Mediation entered into force on September 12, 2020.[72] Known informally as the Singapore Convention on Mediation, the treaty will allow businesses seeking enforcement of a mediated settlement to apply directly to the courts of countries that have ratified the treaty. The treaty has 53 signatories including the People's Republic of China, India, and the United States.

Six states have ratified the treaty: Belarus, Ecuador, Fiji, Qatar, Saudi Arabia, and Singapore. The nations that have signed but not ratified the treaty are Afghanistan, Armenia, Benin, Brunei Darussalam, Chad, Chile, the People's Republic of China, Colombia, Congo, Democratic Republic of the Congo, Eswatini (previously known as Swaziland), Gabon, Georgia, Ghana, Grenada, Guinea-Bissau, Haiti, Honduras, India, the Islamic Republic of Iran, Israel, Jamaica, Jordan, Kazakhstan, Lao People's Democratic Republic, Malaysia, Maldives, Mauritius, Montenegro, Nigeria, North Macedonia, Palau, Paraguay, Philippines, Republic of Korea, Rwanda, Samoa, Serbia, Sierra Leone, Sri Lanka, Timor-Leste, Turkey, Ukraine, the United States of America, Uruguay, and the Bolivarian Republic of Venezuela.

As more countries ratify the treaty, businesses will increase their reliance on mediation as a mechanism for dispute resolution. An increased use of mediation will likely help preserve commercial relationships.

X. ENFORCING FOREIGN DEFAMATION JUDGMENTS

The Securing the Protection of our Enduring and Established Constitutional Heritage Act, also known as the SPEECH Act, provides that a U.S. domestic court may not recognize or enforce a foreign judgment for defamation unless it finds that "(1) the defamation law applied in the foreign jurisdiction provides at least as much protection for freedom of speech and press as would be provided by the First Amendment to the Constitution

70. Ermgassen & Co. Ltd. v. Sixcap Fin. Pte. Ltd, [2018] SGHCR 8 (Sing.), *available at* https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/gd---os-680-of-2018-(20180618)-(final)-pdf.pdf.

71. *Id.*

72. The treaty required only three ratifications to enter into effect.

and by the constitution and law of the state in which the domestic court is located;" or (2) if the party challenging the enforcement of that judgment "would have been found liable for defamation by a domestic court applying the First Amendment to the Constitution and the constitution and law of the state in which the domestic court is located."[73] The SPEECH Act protects U.S. persons from "libel tourism," which is "a form of international forum-shopping in which a plaintiff chooses to file a defamation claim in a foreign jurisdiction with a more favorable substantive law."[74]

The SPEECH Act bars domestic courts from recognizing foreign defamation judgments unless "the domestic court determines that the exercise of personal jurisdiction by the foreign court comported with the due process requirements imposed on domestic courts by the Constitution."[75] The Act also provides that a foreign defamation judgment against an interactive computer service provider may not be enforced in a domestic court unless "the domestic court determines that the judgment would be consistent with section 230 of the Communications Act of 1934 if the information subject to judgment has been provided in the United States."[76] Any U.S. person held liable for defamation in a foreign jurisdiction is permitted to "bring an action in district court for a declaration that the foreign judgment is repugnant to the Constitution or laws of the United States."[77] The act also provides attorneys fees to a U.S. party who successfully opposes enforcement of a foreign defamation judgment.[78]

Although the SPEECH Act was invoked in several federal court cases in 2020, none of those decisions found that the statute actually applied to the case before the court.[79]

73. 28 U.S.C. § 4102(a).

74. Trout Point Lodge, Ltd. v. Handshoe, 729 F.3d 481, 487 (5th Cir. 2013); *see also* Elec. Frontier Found. v. Global Equity Mgmt. (SA) Pty Ltd., 290 F. Supp. 3d 923, 941 (N.D. Cal. 2017).

75. 28 U.S.C. § 4102(b).

76. *Id.* § 4102(c).

77. *Id.* § 4104(a).

78. *Id.* § 4105.

79. *See*, *e.g.*, Steffens v. Kaminsky, No. 3:20-cv-737 (D. Conn. June 2, 2020); Thomas v. Brasher-Cunningham, No. 3:19-cv-1981 (D. Conn. July 27, 2020); Mitchell v. DHR, No. 20-0411-TFM-C (S.D. Ala. Oct. 28, 2020); Smith v. Comcast, No. 20-5749 (E.D. Pa. Nov. 24, 2020). A similar situation happened in 2019. *See*, *e.g.*, Limtung v. Paypal Holdings, 2019 WL 6173543 (E.D.N.Y. Nov. 11, 2019); Gibbs v. Gill, 2019 WL 3017773 (D. Utah July 10, 2019); Knight v. Chatelin, 2019 WL 2464789 (D. Neb. June 13, 2019); Armstrong v. Whitaker, No. 7:17-cv-1857-LSC (N.D. Ala. May 6, 2019).

RECENT DEVELOPMENTS IN WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY LAW

David B. Torrey, Lawrence D. McIntyre, and Justin D. Beck[*]

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This survey reviews significant statutory developments and appellate court decisions addressing workers' compensation issues for the period from October 2019 through September 2020. Workers' compensation systems are state statutory regimes, and the direct effect of statutes and precedents outside of their state of origin is necessarily restricted. Still, compensation principles and laws have much in common among states, and much can be learned from studying how legislatures and courts of other jurisdictions have treated similar issues. When state courts cannot adjudicate an issue based solely upon a statute's plain language, and no precedent of the jurisdiction is determinative, they often consider authority from other states.[1]

1. *See, e.g.*, City of Asbury Park v. Star Ins. Co., 233 A.3d 400 (N.J. 2020) (analyzing the laws of Connecticut and Pennsylvania in determining whether the make-whole doctrine

Given this state-based nature of compensation laws, not all of the new cases discussed herein can be characterized as landmarks. Yet, they are all significant for what they can teach lawyers and judges about how workers' compensation laws are structured and interpreted.

I. STATUTORY AND REGULATORY DEVELOPMENTS

As discussed in prior years' surveys,[2] workers' compensation has been marked by retractive legislative changes since the 1980s.[3] Yet, in 2020, little room existed for worker- or business-friendly reform, given governmental concern at all levels over the COVID-19 crisis.

Indeed, with regard to significant legislative and regulatory action for the survey period, most remarkable were the efforts by states to enact coverage for work-related infections caused by COVID-19 among public safety and "frontline" workers.[4] The ubiquitous device was to create a presumption of causation among groups of employees believed to be especially at risk for occupational infection.[5]

The principal speaker at an October 13, 2020 American Bar Association Continuing Legal Education panel identified three methods for accomplishing such measures.[6] The first is direct executive order, the second administrative action, and the third legislative amendment. The speaker

applies to deductibles); York v. Longlands Plantation, 840 S.E.2d 544 (S.C. 2020) (analyzing the laws of Georgia and Nevada in determining whether unmarried cohabitants may recover death benefits).

2. *See*, *e.g.*, David B. Torrey & Lawrence D. McIntyre, *Recent Developments in Workers' Compensation & Employers' Liability Law*, 51 Tort Trial & Ins. Prac. L.J. 749, 750–53 (2016).

3. *See generally* Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900–2017*, 69 Rutgers Univ. L. Rev. 891 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3079871.

4. *See* Michael C. Duff, *Can Workers' Compensation "Work" in a Mega-Risk World?: The Covid-19 Experiment*, 35 J. Lab. & Emp. L. 19, 21 (2020) ("[S]ome states have . . . creat[ed] COVID-19 workers' compensation presumptions that are structured similarly to occupational disease presumptions, making it much easier for 'essential workers' . . . to prove causation in workers' compensation claims. . . . In general, if employees fall into an essential worker classification and are reliably diagnosed as having contracted COVID-19, the burden of proof on causation shifts from the employee to the employer (or insurance carrier) to prove 'non-causation.'").

5. The National Council on Compensation Insurance (NCCI) tracks these enactments. *See* 2020 State Activity: COVID-19 WC Compensability Presumptions (Chart), https://www.ncci.com/Articles/Documents/II_Covid-19-Presumptions.pdf (hereinafter "NCCI Chart").

6. Comments of James Gallen, Esq., at ABA CLE Panel, "COVID-19 and Workers' Compensation Claims: Emerging Medical and Legal Issues" (ABA Tort Trial & Insurance Practice Section, Oct. 13, 2020). Mr. Gallen has, in unpublished memoranda, summarized his findings with regard to the nature of the various presumption rules that have been promulgated (on file with author).

identified five jurisdictions featuring an executive order,[7] two having undertaken administrative action,[8] and nine changing their laws.[9]

An example of executive action is found in Kentucky. There, the governor, on April 9, 2020, issued an executive order directing, among other things, "that employees removed from work by a physician due to occupational exposure to COVID-19 are entitled to temporary total disability . . . during the period of removal even if the employer ultimately denies liability for the claim . . . ." Under the order, workers including first responders (like police officers) and frontline employees (like healthcare, grocery, and childcare workers) enjoy a presumption that "removal . . . from work by a physician is due to occupational exposure to COVID-19."[10] Notably, the state supreme court upheld the order on November 12, 2020.[11]

An example of administrative action is that of Florida. There, the Department of Financial Services, operating under the auspices of the governor's state of emergency order, directed that "Frontline State Employees" contracting COVID-19 were entitled to benefits. Specifically, the "Division of Risk Management shall process Workers' Compensation claims submitted by Frontline Employees who have tested positive for COVID-19, through a reliable method as compensable claims for occupational disease . . . unless the State of Florida can show by a preponderance of the evidence that a Frontline State Employee Contracted COVID-19 outside his or her scope of employment as a state employee."[12] The covered workers include first

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7. The states are Connecticut (Conn. Exec. Order No. 7JJJ (July 24, 2020)); Kentucky (Ky. Exec. Order No. 2020-277 (Apr. 9, 2020)); Michigan (Mich. Exec. Order No. 2020-128 (June 18, 2020)); Missouri (Mo. Emergency R. 8 CSR 50-5.005 (Apr. 22, 2020)); and North Dakota (N.D. Exec. Order No. 2020-12.2 (July 28, 2020)); *see also* NCCI Chart, *supra* note 5.

8. The states are Illinois (50 Ill. Adm. Code § 9030.70, retracted); and Florida (Directive 2020-05, Fla. Dep't of Fin. Servs., Office of the Chief Fin. Officer (Mar. 30, 2020)).

9. These states are Alaska (S.B. 241, 31st Leg., 2nd Sess. (Alaska 2020)); California (S.B. 1159, 2019-2020 Reg. Sess. (Cal. 2020)); Illinois (H.B. 2455, 101st Gen. Assemb., 2nd Reg. Sess. (Ill. 2020)); Minnesota (H.F. 4537, 91st Leg., 2nd Reg. Sess. (Minn. 2020)); New Jersey (S.B. 2380, 219th Leg., 1st Ann. Sess. (N.J. 2020)); Utah (H.B. 5006, 63rd Leg., 5th Spec. Sess. (Utah 2020)); Vermont (S.B. 342, 2019-2020 Leg. Sess. (Vt. 2020)); Wisconsin (A.B. 1038, 104th Leg., 2019-2020 Reg. Sess. (Wis. 2020)); and Wyoming (S.F. 1002, 2020 Spec. Sess. (Wyo. 2020)); *see also* NCCI Chart, *supra* note 5.

