MIReBA
Massachusetts Insurance and Reinsurance Bar Association

Massachusetts Insurance and Reinsurance Bar Journal

2020-2021

2021 Insurance Law: The Year In Review

Michael Aylward[1]

After the non-stop shocks of 2020, 2021 almost felt "normal." Well, not quite and certainly not in the courts. Here is a brief survey of the major new rulings and legal developments that dominated the headlines over the past twelve months.

1. COVID 19 BUSINESS INTERRUPTION CLAIMS

If early trends are any indicator (and they likely shouldn't be), the COVID coverage litigation may fade away faster than the pandemic that triggered it. In the final months of 2021, insurers secure key rulings in seven of the eleven federal circuits and won intermediate state appellate courts in California and Ohio. What remains to be seen is whether there will a knockout punch, much as occurred 20 years ago with the nascent Y2K coverage litigation, or whether the COVID coverage litigation will follow the path of the environmental insurance wars of the 1980s and 1990s with a checkerboard map of jurisdictions that have adopted or rejected key issues.

Since the COVID coverage litigation began in New Orleans in March 2020, it has been concentrated in the federal courts, which have been remarkably receptive to insurer arguments that loss of use of business premises is not "physical loss of or damage" to property and that these losses are subject to virus exclusions. As we enter 2022, the cockpit of this controversy is shifting to the state courts.

There are comparatively fewer state appeals (there are more appeals pending in the Ninth Circuit at present than all state appellate courts combined) but the outcome of these state appeals will probe decisive in the long term. First up will probably be either Indiana Repertory Theater v. Cincinnati Ins. Co. (argued in the Indiana Court of Appeals on November 19) or Roses 1, LLC v. Erie Insurance Exchange, one of the earliest insurer rulings in 2020, which was argued before the D.C. Court of Appeals on November 30. Next up will be oral arguments in the Supreme Judicial Court of Massachusetts on January 7 (Verveine v. Strathmore Insurance), the Vermont Supreme

[1] Michael Aylward is a Partner at Morrison Mahoney LLP. This article was originally published on the Morrison Mahoney website here.

Court on January 26 (Huntington Ingalls Industries v. ACE American) and the Ohio Supreme Court on February 8 (Neuro Communications Services v. Cincinnati Ins. Co.). Next along will likely be rulings from the Wisconsin Supreme Court (2 Colectivo Coffee Roasters v. Society Insurance), the North Carolina Court of Appeals (North State Deli LLC v. The Cincinnati Ins. Co.) and the Appellate Division of the New York Supreme Court (Consolidated Restaurant Operations. v. Westport Insurance).

As a practical matter, any relief from these courts may come too late for policyholders whose claims are not already in suit. New court filings have slowed to a trickle since a brief surge in early 2021 and new claims may soon be time-barred as the second anniversary of the on-set of state shut down orders nears.

2. CYBER

While the COVID-19 virus predominated in 2021, earlier "virus" claims continued to plague American businesses and resulted in diverse insurance coverage controversies. Whether in the form of phishing schemes or malware or ransomware attacks, cyber-crime remains a problem of ever-expanding cost and complexity and, increasingly, a source of litigation under both commercial general liability and commercial property policies.

Liability Insurance

In a major victory for policyholders, the Fifth Circuit ruled in Landry's Inc. v. The Insurance Company of the State of Pennsylvania, 4 F.4th 366 (5th Cir. July 21, 2021)(Texas law) that a CGL insurer owed coverage for losses resulting from a data breach of a hotel chain's computer systems, ruling that there was a "publication" of private information as to trigger the policy's "personal and advertising injury" coverage when malware that hackers had installed on the hotel chain's computer systems captured and transmitted confidential information from magnetic strips on credit cards used by hotel and casino customers. In Minnesota, a federal district court ruled that a retailer is not entitled to CGL coverage for suits brought against it by credit card companies following a computer hack that exposed confidential financial data. In Target Company v. ACE American Ins. Co., 517 F.Supp.3d 798 (D. Minn. Feb. 8, 2021), Judge Wright ruled that Target has not satisfied its burden to demonstrate that the Data Breach had not resulted in a "loss of use" of "tangible property that is not physically injured."

Property Insurance

In G&G Oil Company of Indiana, Inc. v. Continental Western Ins. Co., 165 N.E.3d 82 (Ind. Mar. 18, 2021), the Indiana Supreme Court ruled that "computer fraud" coverage might apply to a spear-fishing loss. In reversing the intermediate appellate court's entry of summary judgment for the insurer, the Supreme Court ruled that a reasonable

policyholder would understand the term "fraudulently cause a transfer" as meaning "to obtain by trick". In light of this standard, the court ruled that neither party had sustained their burden with respect to summary judgment owing to questions of fact with respect to how the hack occurred and whether it was obtained by trick. Whereas the trial court had ruled that the insured's data was not physically damaged in any manner and was fully accessible once the demanded ransom had been paid, the Ohio Court of Appeals held in EMOI Services, LLC v. Owners Ins. Co., 2021 WL 5144828 (Ohio App. Nov. 5, 2021).that insured's computer system could have suffered "direct physical loss." At a minimum, the court ruled that there were disputed issues of fact and unrefuted expert testimony presented by the insured concerning the inadequate coverage investigation performed by Owners prior to denying the claim, such that summary judgment should not have been granted on the bad faith claim.