10. Ky. Exec. Order No. 2020-277 (Apr. 9, 2020), http://apps.sos.ky.gov/Executive/Journal/execjournalimages/2020-MISC-2020-0277-266480.pdf. The Department of Workers' Claims published "Guidance" in memorandum form on April 15, 2020, advising the insurance community that COVID-19 was indeed covered under the Executive Order. Memorandum from Comm'r Robert L. Swisher (Apr. 15, 2020), https://labor.ky.gov/Documents/COVID-19%20Executive%20Order%202020-277.pdf. For an initial actuarial analysis of the effects of the change in the law, *see* Analysis of Kentucky Executive Order 2020-277 Regarding Presumptive Coverage for COVID-19 Exposure, https://www.ncci.com/Articles/Documents/II_LegislativeActivity_KY-Exec-Order-2020-277-LEAP-Write-Up.pdf.

11. Beshear v. Acree, No. 2020-SC-0313-OA, 2020 WL 6736090 (Ky. Nov. 12, 2020).

12. Directive 2020-05, Fla. Dep't of Fin. Servs., Office of the Chief Fin. Officer (Mar. 30, 2020), https://www.myfloridacfo.com/coronavirus/documents/CFO-Directive-20-05.pdf.

responders, corrections officers, state employees laboring in healthcare, child safety investigators, and members of the National Guard.[13]

An example of legislative action is that found in Illinois. There, the governor, on June 5, 2020, signed H.B. 2455, establishing a rebuttable presumption of coverage for first responders and a broad range of "front-line workers." The bill amends a number of scattered statutes,[14] and replaces earlier administrative action by the Workers' Compensation Commission.[15] The definition of "front-line worker" is indeed broad, extending to "any individuals employed by essential businesses and operations . . . includ[ing] . . . individuals employed by grocery stores, pharmacies, convenience stores, food banks, media outlets, gas stations, banks, hardware stores, educational institutions, transportation providers, manufacturing facilities and restaurants, as long as individuals employed by essential businesses and operations are required by their employment to encounter members of the general public or to work in employment locations of more than 15 employees."[16] The presumption may be rebutted by evidence "that the employee was working from home or on leave for a period of 14 or more consecutive days immediately prior to incapacity resulting from COVID-19; evidence showing that the employer was following current public health guidelines for two weeks prior to when the employee claims they contracted COVID-19; or evidence that the employee was exposed to COVID-19 by an alternate source."[17]

The COVID-19 crisis and governmental attention to it seems to have slowed a trend among states of enacting laws in favor of first responders who develop PTSD after mentally stressful exposures.[18] The exceptions were Virginia and Colorado.

In Virginia, the legislature, with a law similar to that of Florida, passed legislation providing that benefits for PTSD may be claimed by law-enforcement officers, firefighters, and emergency medical service workers (as to the last two, both career and volunteer).[19] A licensed psychiatrist or psychologist must diagnose the disorder, a specific "qualifying" traumatic event must be identified, such event must be the "primary cause"

13. *Id.* § 2.

14. The provisions of law are as follows: 820 Ill. Comp. Stat. § 80/5, § 80/30, § 80/45, § 80/65.

15. Anne Marie Schloemer, *Take Two: Illinois Enacts Law Providing Presumption of Workers' Compensation Coverage for COVID-19*, Lexology, Blog, (June 10, 2020), https://www.lexology.com/library/detail.aspx?g=73b105d6-f3b0-4a8b-88ad-4841d882f959.

16. 820 Ill. Comp. Stat. § 310/1(g)(2).

17. *Id.* § 310/1(g)(3).

18. With regard to the trend, see Don DeCarlo & David Torrey, Workplace Stress: Past, Present, and Future, 127–131 (2020) (for a PDF file, contact DTorrey@pa.gov).

19. Va. Code Ann. § 65.2-107.

of the disorder, and the PTSD may not arise from a good-faith personnel action.[20] The law features a cap of 52 weeks on the duration of disability payments, and a statute of repose provides that no medical treatment or disability payments may be made beyond four years from the date of the qualifying event.[21] Notably, unlike others, the Virginia PTSD law does not feature a presumption of causation.

In Colorado, meanwhile, the law was tweaked. The law already covered PTSD, among all employees, as a "psychologically traumatic event," but the 2020 amendment clarified that the term includes "audible trauma."[22] By this amendment, the legislature intended to include mental trauma sustained by 911 operators.[23]

Laws strengthening the intoxication defense have, since the early 1990s, been a feature of workers' compensation laws.[24] The state of Utah altered its statute by lowering the blood alcohol content necessary to invoke a presumption that intoxication caused the worker's injury. The threshold was previously .08, but it has now been lowered to .05.[25] Iowa, meanwhile, amended its medical marijuana statute to provide that workers' compensation carriers are not obliged to provide such medication to injured workers.[26]

Finally, the Virginia legislature enabled the Commission to establish an ombudsman program within the system. The program is intended "to provide neutral educational information and assistance to persons who are not represented by an attorney, including those persons who have claims pending or docketed before the Commission."[27]

20. *Id.* § (A), § (B).

21. *Id.* § (C).

22. Colo. Rev. Stat. §§ 8-41-301(3)(b)(II)(B), (C) (latter providing that a "psychologically traumatic event" may occur when "[t]he worker repeatedly and either visually or audibly, or both visually and audibly, witnesses the serious bodily injury, or the immediate aftermath of the serious bodily injury, of one or more people as the result of the intentional act of another person or an accident.").

23. *See* Audra Streetman, *Gov. Polis Signs Bill to Provide New Protections for 911 Operators*, CBS Denver (June 30, 2020), https://denver.cbslocal.com/2020/06/30/colorado-jared-polis-bill-signing-911-operators.

24. *See* David B. Torrey, *The Section 301(a) Intoxication Defense of the Pennsylvania Workers' Compensation Act: Law, Practice, and a Comparative National Inventory*, 92 Pa. Bar Q. 88 (2021).

25. Utah Code Ann. § 34A-2-302(5)(a)(ii).

26. Iowa Code § 124E.22 ("Nothing in this chapter shall require a governmental medical assistance program, private health insurer, workers' compensation carrier, or self-insured employer providing workers' compensation benefits to reimburse a person for costs associated with the medical use of marijuana.").

27. Va. Code Ann. § 65.2-205(A).

II. THEORY, PRINCIPLE, CONSTITUTIONALITY

Appreciation of the theory, principles, and constitutional basis of workers' compensation is critical for the true specialist. Of course, a key item to recall is that, with the exception of Texas,[28] a state's workers' compensation system defines the legal rights between injured workers and their employers. It is the "police powers of the state" under which workers' compensation laws are authorized,[29] and they will not be preempted by federal law "except by the clear and manifest intent of Congress."[30] In exchange for being no-fault liable,[31] the employer is immune from tort liability. The legislative compromise was, in 2020, described by an Idaho court as follows:

> [Workers' compensation] was considered the great compromise between the employers and employed. Both master and servant had suffered under the old system of common law, even though the master was required to maintain a safe workplace. Both wanted peace. The master, in exchange for limited liability, was willing to pay on some claims in the future, even though there had been no liability at all in the past. The servant was willing, not only to give up trial by jury, but to accept far less than the worker often won in court; provided he or she was sure of getting the small sum without having to fight for it. All agreed that the blood of the worker was the cost for production, that the industry should bear the charge.[32]

28. In Texas, employers need not opt into the system. Such employers are called "non-subscribers" and expose themselves to potential tort liability. For a 2020 case in which the estate of a fatally injured ranch hand successfully sued the deceased's employer, see Waak v. Rodriguez, 603 S.W.3d 103 (Tex. 2020) (Farm Animal Activity Act, formerly known as the "Equine Act," did not provide immunity to "non-subscriber" ranch owners with regard to the personal work injury tort claims of their injured workers).

29. *See* Gomez v. Crookham Co., 457 P.3d 901 (Idaho 2020) (explaining how enactment of the Idaho Act was expressly supported by invocation of the police powers of the state, and how the concept endures to the present (citing Roe v. Albertson's, Inc., 112 P.3d 812 (Idaho 2005)); Young v. Station 27, Inc., 404 P.3d 829, 840 (Okla. 2017) ("Historically, court decisions sustaining workers' compensation statutes establishing employer liability hold the view that they are enacted within the police power of the state to accomplish appropriate public policy goals based upon valid public interests."). The landmark case *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917), is an excellent early case on a state's authority to establish a workers' compensation system.

30. *See* Sanchez v. Dahlke Trailer Sales, Inc., 897 N.W.2d 267, 275–76 (Minn. 2017) (Minnesota court rejecting employer argument that federal immigration law must be read to preempt retaliatory discharge proviso of state workers' compensation law (citing Arizona v. United States, 567 U.S. 387 (2012)); Tex. Mut. Ins. Co. v. PHI Air Med., LLC, 610 S.W.3d 839 (Tex. 2020) (holding federal law did not preempt the Texas Workers' Compensation Act's "fair and reasonable [medical] reimbursement" standard).

31. *See, e.g.*, Cadiz v. QSI, Inc., 468 P.3d 110, 121 (Haw. 2020) (explaining that the Hawaii workers' compensation law is no fault; benefits are paid "regardless of questions of negligence and proximate cause").

32. *Gomez*, 457 P.3d at 908 (quoting Jose Luis Reyes, Claimant, No. IC 94-900858, 1997 WL 857497, at *7 (Idaho Indus. Comm'n July 15, 1997) (Kerns, Chairman, dissenting)).

As to interpretation, workers' compensation statutes are, by tradition, considered remedial statutes and, hence, are liberally construed.[33] Some states, however, as part of retractive change, have pointedly eliminated this proposition from their laws.[34]

The theory of and principles underlying workers' compensation are well-established. These concepts are also discussed in the following cases, which treat the interfasce of workers' compensation with other types of laws and, in one case, the constitutionality of such laws.

A. *Texas: Federal Law as Not Preempting Texas Act's Regulation of Air Ambulance Fees*

The Supreme Court of Texas held that a federal law did not preempt the Texas Workers' Compensation Act's "fair and reasonable reimbursement" standard.[35] That case involved a dispute about the amount that an air ambulance provider, PHI Air Medical ("PHI"), could recover from workers' compensation insurers. Under the Texas Act, healthcare providers may contract with insurers to determine the amount of reimbursement.[36] Absent such a contract, however, the reimbursement amount is governed by fee guidelines promulgated by the state's Division of Workers' Compensation.[37] Alternatively, when the Division has not adopted a guideline for a specific service, the Act requires that the insurer reimburse the provider a fair and reasonable amount for its services.[38]

For many years, Texas insurers had reimbursed PHI for its air ambulance services at 125% of the Medicare reimbursement rate.[39] In 2012, however, PHI began filing fee disputes with the Division, seeking to recover the full amount of its billed charges.[40] Before the Division, PHI argued that a federal statute, the Airline Deregulation Act ("ADA"),[41] preempted the Texas Workers' Compensation Act's reimbursement standards. The Division

33. *See*, *e.g.*, *Cadiz*, 468 P.3d at 121 ("The Hawai'i workers' compensation statute must be 'construed . . . liberally' in order to effect its 'beneficent purposes.'" (quoting Puchert v. Agsalud, 677 P.2d 449 (Haw. 1984)).

34. *See*, *e.g.*, Perez v. Irby Constr. Co., 290 So. 3d 1149, 1162 (La. Ct. App. 2020) (holding that the surviving "concubine" of a fatally injured worker was entitled to dependency benefits (citing La. Stat. 23:1020.1(D)(3) ("According to Article III, Section 1 of the Constitution of Louisiana, the legislative powers of the state are vested solely in the legislature; therefore, when the workers' compensation statutes of this state are to be amended, the legislature acknowledges its responsibility to do so. If the workers' compensation statutes are to be liberalized, broadened, or narrowed, such actions shall be the exclusive purview of the legislature."))).

35. Tex. Mut. Ins. Co. v. PHI Air Med., LLC, 610 S.W.3d 839 (Tex. 2020), *cert. denied*, 2021 WL 1602647 (U.S. 2021).

36. *Id.* at 843–44 (citing Tex. Lab. Code § 413.011(d-4)).

37. *Id.* at 844 (citing § 408.028).

38. *Id.* (quoting § 413.011(d)).

39. *Id.*

40. *Id.*

41. 49 U.S.C. § 1301 *et seq.*

agreed, but an administrative law judge ("ALJ") reversed, holding that the ADA did not preempt the Texas Act's reimbursement scheme.[42] The ALJ relied on the McCarran-Ferguson Act,[43] a federal statute that saves or "reverse-preempts" state laws regulating the business of insurance.

PHI then sought judicial review of the ALJ's decision. The trial court agreed with the ALJ that the ADA does not preempt the Texas Act's reimbursement provisions, but the court of appeals reversed. The appellate court held that the Texas Act's reimbursement provisions are preempted by the ADA and are not saved by the McCarran-Ferguson Act.[44]

On further appeal, the Supreme Court concluded that the ADA does not preempt the state's reimbursement scheme. The court explained that Congress enacted the ADA "in order to encourage market competition, lower prices, advance innovation and efficiency, and increase the variety and quality of air transportation services."[45] To prevent states from thwarting that goal, Congress included an express preemption clause, which provides that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier."[46] Thus, the question before the court was whether Texas' fair and reasonable reimbursement standards are "related to a price . . . of an air carrier."[47]

In concluding that the fair-and-reasonable standard does not relate "to a price" of an air carrier, the court found it "not at all clear that adopting a reasonableness standard for reimbursement by third parties, standing alone, has a significant effect on the price" that PHI charges its customers (*i.e.*, injured workers) for its services.[48] The court defined "price" narrowly to mean "how much one charges or pays for a good or service."[49] Under this definition, the amount that third-party insurers reimburse PHI does not inevitably affect the "price" of air transport. In this regard, the court noted that PHI was not challenging the Act's prohibition on balance billing workers directly when the price of a service exceeds the state's fair-and-reasonable amount. The court suggested that the preemption analysis might be different in such a case.[50]

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42. *Tex. Mut. Ins. Co.*, 610 S.W.3d at 844.
43. *See* 15 U.S.C. §§ 1011–1015.
44. PHI Air Med., LLC v. Tex. Mut. Ins. Co., 549 S.W.3d 804 (Tex. App. 2018).
45. *Tex. Mut. Ins. Co*., 610 S.W.3d at 847 (quoting Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG, 567 S.W.3d 725, 737 (Tex. 2019)).
46. *Id.* (quoting 49 U.S.C. § 41713(b)(1)).
47. *Id.* (quoting § 41713(b)(1)).
48. *Id.* at 849.
49. *Id.* (emphasis omitted).
50. *Id.* at 849 ("If we were analyzing the prohibition on PHI billing its customers (unchallenged here), it would be logical to expect that prohibition to have a significant effect on PHI's prices."). For a critique of this case, see Michael C. Duff, *Texas Supreme Court Rules Air Ambulance Rates Regulable by Texas Workers' Compensation Law*, Blog Post, WorkCompLawProf

B. *California: Guaranty Association Not Obliged to Reimburse Medicare Conditional Payments*

In a recent federal case, the Ninth Circuit Court of Appeals held that the California Insurance Guarantee Association ("CIGA") has no obligation to reimburse Medicare for conditional payments made on behalf of insolvent workers' compensation insureds.[51] California law requires certain insurers to participate in CIGA, which provides funding when a member insurer becomes insolvent.[52] But state law prohibits CIGA from reimbursing state and federal government agencies, including the Center for Medicare and Medicaid Services ("Medicare").[53]

After Medicare paid for and demanded reimbursement from CIGA for medical expenses of individuals whose workers' compensation benefits CIGA was administering, CIGA sought a declaratory judgment that CIGA was not required to reimburse Medicare. A federal district court ruled in favor of Medicare, finding that federal law preempted California law to the extent that it prohibited CIGA from reimbursing Medicare.[54]

On appeal, the Ninth Circuit reversed, holding that federal law does not permit Medicare to seek reimbursement from CIGA. The court explained that, as a secondary payer, Medicare is entitled to seek reimbursement from a beneficiary's "primary plan,"[55] a term which the Medicare Act defines to include "a workmen's compensation law or plan."[56] The court found that "CIGA does not fall within the plain meaning of this definition because it is not a workers' compensation law or plan."[57] In this regard, the court noted that, while CIGA protects against defaults by workers' compensation insurers, it is not itself a workers' compensation insurer. Rather, CIGA is an insurer of last resort, which "falls within the class of insolvency insurance."[58] Accordingly, the court concluded that, "[b]ecause CIGA is not a primary plan under the Medicare Act's secondary payer provisions, it has no obligation to reimburse [Medicare] for conditional payments made on behalf of workers' compensation insureds."[59]

(June 30, 2020), https://lawprofessors.typepad.com/workerscomplaw/2020/06/texas-supreme-court-rules-air-ambulance-rates-regulable-by-texas-workers-compensation-law.html (noting, *inter alia*, that case's result is "completely at odds with the federal circuits" that had considered the same issue).

51. Cal. Ins. Guar. Ass'n v. Azar, 940 F.3d 1061 (9th Cir. 2019).

52. Cal. Ins. Code §§ 1063–1063.18.

53. *Id.* § 1063.1(c)(4) ("'Covered claims' does not include an obligation of the insolvent insurer arising out of . . . an obligation to a state or to the federal government.").

54. Cal. Ins. Guar. Ass'n v. Burwell, Case No. CV 15-01113 MMM(FFMx), 2015 WL 12762027 (C.D. Cal. Nov. 3, 2015).

55. *Azar*, 940 F.3d at 1063.

56. 42 U.S.C. § 1395y(b)(2)(A).

57. *Azar*, 940 F.3d at 1068.

58. *Id.*

59. *Id.* at 1071.

C. *Illinois: Proceeds of Settlement Exempt From Medical Providers/Bankruptcy Creditors*

In an Illinois case, the Supreme Court held that proceeds of a workers' compensation settlement were exempt from the claims of healthcare providers.[60] There, the claimant had been injured and received treatment from three providers.[61] Subsequently, she filed for Chapter 7 bankruptcy. As it turned out, claimant owed over $135,000.00 to the providers.[62] Meanwhile, only two days following her bankruptcy filing, the claimant settled her claim for approximately $30,000.00.[63] The claimant did not consult the bankruptcy trustee in finalizing the settlement, as she believed those monies were exempt under Section 21 of the Workers' Compensation Act, which provided that such monies were not subject to any lien or garnishment.[64] The providers objected, and the bankruptcy judge summarily held that the settlement proceeds were not, in fact, exempt.[65] The claimant appealed to the district court which, affirming, held that certain amendments to the Act, passed in 2005, permitted providers to resume collection efforts following a settlement.[66] The claimant appealed to the Seventh Circuit, which certified the question to the state supreme court.[67]

The Supreme Court, concluding that the settlement proceeds were exempt, first explained that Section 21 had long allowed injured workers to claim an exemption with regard to their workers' compensation awards.[68] And, notably, the statute was entirely legitimate from the point of view of the bankruptcy law. In this regard, that federal law permits states to opt out of the *federal* exemption scheme and establish their own,[69] and Illinois had—as with the enduring Section 21—exercised that option.[70] Accordingly, in federal bankruptcy proceedings, Illinois law validly exempts workers' compensation benefits from the claims of creditors.[71]

60. *In re* Hernandez, 161 N.E.3d 135 (Ill. 2020).
61. *Id.* at 137.
62. *Id.*
63. *Id.*
64. *Id.* (discussing 820 Ill Comp. Stat. 305/21 (West 2016) (providing, in part, "No payment, claim, award or decision under this Act shall be assignable or subject to any lien, attachment or garnishment")).
65. *Id.*
66. *Id.* at 138.
67. *Id.*
68. *Id.* at 139.
69. *Id.* at 139–41 (discussing 820 ILCS 305/8, which "introduced fee schedules limiting the amount providers could collect and employers would be obligated to pay for procedures, treatments, or services covered by the Act").
70. *Id.* at 139.
71. *Id.* at 142–43.