On the other hand, the Fifth Circuit recently ruled in Realpage, Inc. v. National Union Fire Insurance Company of Pittsburgh, PA, No. 21-10299 (5th Cir. Dec. 22, 2021) that an online rent payment processor was not entitled to commercial crime coverage for nearly $6 million in funds that were diverted through a phishing scheme and that the insured had to reimburse its clients for. As had the Federal District Court of Texas, the Fifth Circuit ruled that the insured never had possession of any of the transferred funds, as its computer system automatically rerouted them to clients upon payment.

Earlier in the year, the Fifth Circuit ruled in Mississippi Silicon Holdings LLC v. AXIS Insurance Company Ins. Co. 2021 WL 406238 (5th Cir. Feb. 4, 2021) that a Mississippi District Court did not err in holding that a business was not covered under a commercial crime policy for over $1 million that it was fooled into transferring to an offshore banking account. In light of language in the Computer Transfer Fraud section of the policy requiring that there be a transfer of covered property "to a person, place or account beyond the Insured Entity's control, without the Insured Entity's knowledge or consent," the Fifth Circuit ruled that the transfer of funds was not undertaken "without the Insured Entity's knowledge or consent" since the wire transfers were made by the insured's employees.

Industry Developments

In October, a new NAIC estimated that there was a 400% increase in the incidence of ransomware claims in 2020 and a significant increase in the amounts demanded in each case. Even as the market for cyber-insurance continues to grow, industry is itself under attack, including major events at Arthur J. Gallagher, Marsh and CNA.

3. PRIVACY CLAIMS

A decade after the battle over coverage for junk faxes subsided, a new controversy has arisen under Coverage B with respect to new statutory protections for biometric data

such as fingerprints and retina scans. Additionally, courts are increasingly giving effect to exclusions for violations of TCPA and similar statutes.

Biometric Privacy Disputes

The Illinois Supreme Court ruled in West Bend Mutual Insurance Company v. Krishna Schaumburg Tan, Inc., 154 N.E.3d 804 (Ill. May 20, 2021) that allegations that a tanning salon violated the Illinois Biometric Information Privacy Act (BIPA) by sharing a customer's fingerprints without her permission triggered coverage under CGL policies as involving the publication of material in violation of a person's right of privacy. In affirming the Appellate Court's declaration of coverage, the state Supreme Court rejected West Bend's contention that "publication" required dissemination of information to the general public, notwithstanding dicta to that effect in its TCPA opinion in Swiderski.

Rather, the court ruled that the common and ordinary meaning of this term, as evidenced by various dictionaries, comprised both a limited sharing of information of the single party and a broad sharing of information to multiple recipients. The court also ruled that these claims were not subject to a "Violation of Statutes" exclusion, as the statutes enumerated in the exclusion (TCPA, CAN-SPAM etc.) all prohibit certain *methods* of communication which is not the case with BIPA. Applying the rule of *ejusdem generis*, the court held that the exclusions referenced to other statutes could not be read so broadly as to apply to laws that do not regulate the method of communication and that the exclusion was, at best, ambiguous in this regard and, therefore, could not be applied to defeat coverage.

A North Carolina federal court reached a different conclusion in Massachusetts Bay Ins. Co. v. Impact Fulfillment Services, Inc., 2021 U.S. Dist. LEXIS 182970 (M.D.N.C. Sept. 24, 2021) that liability insurers had no duty to cover a law suit in which the plaintiff alleged that the insured violated the Illinois Biometric Information Privacy Act by using their fingerprints as part of its payroll time-keeping procedures. In granting the insurers' Motion for Judgment on the Pleadings, Judge Osteen ruled that the BIPA claims were subject to an exclusion in the primary policy issued by Massachusetts Bay and the Hanover American umbrella policy for the violation of statues involving "recording and distribution of material or information." While acknowledging that the Illinois Supreme Court had reach a different conclusion, the court observed that the exclusion at issue in Krishna Schaumburg did not contain the third paragraph referencing the Federal Credit Reporting Act and declared that it was not obliged to follow Illinois law.

TCPA Claims

The Tenth Circuit has ruled that a liability insurer had no duty to defend a suit brought by the United States and the States of California, Illinois, North Carolina and Ohio alleging that the insured's telemarketing practices had violated the federal Telephone

Consumer Protection Act. In declining to certify these issues to the Colorado Supreme Court), the court ruled in National Union Fire Insurance Company of Pittsburg, PA v. Dish Network LLC, No. 20-1215 (10th Cir. Nov. 2, 2021) that the suit did not seek damages for any covered "bodily injury" or "property damage." Specifically, the court ruled that the suit's claim for statutory damages was a penalty that was uninsurable as a matter of Colorado public policy despite Dish Network's contention that ACE American's holding to this effect had been abrogated by the Colorado Supreme Court's more recent decision in Rooftop Restoration. Further, the court rules that in the complaint the complaint's claim for injunctive relief was not covered as it solely sought recovery for the cost for preventing future violations and that it failed to seek recovery for any covered claim for "bodily injury" or "property damage." As to the issue of "property damage", the court rejected Dish Network's contention that its unwanted telemarketing calls had caused recipients to suffer a "loss of use" of their telephones, observing that such allegations did not appear in the government's complaint.