Further, the 2005 amendments to the Act, invoked by the providers and the lower courts, did not change the critical analysis.[72] While those amendments, reflecting medical cost reform, permitted providers to seek payment directly from an injured employee following a final award or settlement, it did not permit those providers to actually look to workers' compensation *benefit payments* as a source of payment. The court rejected the providers' urging that this new law created an exception to the exemption; thus, such benefits remained beyond the providers' reach.[73] The court answered that collection by the providers must be directed not at workers' compensation benefits but, instead, towards assets unrelated to the individual's injury claim.[74]

D. *Oklahoma: Provision Limiting Recovery in Workers' Compensation Death Cases Unconstitutional*

In an Oklahoma case, the Supreme Court struck down a workers' compensation law provision limiting recovery for death exclusively to a spouse, child, or legal guardian dependent on the worker.[75] The plaintiff in that case was the mother of an unmarried twenty-three-year-old who was killed in a work-related accident.[76] The plaintiff filed a wrongful death action in civil court alleging that her son's employer negligently caused his death, but the trial court granted summary judgment in favor of the employer.[77] The court concluded that the mother's exclusive remedy was in the workers' compensation system.[78]

On appeal, the Supreme Court held that the trial court erred in granting summary judgment. The court explained that, under the Workers' Compensation Act, only spouses, children, and dependent legal guardians are entitled to death benefits.[79] Thus, when an adult decedent has no spouse or children, the Act abrogates the rights of the decedent's next of kin to bring a death action without affording any statutory benefit in exchange. Such a result, the court concluded, violates the right to a remedy guaranteed in Article 23, Section 7 of the Oklahoma Constitution.[80] Because the state's constitution forbids the legislature from abrogating the plaintiff's right to a

72. *Id.* at 142.
73. *Id.*
74. *Id.*
75. Whipple v. Phillips & Sons Trucking, LLC, 474 P.3d 339 (Okla. 2020).
76. *Id.* at 340.
77. *Id.*
78. *Id.*
79. Okla. Stat. tit. 85A, § 47.
80. *Whipple*, 474 P.3d at 344–46; Okla. Const. art. 23, § 7 ("The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, provided however, that the Legislature may provide an amount of compensation under the Workers' Compensation Law for death resulting from injuries suffered in employment covered by such law, in which case the compensation so provided shall be exclusive[.]").

remedy "to recover damages for injuries resulting in death,"[81] and because the Oklahoma Workers' Compensation Act purported to do exactly that, the court believed that its "only choice is to allow the mother to pursue her [civil] action for the wrongful death of her son[.]"[82]

III. EMPLOYER-EMPLOYEE RELATIONSHIP

For a cognizable claim to exist, the worker must demonstrate that he or she is in an employer-employee relationship, that the injury arises in the course of employment and is medically related thereto (that is, that medical causation exists), and that the injury or disease is within the protection of the statute. A scholar of an earlier day referred to these substantive elements of the claim as the "three pillars upon which coverage rests."[83]

A worker was *unable* to show employee status in a 2020 Nebraska case.[84] In a typical dispute of this type, he was found, instead, to have been engaged as an independent contractor. The worker in that case was laboring on a roofing job when he fell and sustained a significant injury.[85] He sought workers' compensation from the general contractor on the job (LFA), apparently because the individual who had immediately retained his services (Huerta, alleged to be the actual employer) had failed to insure for workers' compensation. Such general contractors, in Nebraska and in most states, can be deemed "statutory employers" and potentially liable for workers' compensation benefits. In Nebraska, a general contractor assumes such a position only when "creating or carrying into operation any scheme, artifice, or device to enable … it to execute work without being responsible to the workers for the provisions of the … Workers' Compensation Act."[86] The trial court, however, concluded that claimant was in fact an independent contractor.[87] And, as statutory employer liability only accrues to a general contractor when the subcontractor himself employs the injured worker, no such liability arose in the present case.

The Supreme Court affirmed, holding the trial court committed no error in concluding that claimant was not an employee. This was so as claimant enjoyed such freedom from Huerta's control, and had such scattered and irregular work with him, that he was indeed an independent contractor.[88] And

81. Okla. Const. art. 23, § 7.

82. *Whipple*, 474 P.3d at 345.

83. Stefan A. Riesenfeld, *Forty Years of American Workmen's Compensation*, 7 N.A.C.C.A. L.J. 15, 24 (1951). *See infra* Sections IV and V for case law discussions on the second and third pillars of coverage.

84. Aboytes-Mosqueda v. LFA Inc., 944 N.W.2d 765 (Neb. 2020).

85. *Id.* at 768.

86. *Id.* at 770 (quoting Neb. Rev. Stat. § 48-116).

87. *See id.*

88. Under Nebraska law, no single test exists for determining whether one "performs services for another as an employee or as an independent contractor." *Id.* at 771. Instead, ten

the trial court was correct in its legal reasoning as well; the court remarked, "Although we have never made this point explicit, it is clear . . . that [statutory employer] liability . . . presupposes that the injured worker was an 'employee' of the subcontractor, to whom the subcontractor had an obligation to procure workers' compensation insurance protection. . . ."[89]

IV. INJURIES IN COURSE OF EMPLOYMENT AND ARISING OUT OF EMPLOYMENT

The second pillar of coverage, that is, whether the injury arose out of, and in the course of, employment, constitutes the pivotal test of coverage. A 2020 Nebraska case sets forth a typical formulation:

> The two phrases "arising out of" and "in the course of" in [our statute] are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist. . . . The "in the course of" requirement tests the work connection as to the time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of employment and in the course of an activity whose purpose is related to employment. . . . The phrase "arising out of" . . . describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job.[90]

The worker who has clocked in and is hard at work at the punch-press when injured will obviously meet this two-part test. Still, many gray areas exist that give rise to disputes.

A. *Georgia: On-Premises Injury During Lunch Break Compensable*

In a Georgia case, the Supreme Court held that a claimant, who had been injured in a slip-and-fall during her scheduled lunch break, had indeed sustained a compensable injury.[91] There, the claimant, an insurance claims associate, was exiting the employer's breakroom to take her lunch outside of its shared-space office building, when she slipped on water and fell.[92] She filed a claim, and the ALJ awarded benefits.[93] The employer appealed, and the Board reversed, finding that the injury arose out of a purely personal

factors exist for consideration, among which are extent of control, length of time the worker is engaged, and the method of payment. *Id.* at 771–72.

89. *Id.* at 771. The court added, "We have found liability [in this context] only when the claimant was an employee of the subcontractor and the principal contractor failed to require the subcontractor to carry the proper insurance. Thus, the applicability of [the statutory employer provison] depends on whether or not Aboytes-Mosqueda is an employee of Huerta under the Nebraska Workers' Compensation Act." *Id.*

90. Webber v. Webber, 942 N.W.2d 438, 445 (Neb. Ct. App. 2020) (citations omitted).

91. Frett v. State Farm Emp. Workers' Comp., 844 S.E.2d 749 (Ga. 2020).

92. *Id.* at 751.

93. *Id.*

matter.[94] The Superior Court affirmed the denial of benefits, as did the Court of Appeals.[95]

The Supreme Court, however, reinstated the ALJ's award of benefits. The court noted that any claim for compensation must establish that the injury occurred "in the course of employment" and "[arose] out of" the same.[96] Injuries occurring in the course of employment include not only those sustained while actually engaged in the performance of assigned work, but also those sustained while the employee is engaged in activities "incidental" to that work.[97] Such incidental activities include, among other things, ingress and egress to the place of work while on the employer's premises.[98] Incidental activities, further, include the employee attending to routine personal needs, such as eating a meal or using the restroom.[99] Based upon these principles, the court concluded that the claimant had sustained an injury in the course of employment as the same occurred while preparing to eat lunch.[100] Notably, the court was not persuaded otherwise by the fact that the employee was not paid during her lunch break.[101]

Further explaining its award, the court recognized that the "aris[ing] out of" requirement requires a causal connection between the condition under which an employee works and the resulting injury.[102] The court noted that, here, it should be "straightforward" that the claimant's injury arose out of her employment. True, prior precedent, with strikingly similar facts, had held that injuries sustained during a lunch break are not part of an employee's work,[103] but that traditional holding could not stand. Acknowledging that it typically adheres to *stare decisis*, the court nevertheless indicated that this prior precedent was more than eighty-five years old, unsound, untethered from the analytical framework employed in workers' compensation for a century, and, in the end, unworkable.[104]

B. *Kansas: Presumption of Marijuana Intoxication-Induced Fatal Injury Rebutted*

The Kansas Supreme Court held that the widow of a worker who perished in a fall, and was found to have a high level of THC in his blood, rebutted the presumption that his presumed impairment from THC contributed to

94. *Id.*
95. *Id.*
96. *Id.* at 752.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 753.
101. *Id.* at 754.
102. *Id.*
103. *Id.* at 755 (citing Ocean Acc. & Guarantee Corp. v. Farr, 178 S.E. 728 (Ga. 1935)).
104. *Id.* at 756–62.

his fall.[105] There, the claimant was employed in a labor job at a mill. He was cleaning a high catwalk when, in an unwitnessed accident, he fell, fracturing his skull and ultimately dying.[106] He was found to have THC in his blood.[107] Notably, under Kansas law, any level of THC creates a *conclusive* presumption of impairment and a *rebuttable* presumption that said impairment contributed to the injury.[108]

The Board (the final fact-finder) held that the lab work showing the THC was inadmissible on chain-of-custody grounds, but held further that, even were the test positive, the widow had shown by clear and convincing evidence that the deemed impairment did not contribute to the injury.[109] The Court of Appeals remanded for further fact-finding,[110] but the Supreme Court affirmed the award. In this regard, the Board had legitimately credited the testimony of claimant's co-worker that claimant had no outward sign of being impaired immediately before the accident.[111] The Board had, meanwhile, rejected the testimony of employer's expert that a layperson could likely not detect impairment on the part of a marijuana user.[112] Given these fact-findings, the Supreme Court held that the co-worker's testimony constituted clear and convincing evidence to rebut the presumption.

C. *Arkansas: Presumption of Marijuana Intoxication-Induced Injury Not Rebutted*

The Arkansas Court of Appeals, affirming the Commission, held that an injured worker who, after his accident, tested positive for THC, had failed to rebut the presumption that the injury was "substantially occasioned by the presence of illegal drugs."[113] There, the claimant was an industrial worker who sustained a serious injury when a heavy, crane-borne load he was positioning fell and crushed his hand. At the hospital, the claimant tested positive for marijuana.[114] The employer denied the claim, invoking the intoxication forfeiture statute. That law provides that benefits are to be denied if the injury is "substantially occasioned by the use . . . of illegal drugs."[115] The law further provides that any presence of illegal drugs—like marijuana —causes the presumption to arise; no minimum threshold

105. Woessner v. Lab. Max Staffing, 471 P.3d 1 (Kan. 2020).
106. *Id.* at 3.
107. *Id.*
108. Ky. Rev. Stat. Ann. § 44-501(b)(1).
109. *Woessner*, 471 P.3d at 5.
110. *Id.*
111. *Id.* at 11–12.
112. *Id.* at 12.
113. Allen v. Employbridge Holding Co., 594 S.W.3d 165, 166 (Ark. Ct. App. 2020) (quoting Ark. Code Ann. § 11-9-102(4)(B)(iv)(b)).
114. *Id.* at 167.
115. Ark. Code § 11-9-102(4)(B)(iv)(a).

need be established by the employer before the presumption takes effect.[116] Meanwhile, the claimant may try to rebut the presumption by proving that a preponderance of the evidence shows that the drugs did not substantially occasion the injury.[117]

The ALJ awarded benefits, but the Commission (final fact-finder) reversed. The court affirmed. Substantial evidence supported the Commission's finding. While claimant denied using marijuana, and two witnesses stated that he did not seem impaired at the time of the accident, another witness believed that claimant did appear red-eyed.[118] Further, supervisors stated that the type of accident in which claimant was involved was unheard of, leading them to conclude that claimant must have made an error in judgment while performing his task.[119] The court held that this testimony supported the Commission's fact-finding that the accident "was caused by extreme carelessness and flawed judgment, which actions were the result of the claimant's use of the illegal drug marijuana."[120]

In a second case, the same court, again affirming the Commission, held that a claimant who, after her industrial-machine amputation accident, tested positive for THC, had failed to rebut the presumption that her injury was substantially occasioned by the use of marijuana, an illegal drug.[121] There, the claimant was a newly-hired machine operator in a textile manufacturing enterprise. Claimant sustained the amputation of a finger when, without having been trained on the machinery, she inserted her hand into a jammed cutting machine.[122] She was seeking, at the time, to un-jam the machine and remain productive.[123] At the hospital, her blood tested positive for THC. Claimant was then fired and her workers' compensation claim denied. As in the above case, the employer invoked the presumption that the presence of the illegal drug demonstrated that the injury was substantially occasioned by the presence of THC.[124] But, as in the preceding case, the ALJ ruled that the claimant had met her rebuttal burden of proof.[125] The Commission, however, found that claimant had not rebutted the presumption, and the Court of Appeals affirmed.

The court held, in this regard, that substantial evidence supported the Commission's ruling. True, no witness testified that claimant was impaired on the day in question, and the emergency room record recorded that claimant was unimpaired. It was true also that claimant testified that she

116. *Id.* § 11-9-102(4)(B)(iv)(b).
117. *Id.* § 11-9-102(4)(B)(iv)(d).
118. *Allen*, 594 S.W.3d at 168.
119. *Id.*
120. *Id.* at 168–69.
121. Blair v. Am. Stitchco, Inc., 593 S.W.3d 44 (Ark. Ct. App. 2020).
122. *Id.* at 45–46.
123. *Id.* at 46.
124. *Id.* at 47.
125. *Id.*

was only a sporadic marijuana user, and had not smoked for the last four weeks.[126] Yet, the court responded, the Commission was the final fact-finder, and it had discredited the claimant.[127] Further, the claimant had in effect admitted that she had shown poor judgment by placing her hand in a jammed slicing machine. This admission was of moment; in this regard, under the forfeiture law, to try to rebut the presumption, claimant is expected to show freedom from impaired judgment as being implicated in the accident.[128]

D. *Colorado: Worker, Post-Celebration, Had Concluded Deviation at Time of Fatal Injury*

The Colorado Court of Appeals held that a worker, an airline pilot on a special training trip, had not abandoned the course of employment when, after an evening of post-training celebration, and a period of sleep in his *co-worker's* hotel room, he was struck by a car while trying to cross a busy highway.[129] The court so held notwithstanding the fact that the worker was, at the time of the fatal accident, apparently running across the road *away* from the area of *his own* hotel.

The worker was a California resident airline pilot who was in Denver, along with a co-worker, for multi-day training at company headquarters.[130] Each had hotel rooms at units of different chains, located along the same side of a busy highway. After passing a stressful test, the co-worker and his colleague had dinner and drinks, followed by further celebration and drinking. Later, the worker, confused, and appearing inebriated, turned in for the night in the room of his *co-worker* at *his* hotel.[131] In the morning, still appearing confused, hotel personnel pointed him to his own hotel, a few buildings down. The worker, for reasons never determined, then sought to run across the road and was struck and killed.[132]

The ALJ denied benefits, ruling that the claimant, though a traveling employee at the time of his death, was still in the midst of a "personal deviation" marked by the drinking, his confused presence at the wrong hotel, and the fact that he was crossing the road in the wrong direction.[133] The Appeals Panel, however, awarded benefits, and the court affirmed. Here, while the deceased had undertaken a personal deviation during the

126. *See Blair*, 593 S.W.3d at 49.
127. *Id.*
128. *Id.* at 50 ("It was [the worker's] burden to produce evidence or call witnesses to prove that her injury was not substantially occasioned by her drug use, and she failed to do so.").
129. SkyWest Airlines, Inc. v. Indus. Claim Appeals Off., Court of Appeals No. 19CA1783, 2020 WL 5048498 (Colo. App. 2020).
130. *Id.* at *2.
131. *Id.*
132. *Id.*
133. *Id.* at *3.

post-test celebration (such a deviation was *admitted*), by the time of the fatal injury the deviation had ceased.[134] This was so as the deceased worker "had already returned to 'lodging quarters for the night' (even if it was his colleague's room). The accident happened hours later."[135] Justifying this ruling, the court explained that, under the "travel status" doctrine, injuries sustained during necessary travel are compensable, even those injuries dealing with "eating, sleeping, and ministering to personal needs away from home."[136] Further parsing the law, the court explained that "although the burden of proof is on the employer to show that the employee made a distinct departure from the scope of employment while on travel status [achieved here], the burden of proof is on the claimant to show a return to the course and scope of employment."[137] Here, claimant had met this burden.

V. CASUALTIES & DISABLEMENTS COMPENSABLE

The third pillar of coverage is the requirement that the injury or disease sustained by the worker is within the protection of the statute. Some states, like Pennsylvania, define injury liberally, and virtually all injuries and diseases shown by the persuasive medical evidence are covered.[138] Not all jurisdictions are so liberal. Many states, for example, still require—at least nominally—that an "accident" cause or attend the injury. This fact is shown by the Virginia case discussed below. Other states, meanwhile, may have limits on the compensability of infectious diseases. That fact is illustrated by the Wyoming case summarized in this section.

A. *Virginia: Worker Must Show "Structural or Mechanical Change" in All Anatomic Regions*

In a Virginia case, the Supreme Court held that, to meet the burden of proof to establish the occurrence of a compensable work-related injury, a claimant must show a "structural or mechanical change" in every body part affected by the related accident.[139] There, the claimant, a teacher, in the midst of her work, fell on her side. She received medical treatment and filed an injury report with the school system, listing injuries to the right ankle, knee, hip, shoulder, neck, and back.[140] Later, the claimant filed a for-

134. *Id.*
135. *Id.* at *5.
136. *Id.* at *4.
137. *Id.*
138. The casualty or compensable event under the Pennsylvania Act is the "injury," and the Supreme Court in 1987 liberally construed that term to encompass any "adverse and hurtful change." This was so held in the landmark case *Pawlosky v. W.C.A.B.*, 525 A.2d 1204 (Pa. 1987).
139. Alexandria City Pub. Sch. v. Handel, 848 S.E.2d 816, 820 (Va. 2020).
140. *Id.* at 817.

mal claim for benefits; the accident was acknowledged, but the shoulder aspect of the claim was contested.[141] In this regard, while claimant had complaints of pain radiating down her arm, one of her doctors "detected no abnormalities in the medical imaging of [claimant's] right shoulder."[142] Still, the deputy commissioner found that a causal relationship existed between the accident and claimant's shoulder complaints, and hence that she had indeed sustained an "injury by accident" to the shoulder.[143] The full Commission and Court of Appeals both affirmed.[144] Critically, the Court of Appeals held that "a 'single, sudden mechanical or structural change' *anywhere* in the body suffices to establish that a claimant has suffered an 'injury by accident.'"[145] Once established, any other injured body part, also causally connected to the accident, whether or not reflective of a sudden or mechanical change, is compensable.[146]

The Supreme Court, however, reversed. The court explained that, before an "injury by accident"—the compensable event under the law[147]—has occurred, the injured worker must establish an "obvious sudden mechanical or structural change in the body."[148] The court disagreed with the lower court's more liberal reading of this common-law requirement. To the contrary, this aspect of the "injury by accident" definition serves to define the "injury" part of "injury by accident."[149] That phrase includes two discrete concepts—an injury *and* an accident—and compensability requires both.[150] The Court of Appeals had erred by ruling that a claimant does not need to prove a structural or mechanical change in every body part affected by an accident.[151] To the contrary, without such a change in a body part, no injury to the same has been sustained.[152]

141. *Id.*

142. *Id.*

143. *Id.* at 817–18.

144. *Id.* at 818–19.

145. *Id.* at 818 (emphasis added).

146. *Id.*

147. The court observed, "'Injury by accident' is a term of art used in the definitions of the Workers' Compensation Act." *Id.* at 817 n.1 (quoting Va. Code Ann. § 65.2-101).

148. *Id.* at 819–20. This common-law formulation is longstanding in Virginia. The Supreme Court, detailing the interpretation of "injury by accident," explained that "[w]e introduced the phrase 'obvious sudden mechanical or structural change in the body' into Virginia case law in *Virginia Elec. & Power Co. v. Quann*, 197 Va. 9, 12, 87 S.E.2d 624 (1955)." *Id.* at 819.

149. *Handel*, 848 S.E.2d at 819–20.

150. *Id.*

151. *Id.* at 820.

152. *Id.*

B. *Illinois: Injury by Otherwise-Unremarkable Kneeling and Standing Compensable*

In an Illinois case, the Supreme Court held that a claimant had sustained a compensable injury to his knee where the physical acts of kneeling and standing, though common bodily movements, were incident to and causally connected to his job duties.[153] There, the claimant, a sous-chef, had alleged an injury to his right knee after kneeling down to locate vegetables in a walk-in cooler, causing the knee to "lock[] up."[154] An arbitrator awarded benefits, determining that the claimant's act of looking for vegetables was one that arose out of and occurred in the course of his employment.[155] The arbitrator's decision was, however, reversed by the Commission, which concluded that the claimant had failed to establish a work-related injury because he was subjected only to "neutral risks" which had no particular employment characteristics.[156] The circuit court affirmed, as did the appellate court.[157]

On further appeal, however, the Supreme Court reversed, awarding benefits and agreeing with claimant that his knee injury arose out of his employment. The court first explained that for an injury to be considered compensable, its origin must reflect some risk connected with, or incident to, employment. It noted that risks, in general, fall within three categories: (1) employment; (2) personal; and (3) neutral.[158] The court determined that the claimant's act of kneeling on the floor to search for vegetables was a risk incident to his employment, as the employer might reasonably expect him to perform such task in fulfilling his assigned kitchen duties.[159] Accordingly, the injury was conceptualized as arising out of and in the course of employment. The court so held despite the fact that the injury was caused by common bodily movements and a routine activity. The court, as part of its reversal, overruled precedent which had required a finding that, before an injury could be found, the claimant had been exposed to a risk of injury from common bodily movements "to a greater extent than the general public."[160]

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153. McAllister v. Ill. Workers' Comp. Comm'n, Docket No. 124848, 2020 WL 5668970 (Ill. Sept. 24, 2020).
154. *Id*. at *1.
155. *Id*. at *2.
156. *Id*.
157. *Id*. at *2–3.
158. *Id*. at *5.
159. *Id*. at *6.
160. *Id*. at *10.

C. *Wyoming: Consequential Flesh-Eating Bacteria Constituted Injury*

In a Wyoming case, the Supreme Court held that the law's communicable disease exclusion did not operate to bar compensation for a claimant's contraction of injury via a flesh-eating bacteria, as it was consequential to his original flesh wound.[161] There, the claimant, a miner, had scraped the knuckle of his right index finger on a locker in the employer's shower facilities.[162] Within 24 hours, he experienced swelling of the right hand, and eventually delirium set in. Ultimately, the claimant was diagnosed with necrotizing fasciitis caused by Strep A-induced flesh-eating bacteria. The Office of Administrative Hearings found that the claimant had sustained both a work-related knuckle scrape and flesh-eating bacteria infection.[163] Still, it denied benefits given the law's "illness and communicable disease" exclusion.[164] That provision precludes benefits for diseases unless the risk of contraction is increased by the nature of the employment.[165] The claimant appealed, and the district court reversed.

The Supreme Court affirmed the district court and its award of benefits. The court rejected the employer's argument that the exclusion applied. True, necrotizing fasciitis and Strep A/flesh-eating bacteria were communicable diseases, and the claimant's employment had apparently not increased his risk of contracting them. Still, the court noted that the Act defined the operative term "injury" as "any harmful change in the human organism other than normal aging . . . arising out of and in the course of employment."[166] It further noted that the employer had not challenged the initial finding that the claimant had sustained a scrape to the knuckle.[167] The court explained that a compensable injury may well lead to subsequent conditions, which are also compensable if causally connected to the original injury.[168] It emphasized that the employer also had not challenged the original finding that the necrotizing fasciitis was connected to the knuckle wound.

VI. BASIS, FORM, AMOUNT, AND PERIOD OF COMPENSATION

The New Jersey Superior Court, affirming the order of a judge of compensation, held that an employer was responsible for an injured worker's medical marijuana expenses.[169] There, the claimant was a construction worker

161. Matter of Worker's Comp. Claim of Vinson, 473 P.3d 299 (Wyo. 2020).
162. *Id.* at 303–04.
163. *Id.* at 304.
164. *Id.*
165. Wyo. Stat. Ann. § 27-14-102(a)(xi)(A).
166. *Claim of Vinson*, 473 P.3d at 309 (quoting Wyo. Stat. Ann. § 27-14-202(a)(xi)).
167. *Id.*
168. *Id.* at 310.
169. Hager v. M & K Constr., 225 A.3d 137 (N.J. App. Div. 2020), *aff'd*, 247 A.3d 864 (N.J. 2021).

injured when a dump truck deposited its load on him. He thereafter developed chronic pain.[170] After several years, a judge awarded both his claim in general and his request that the employer be responsible for his medical marijuana.[171] On appeal, the court rejected the carrier's argument (notably successful in a recent Maine Supreme Court precedent[172]), that an insurmountable conflict existed between the federal Controlled Substances Act[173] and the New Jersey law authorizing medical marijuana.[174] The court recognized the employer's argument that it could be conceived of as aiding and abetting a criminal act, but rejected the proposition that such a theoretical violation compelled the conclusion that a conflict existed. The court declared, "a speculative argument cannot support a finding of conflict preemption."[175] The court also rejected the carrier's argument that it should be treated as a private health insurer, entities which are, under New Jersey law, excused from the requirement of covering the "medical use of cannabis." Indeed, under the statute, health insurance does not *includ*e "workers' compensation coverage."[176]

VII. EXCLUSIVE REMEDY & THIRD-PARTY ACTIONS

As noted at the outset, in exchange for imposition of liability regardless of fault, injured workers and their dependents are limited, as their exclusive remedy, to the insurance benefits available under the workers' compensation law. The parameters of the exclusive remedy are always being contested.

A. *California: In COVID-19 Case*, *Exclusive Remedy Barred Worker's IIED Lawsuit*

In a 2020 case, a federal district court held that the California Act's exclusive remedy provision barred a suit for intentional infliction of emotional distress.[177] The plaintiff in that case, a detention officer at a correctional facility, alleged that her employer failed to maintain a safe work environment during the COVID-19 pandemic. Specifically, the plaintiff claimed that her employer did not: (1) provide adequate personal protective

170. *Id.* at 141.
171. *Id.* at 144.
172. *See* Bourgoin v. Twin Rivers Paper Co., LLC, 187 A.3d 10 (Me. 2018) (determining that Maine's Medical Marijuana Act was preempted by the federal Controlled Substances Act).
173. *See* Controlled Substances Act (CSA), 21 U.S.C. § 841.
174. *Hager*, 225 A.3d at 147; *see* N.J. Stat. Ann. § 24:6I-1 to -29.
175. *Hager*, 225 A.3d at 149.
176. *Id.*
177. Brooks v. Corecivic of Tenn. LLC, Case No.: 20cv0994 DMS (JLB), 2020 WL 5294614 (S.D. Cal. Sept. 4, 2020).

equipment like gloves and masks; (2) provide necessary cleaning supplies to staff; and (3) ensure social distancing.[178] After more than 200 detainees and 30 staff members tested positive for the virus, the plaintiff resigned from her position due to what she believed to be an unsafe work environment.[179]

The employer moved to dismiss the plaintiff's suit, arguing that her claims were barred by the Act's exclusive remedy provision.[180] In response, the plaintiff argued that her "claims fall outside the compensation bargain because they involve a response to a pandemic, which 'was never contemplated as a risk inherent in the employment relationship.'"[181]

The court granted the employer's motion to dismiss. In doing so, the court noted that the critical inquiry is whether the employer's allegedly tortious conduct "is part of the compensation bargain."[182] For example, the court noted that "claims based on harassment or discrimination have been found to fall outside the workers' compensation system" because "harassment and discrimination do not fall within the compensation bargain."[183] As for the plaintiff's intentional infliction of emotional distress claim, however, the court concluded that the employer's duty to maintain a safe and healthy workplace "exists at all times, and does not fall outside the compensation bargain just because the triggering event is a pandemic."[184]

B. *Idaho: Dependents of Fatally Injured Worker Established Intentional Injury Claim*

The Idaho Supreme Court held that the survivors of a worker who was killed when her hair got caught in the drive shaft of a seed-sorting machine may be able to sue the deceased's employer in civil court.[185] After the worker's death, her family received workers' compensation benefits and brought a suit alleging negligence and wrongful death claims against the employer. The plaintiffs argued that their suit was not barred by the Idaho Act's exclusive remedy provision, which does not apply when a worker's "injury or death is proximately caused by the willful or unprovoked physical aggression of the employer."[186] The trial court rejected this argument and granted summary judgment in favor of the employer, finding that the Act's exclusive-remedy exception for "willful or unprovoked physical aggression" did not apply.[187]

178. *Id.* at *2.
179. *Id.*
180. *Id.* at *6; *see also* Cal. Lab. Code §§ 3601–3602.
181. *Brooks*, 2020 WL 5294614, at *7.
182. *Id.* at *6.
183. *Id.*
184. *Id.* at *7.
185. Gomez v. Crookham Co., 457 P.3d 901 (Idaho 2020).
186. *Id.* at 905, 909 (quoting Idaho Code § 72-209(3)).
187. *Id.* at 905.

On appeal, the Supreme Court reversed. The court began by summarizing its own case law interpreting the Act's "willful or unprovoked physical aggression" standard. In those prior decisions, the court had held that "[a]n act of 'willful physical aggression' requires a level of intent that is deliberate and purposeful," and that the employee must show that the employer "wished a specific individual employee harm and then effectuated some means appropriate to that end."[188] "[A]n act of 'unprovoked physical aggression,' . . . is one lacking in motive, deliberation, or specific purpose," and the employee must only show the employer "actually knew or consciously disregarded knowledge that employee injury would result from the employer's action."[189] As an example, the court offered a hypothetical: an aquarium owner who orders an unwitting employee to clean a shark tank might be said to have committed an act of unprovoked physical aggression against the employee "because the employer would surely know that there was a high risk of death or injury to the employee."[190]

Applying this standard, the appellate court emphasized that the plaintiffs' complaint alleged that the employer failed to follow established safety procedures at the time of the worker's death. Specifically, both before and after the accident, "OSHA issued 'serious' violations and fined [the employer] for its lack of lockout-tagout procedures with the picking table and for its failure to properly guard the drive shaft on the table."[191] The plaintiffs also produced an expert report concluding that the employer's conduct "was intentional, negligent, and reckless, and that it was a foregone conclusion that its conduct would result in injury."[192] Given these allegations, the court found that the trial court erred in failing to consider whether the employer consciously disregarded a significant risk to its employees. The court instructed that, on remand, the trial court should "apply the proper standard for proving an act of unprovoked physical aggression . . . by determining whether there is a genuine issue of material fact as to whether [the employer] consciously disregarded knowledge of a serious risk to" its employees.[193]

C. *Minnesota: Third-Party's Liability Share Not to Be Reduced by Employer's Fault*

The Supreme Court of Minnesota held that a third-party defendant's share of liability in a tort suit cannot be reduced by the share of fault attributed to

188. *Id.* at 910 (quoting Marek v. Hecla, Ltd., 384 P.3d 975, 980–81 (Idaho 2016)).
189. *Id.* (quoting *Marek*, 384 P.3d at 981).
190. *Gomez*, 457 P.3d at 910.
191. *Id.* at 911.
192. *Id.*
193. *Id.* at 912.

the worker's employer.[194] The worker in that case was injured while loading an oversized concrete beam onto a semi-trailer. The allegedly negligent driver of the truck was employed by a third-party company, Ramler Trucking. After the worker and his employer settled his workers' compensation claim, he filed a negligence suit against Ramler.[195] The case proceeded to trial, and the jury apportioned liability as follows: 5% to the injured worker, 75% to the worker's employer, and 20% to Ramler.[196]

Ramler argued that its liability should be reduced, not just by the worker's 5% fault, but also by the employer's 75% fault.[197] The worker, on the other hand, argued that Ramler was liable for the full damage award, reduced only by the worker's 5% contributory fault and any damages duplicative of workers' compensation benefits that the worker received.[198] The trial court agreed with Ramler and reduced the net damage award by an amount proportionate to the employer's fault, but the court of appeals reversed.[199]

On further appeal, the Supreme Court, affirming, held that Ramler's liability should not be reduced by the fault of the worker's employer. The court acknowledged that the Minnesota statute governing apportionment of damages in civil negligence actions provides, in general, that "[w]hen two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each."[200] Interpreting this provision, the court emphasized that, in order for the statute to be triggered, persons first must be "severally liable."[201] Yet, "employers liable in workers' compensation and third parties liable in tort are not commonly liable, either jointly or severally, because the employer is shielded from tort liability."[202] Thus, the court concluded that Ramler's liability could not be reduced by the share of liability attributable to the worker's employer.

D. *New York: Uninsured Employer Deprived of Immunity from Joinder in Third-Party Actions*

The New York Act prohibits third-party claims for indemnification and contribution against an employer unless the employee has sustained a "grave injury" as defined in that statute, or a written contract exists entered into prior to the accident in which the employer expressly agrees to contribution or indemnification of the claimant.[203] In a 2020 case, a New

194. Fish v. Ramler Trucking, Inc., 935 N.W.2d 738 (Minn. 2019).
195. *Id.* at 740.
196. *Id.*
197. *Id.*
198. *Id.* at 741.
199. *Id.*
200. *Id.* (quoting Minn. Stat. § 604.02, subd. 1).
201. *Id.* at 744.
202. *Id.*
203. N.Y. Workers' Comp law § 11.

York appellate court held that this protection against third-party liability does not apply when the employer fails to secure workers' compensation insurance.[204]

The worker in that case ("Naula") was injured when he fell at a construction site located at premises owned by Utokilen, LLC ("Utokilen") and leased by Nancy Marin-Rojas ("Marin-Rojas").[205] Naula's employer, Specialized Dental Construction ("Specialized Dental"), was uninsured at the time of the accident.[206] Naula sued Utokilen and Marin-Rojas in tort, and those defendants in turn commenced a third-party action against Specialized Dental sounding in common law indemnification and contribution. Specialized Dental then moved for summary judgment, invoking its affirmative defense based on the exclusivity provisions of the New York Act and further arguing that it could not be held liable for contribution or indemnity to Utokilen and Marin-Rojas because the worker did not sustain a "grave injury" under the Act.[207] The trial court rejected this argument, citing appellate court precedent holding that New York's exclusivity provision applies only to employers that secure workers' compensation insurance as required by law.[208]

On appeal, the Appellate Division affirmed the lower court's ruling. Like the trial court, the appellate court explained that "an employer cannot benefit from the [Act's exclusive remedy] protections . . . when it fails to secure workers' compensation insurance."[209] Accordingly, the appellate court found no error in the trial court's denial of Specialized Dental's motion for summary judgment.

E. *Pennsylvania: Employer's Contractual Waiver of Immunity Unenforceable*

In a 2020 case, a federal court in Pennsylvania held that an employer's contractual waiver of its immunity to third-party indemnity claims was unenforceable under Pennsylvania law.[210] That case involved a rig worker ("Jones") who was killed at a worksite.[211] The worker was employed by Deep Well Services.[212] But a third-party company, Consolidated Rig Works L.P. ("Consolidated Rig"), sold a hydraulic jack—which allegedly

204. Naula v. Utokilen, LLC, 180 A.D.3d 1058 (N.Y. App. Div. 2020).
205. *Id.* at 1058.
206. *Id.*
207. *Id.* at 1059.
208. Naula v. Utokilen LLC, No. 709320 2016, 2018 WL 10613226, at *1 (N.Y. Sup. Ct. Aug. 7, 2018) (quoting Boles v. Dormer Giant, Inc., 825 N.E.2d 590, 594 (N.Y. 2005)) ("The Legislature cannot have intended to extend the statute's heavily negotiated protections from third-party liability to scofflaws, which would be unfair to law-abiding employers and might discourage compliance with [the Act].").
209. *Naula*, 180 A.D.3d at 1059.
210. Jones v. Swepi L.P., No. 2:19-cv-00050, 2020 WL 241009 (W.D. Pa. Jan. 16, 2020).
211. *Id.* at *1.
212. *Id.*

played a role in Jones's death—to Deep Well Services under a contract that included a choice of law provision stating that Texas law should be used to interpret the agreement.[213]

After the worker's death, his estate filed a wrongful death suit against Consolidated Rig. Consolidated Rig then impleaded Deep Well, alleging in its third-party complaint that Deep Well contracted to indemnify it when Consolidated Rig sold the hydraulic jack.[214] Deep Well moved to dismiss the third-party complaint, arguing that Pennsylvania law should govern and that, under Pennsylvania's Workers' Compensation Act, Deep Well was immune from liability for workplace injuries.[215] Consolidated Rig, on the other hand, argued that the contract should be interpreted using Texas law as stipulated in the choice-of-law provision.[216] Texas law would have allowed the employer to be impleaded.

The district court held that Pennsylvania law applied, and that Consolidated Rig's indemnity claim was barred by the Pennsylvania Workers' Compensation Act. The court first explained that, although Pennsylvania courts generally enforce choice-of-law provisions, they will decline to do so when applying the parties' chosen law "would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties."[217] The court found this exception applicable given that "Pennsylvania has a materially greater interest in protecting workers injured on the job within the Commonwealth's borders. And the Pennsylvania General Assembly codified that fundamental public policy in the Workers' Compensation Act."[218]

The court explained that the Pennsylvania Workers' Compensation Act "allows an employer to contractually waive its immunity to third party indemnity claims by expressly agreeing to indemnify the third party."[219] But Pennsylvania law provides that such provisions are enforceable only if the intent to indemnify is patently clear from the terms of the agreement—contractual language from an employer agreeing to indemnify "any or all" claims or claims of "any nature whatsoever" will not suffice.[220] Applying this standard, the court concluded that Consolidated Rig and Deep Well's contract, which stated only that the parties agreed to indemnify each other

213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at *2 (quoting Restatement (Second) of Conflict of Laws § 187(2)(b)).
218. *Id.* at *3 (citing 77 Pa. Stat. and Cons. Stat. Ann. §§ 1, 481(a)).
219. *Id.* at *4.
220. *Jones*, 2020 WL 241009, at *4 (citing Bester v. Essex Crane Rental Corp., 619 A.2d 304, 307 (Pa. Super. Ct. 1993)).

for "any claims" that arose from certain triggering events, "contains exactly the kind of general indemnity language that Pennsylvania case law holds cannot waive Workers' Compensation Act immunity."[221] Accordingly, the court granted Deep Well's motion to dismiss.

VIII. SUBROGATION

A. *New Jersey: Make-Whole Doctrine Applies to Compensation Policy Deductibles*

In a New Jersey case, the Supreme Court held that the workers' compensation insurance carrier, rather than the municipality which it insured—and which had partially retained risk—was entitled to be first-in-line for subrogation proceeds out of a claimant's third-party action.[222]

There, a firefighter of a municipality, City of Asbury Park ("City"), sustained catastrophic injuries in an accident and was paid benefits voluntarily.[223] The City paid the first $400,000.00 under a "retained risk" arrangement, and its carrier, Star Insurance ("Star"), paid all amounts beyond that sum.[224] Ultimately, claimant accepted $3 million in settlement of his workers' compensation claim.[225] Meanwhile, claimant settled a third-party lawsuit for $2,700,000.00. As a consequence, the amount available for potential reimbursement would not cover the amount paid collectively by the two entities. A dispute thereafter arose between the City and Star over the priority of subrogation.[226] The insurance policy, notably, included a subrogation provision which provided that the carrier would be subrogated to all of the City's rights of recovery.[227]

The carrier, invoking that clause, demanded the entirety of the monies. The City, in opposition, asserted that, pursuant to the "make-whole" doctrine, it was entitled to reimbursement in full before the carrier could assert a right to subrogation.[228] The City filed a declaratory judgment action; ultimately, the court granted the carrier's summary judgment motion, finding that, pursuant to the policy, the carrier indeed had the right to substitute itself for the City and was subrogated to all of its rights of recovery.[229] The court further rejected the contention that the make-whole doctrine applied, as the doctrine was altered by the policy; and that, in any event,

221. *Id.* at *5.
222. City of Asbury Park v. Star Ins. Co., 233 A.3d 400 (N.J. 2020).
223. *Id.* at 402.
224. *Id.*
225. *See id.*
226. *Id.* at 402.
227. *Id.*
228. *Id.*
229. *Id.* at 403.

the doctrine does not apply to "first-dollar" coverage such as deductibles.[230] The City appealed to the Third Circuit, which certified to the Supreme Court the question of whether the make-whole doctrine applied to first-dollar risk.

The court answered in the negative. The City argued that precedent supported the conclusion that the make-whole doctrine applied even where a deductible existed, and that the deductible was to be reimbursed before the insurer received any monies by way of subrogation.[231] The carrier responded that such a rule would circumvent "the bargain made by the parties" and unjustly enrich insureds which agreed to bear responsibility for first-dollar loss.[232] Siding with the carrier, the court first recognized that, under the make-whole doctrine, an insurer generally "cannot assert a subrogation right until the insured has been fully compensated" for its injuries.[233] Still, New Jersey courts had never addressed whether the doctrine applied to first-dollar risk, such as deductibles.[234] Drawing from examples in other jurisdictions, the court concluded that the make-whole doctrine "does not apply to first-dollar risk allocated to the insured."[235] In so holding, the court emphasized that a self-insured retention or deductible constituted a risk that the insured agreed to assume in exchange for a lower premium.[236] It noted that, to allow such an insured priority of recovery would convert the policy into one without a retention, thereby defeating the policy terms and expectations.[237] The result would be "an unbargained for, unpaid for, windfall."[238]

B. *Maryland: Employer Not Subrogated to Claimant's Medical Malpractice Recovery*

In a Maryland case, the Court of Special Appeals held that a self-insured employer did not have a subrogation claim out of a claimant's medical malpractice settlement.[239] There, the claimant sustained a recognized work-related injury to the left elbow for which he pursued medical treatment.[240] Employer paid all of claimant's disability and medical benefits, including the cost of a ruptured biceps tendon surgery.[241] The claimant subsequently

230. *Id*.
231. *Id*. at 403–04.
232. *Id*. at 404.
233. *Id*. at 405.
234. *Id*. at 407.
235. *Id*. at 409 (citing Fireman's Fund Ins. Co. v. TD Banknorth Ins. Agency, Inc., 72 A.3d 36 (Conn. 2013); Jones v. Nationwide Prop. & Cas. Ins. Co., 32 A.3d 1261 (Pa. 2011)).
236. *Id*.
237. *Id*.
238. *Id*. (citing *Fireman's Fund Ins. Co.*, 72 A.3d at 42).
239. Baltimore Cnty. v. Ulrich, 223 A.3d 1111 (Md. Ct. Spec. App. 2020).
240. *Id*. at 1115–16.
241. *Id*. at 1116.

filed a malpractice claim against Concentra, a medical provider. He alleged that he experienced permanent and disabling injuries as a result of its failure to properly diagnose the rupture immediately following the injury.[242]

Prior to mediation of the matter, the employer transmitted to the claimant a lien demand, identifying the benefits—disability and medical—paid during the life of the claim; claimant's counsel recognized the claim, but responded that no recovery of medical expenses against Concentra was being pursued and, thus, no reimbursement for medical benefits would be forthcoming.[243] At mediation, the parties reached a confidential resolution, the net amount of which fortunately exceeded the employer's lien.[244] The claimant reimbursed the employer for all indemnity benefits paid; however, the employer refused the payment, insisting that medical expenses should also be reimbursed.[245]

The Commission held that the employer was not entitled to reimbursement for the cost of medical services necessary to treat the work injury but, instead, only to reimbursement for total disability benefits.[246] The trial court, on appeal, granted summary judgment for the claimant,[247] and the high court affirmed. The Court of Special Appeals explained that injured workers can receive benefits from their employers yet still sue third parties who are alleged to have been at fault in the injury.[248] Employers have subrogation out of such recoveries. However, subrogation only follows when the third party has *caused* the claimant's injury.[249] Here, claimant persuasively pointed out that, while Concentra had failed to diagnose the ruptured biceps tendon work injury, that was indeed *his injury*, and he would have needed the surgery in any event.[250] Thus, Concentra had not caused an injury which in turn gave rise to the malpractice settlement. Claimant, with his allegations of *permanent disability* from the malpractice, was obliged to recognize the lost wages and other aspects of the City's subrogation claim, but not the amount reflecting the cost of the surgery. In short, "[w]hen an employer pays for medical services to treat the part of an injury for which no third party . . . is liable, and where the employee recovers no sums for those medical expenses, the employer is not entitled to be reimbursed for those expenses out of the employee's recovery from a third party."[251]

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242. *Id.*
243. *Id.* at 1117.
244. *Ulrich*, 223 A.3d at 1117.
245. *Id.*
246. *Id.* at 1117–18.
247. *Id.* at 1118–19.
248. *Id.* at 1120.
249. *Id.*
250. *Id.* at 1129–30.
251. *Id.* at 1130.

IX. SETTLEMENT

A. *Massachusetts: Settlement Monies Marital Property in Divorce Proceedings*

In a Massachusetts case, the Appeals Court held that a claimant's workers' compensation settlement monies constituted marital property which were properly subject to division in a divorce proceeding.[252] There, the claimant and his wife had been married for eight years when he filed for divorce. Prior to the entry of the divorce judgment, the claimant received a lump-sum settlement of $240,000.00 for a work injury which occurred during the marriage.[253] Following trial, the court ordered that the wife should receive $50,000.00 of the remaining settlement monies, in consideration of the facts that the claimant was in good health, the wife had primary custody of the child, and that she was to buy out the claimant's $105,000.00 share in the marital home.[254]

On appeal, the claimant argued that a workers' compensation settlement was not a divisible marital asset.[255] The court rejected this assertion, instead finding that, since the "accident occurred during the marriage and the settlement was received before the judgment of divorce *nisi* became final," the proceeds were in fact marital property which could be divided.[256] Moreover, the court ascertained no abuse of discretion in the judge's allocation of the settlement to the wife.[257] It noted that the judge provided well-reasoned findings, which relied on the fact that the wife was to buy out her husband's share of the marital home.[258]

B. *Maryland: Injured Worker Did Not Release Inchoate Fatal Claim Rights of His Spouse*

In a Maryland case, the Court of Appeals, affirming a lower appellate court, held that an injured worker could not release the inchoate (not yet manifested) fatal claim rights of his spouse and that, despite a prior compromise and release settlement of his lifetime claim, the decedent's wife's claim for death benefits was fully cognizable.[259] There, the claimant-decedent had filed a claim for benefits in 2012, alleging that he had developed heart disease and hypertension as a result of his firefighting duties with the employer, a volunteer fire department.[260] He entered into a settlement with the employer, which, in part, provided for a lump-sum payment and funding of a Medicare

252. Warnajtys v. Warnajtys, 150 N.E.3d 346 (Mass. App. Ct. 2020).
253. *Id.* at 348.
254. *Id.*
255. *Id.*
256. *Id.* at 349.
257. *Id.*
258. *Id.*
259. *In re* Collins, 228 A.3d 760 (Md. 2020).
260. *Id.* at 764.

Set-Aside trust.[261] Approximately two years later, the claimant died as a result of cardiac arrest secondary to heart disease.[262] Shortly thereafter, the claimant-widow filed a Dependent's Claim for Death Benefits. The Commission denied her claim, concluding that the claimant-widow had no right to survivorship or death benefits.[263] The claimant-widow appealed, and the Circuit Court affirmed, granting summary judgment to the employer.[264] The claimant-widow subsequently appealed to the Court of Special Appeals, which reversed the Circuit Court.[265]

The Court of Appeals affirmed and awarded dependency benefits. The employer, as it had below, argued that, in the settlement release executed by the claimant-decedent, it was agreed that, in exchange for the lump-sum, neither he nor the claimant-widow would ever assert any additional claims.[266] However, the court, interpreting the language of the release, noted that, if the claimant-decedent had actually intended to release potential death claims, the claimant-widow would have been a party to the settlement negotiations, signed the release, and have received some consideration.[267] The court acknowledged that the language of the release was "very broad," as it referenced "dependents" as also releasing "all other claims . . . which could hereafter arise."[268] The breadth of the release, however, was of no moment. While dependents may settle their future claims for death benefits while the employee is still alive, the employee, on his own, simply lacks the power to release dependents' independent claims.[269] Thus, an agreement which purports to release dependents' claims for death benefits does not render the release enforceable against a dependent who was not a party to the agreement.[270]

As it pertained to public policy, the court was not persuaded by the employer's concerns that such a ruling would largely end the settlement of workers' compensation cases. It emphasized that employers, as well as dependents, would "be able to effectively assess the value of inchoate claims for death benefits in light of each case's unique circumstances."[271]

261. *Id.* at 765.
262. *Id.* at 766.
263. *Id.*
264. *Id.* at 766–67.
265. *Id.* at 767.
266. *Id.* at 770.
267. *Id.* at 770–71.
268. *Id.* at 771.
269. *Id.* at 771–72.
270. *Id.* at 772.
271. *Id.* at 784.

C. *Pennsylvania: Claimant Who Had Settled With Employer Estopped From Suing in Tort*

In a Pennsylvania case, the Superior Court held that a claimant was estopped from pursuing a negligence action against her employer where she had first affirmatively sought and received workers' compensation benefits.[272] There, the claimant, a residential counselor at an inpatient psychiatric facility, was injured in the course of employment when attacked by a resident.[273] The employer paid workers' compensation voluntarily.[274] She subsequently entered into a judge-approved compromise and release agreement ("C&R") with her employer.[275] Thereafter, the claimant brought a negligence action against the employer, alleging that it did not have safety procedures, equipment, or a building design sufficient to protect her from "potentially violent patients."[276] The employer sought summary dismissal of the suit, arguing that her action was barred by both the immunity provisions of the Workers' Compensation Act and pursuant to the C&R.[277] The trial court granted the employer's motion, and the claimant appealed to the Superior Court, which affirmed.

The court clarified that, with regard to workers' compensation immunity, the critical issue was whether the attack fell within the "personal animus" or "third-party attack" exclusion of the Act.[278] It noted that the Act "excludes from its coverage injuries intentionally inflicted by third-parties for personal reasons that are unrelated to the employee's employment."[279] Where such an exclusion applies, the employer is not immune from tort liability for the injury.[280] The court, however, was persuaded that the claimant's receipt of benefits pursuant to the C&R served to bar her negligence action as a matter of law.[281] To this end, although the passive receipt of benefits does not preclude such a suit, here the claimant had affirmatively sought and obtained a lump-sum settlement based upon the position that the injury was, in fact, work-related.[282] That determination of work-relatedness was also memorialized in a final adjudication.[283] For these reasons, the court concluded that the claimant was estopped from arguing that the

272. Grabowski v. Carelink Cmty. Support Servs., Inc., 230 A.3d 465 (Pa. Super. Ct. 2020).
273. *Id.* at 468.
274. *Id.*
275. *Id.*
276. *Id.* at 469.
277. *Id.*
278. *Id.* at 470.
279. *Id.* at 471 (quoting 77 Pa. Stat. and Cons. Stat. § 411(1) (West 2018)).
280. *Id.*
281. *Id.* at 472.
282. *Grabowski*, 230 A.3d at 473.
283. *Id.*

personal animus/third-party attack exception applied to her claim, and her action was barred.[284]

Though moot, the court added that, in any event, the claimant's assertion that the personal animus exception applied would fail because she had been attacked by a non-co-worker while performing her job—injury circumstances falling squarely within the Act.[285] Although the claimant argued that an exception existed for *sexual* assaults, which had purportedly occurred during the attack, the court indicated that the Act did not necessarily exclude coverage for such assaults unless the motivation was for reasons personal to the assailant.[286] Finally, the court rejected the claimant's argument that the question of personal animus was an issue to be determined by a trier of fact. It noted that the complaint did not identify a motivation for the attack and, thus, dismissal at the pleading stage on the grounds of immunity was proper. This was so as the trial court accepted the averments of the complaint as true.[287]

X. PROCEEDINGS TO SECURE COMPENSATION

The Supreme Court of South Carolina held that the girlfriend of a deceased worker was not entitled to death benefits because she failed to establish dependency.[288] The worker in that case, an employee at a historic plantation museum, drowned in a boat accident.[289] After his death, both the decedent's mother and his girlfriend sought death benefits.[290] The Commission denied benefits for the deceased's girlfriend, concluding that the legislature did not intend for the term "dependent," as used in the South Carolina Act,[291] to include persons in a relationship that violates South Carolina's fornication statute.[292]

The girlfriend then appealed to the Court of Appeals, which "reversed the commission's factual finding of fornication because there was no evidence to support that finding."[293] Accordingly, the court remanded to the Commission for a determination of whether the girlfriend qualified as a dependent under the Act.[294] The decedent's mother then appealed to the Supreme Court.

284. *Id.* at 473–74.
285. *Id.* at 474.
286. *Id.* at 474–75.
287. *Id.* at 475.
288. York v. Longlands Plantation, 840 S.E.2d 544 (S.C. 2020).
289. *Id.* at 571.
290. *Id.*
291. S.C. Code Ann. § 42-9-120.
292. *York*, 840 S.E.2d at 546; *see also* S.C. Code Ann. § 16-15-60 (criminalizing adultery and fornication).
293. *York*, 840 S.E.2d at 546.
294. *Id.*

The court reversed in a unanimous opinion. Unlike the lower court, however, the high court avoided the issue of whether the decedent's relationship was "illicit" under state law. Instead, the court found that, even if the girlfriend could establish a legal relationship, she failed to prove that she depended on the decedent for "the reasonable necessities of life."[295] In this regard, the court noted that the South Carolina Act sets forth two classes of persons who may recover death benefits: dependents who are conclusively presumed to be dependents (like surviving spouses and children) and any other person who can establish that they relied upon the decedent for "the reasonable necessities of life."[296]

In concluding that the decedent's girlfriend did not fall within either of these categories, the court noted that the two "had an on-again off-again relationship during which time she owned her own home and filed [her taxes] as head of household," meaning that no one else could claim her as a dependent.[297] The record also revealed that, although the deceased lived with his girlfriend at times, he often spent multiple days a week at his mother's house because his girlfriend would "kick him out" of her house.[298] Given these facts, the court concluded that the girlfriend was not a dependent under the Act; instead, the decedent's mother was his sole dependent.

295. *Id.* at 547–48.
296. *Id.* at 546 (quoting Day v. Day, 58 S.E.2d 83, 86–87 (S.C. 1950)).
297. *Id.* at 548.
298. *Id.* at 545.