Violation of Statutes Exclusions

The Eighth Circuit has ruled that a "Distribution of Material in Violation of Statutes" exclusion precluded coverage for under the Fair Debt Collection Practices Act and various common law theories that a consumer brought against a law firm that had aggressively pursued her to recover a debt that was actually owed by someone else. In Rodenburg LLP v. Certain Underwriters at Lloyd's of London, 2021 WL 3745482 (8th Cir. Aug. 25, 2021), the court ruled that the FDCPA was clearly a statute "that prohibits or limits the sending, transmitting, communicating or distribution of material or information..." and that the conduct underlying the invasion of privacy claim was the same conduct underlying the FDCPA claim and therefore clearly "arose out of" acts excluded by this endorsement.

The U.S. Court of Appeals for the Eleventh Circuit has ruled that a policy exclusion for "claims...arising out of...an invasion of policy" precluded any obligation to provide coverage for a lawsuit alleging the transmission of junk faxes in violation of the Telephone Consumer Protection Act of 1991. In upholding a Florida District Court's declaration that the exclusion precluded coverage for class action claims involving the insured's robo-dialing operations, the Court of Appeals ruled in in Horn v. Liberty Insurance Underwriters, Inc,, 998 F.3d 1289 (11th Cir. June 1, 2021) that the class action specifically alleged that insured had intentionally invaded the class members' privacy and sought recovery for those invasions. Writing in dissent, Judge Newsom ruled that "invasion of privacy" connotes only the common law tort and does not extend to violations of statutes such as the TCPA and is, at a minimum, ambiguous.

Allegations that a debt collection agency harassed a debtor and made 53 abusive phone calls that ultimately caused her to miscarry have been held subject to a Recording and Distribution of Material or Information in Violation of Law" exclusion in Zurich's CGL policies, as well as a Violation of Communications or Information Law exclusion. Despite

the insured's argument that these exclusions were limited to the statutory claims against it and that Zurich's duty to defend was still triggered by the plaintiff's common law privacy claims, the Seventh Circuit ruled in Zurich American Ins. Co. v. Ocwen Financial Corp. 990 F.3d 1073 (7th Cir. Mar. 12, 2021) that these exclusions applied not only to statutory claims but to all common law claims based upon conduct that violated the statutes. The court declared that if the plaintiff would not have been injured but for the conduct that violated an enumerated law, then the exclusion applies to all claims flowing from that underlying conduct regardless of the legal theory.

4. SEXUAL MISCONDUCT CLAIMS

In late 2021, the Boy Scouts of America agreed to pay $2.6 billion to resolve 82,500 sexual assault claims. The settlement was largely fund by $800 million from Chubb and $787 million from The Hartford. In late 2021, USA Gymnastics also reached a $380 million settlement with the victims of team doctor Larry Nassar.
Meanwhile, controversy persists with respect to whether claims against the employers of abusive individuals are a covered "occurrence" and what scope should be accorded to sexual assault exclusions.

The Seventh Circuit ruled in The Netherland Ins. Co. v. Macomb Community Unit School District No. 185, No. 20-3510 (7th Cir. Aug. 6, 2021) that allegations that the insured School District had violated Title IX by failing to protect two female students from sexual misconduct by a male student fell outside the scope of liability policies issued to the district by Netherlands and Consolidated Insurance. Applying Illinois law, the court declared that the underlying claims fell within the scope of a sexual misconduct exclusion which applies to "any actual or alleged sexual misconduct or sexual molestation of any person ...". Judge Easterbrook pithily pointed out that "any means any." Unlike the Illinois District Court, which had declared the exclusion to be ambiguous, the court rejected any suggestion that the exclusion is limited to sexual misconduct committed by employees and therefore did not apply to claims arising out of a student's misconduct. In any event, the court ruled that the exclusion would apply even under the limited interpretation adopted by the trial court inasmuch as liability under Title IX could only arise based on the actions of the school district's employees and not due to any misconduct by a student.

The Illinois Appellate Court has ruled that a trial court erred in finding ambiguity in a "related claims" exclusion so as to find "claims made" coverage for the latest in a series of sexual assault claims against a School District employee. In Freeburg Community Consolidated School District No. 70 v. Country Mutual Ins. Co., 2021 IL App (5th) 190098 (Ill. App. Ct. April 8, 2021), the Fifth District ruled that "claims that involve the same, continuous course of misconduct by the same school officials that culminates in the same type of harm from a common, identified sexual predator, while that predator was an employee of the Freeburg School District is a "related series of facts,

circumstances, situations, transactions or events" under any ordinary meaning of the phrase.

5. D&O COVERAGE DISPUTES

In a major victory for policyholders, the Delaware Supreme Court ruled in RSUI Ind. Co. v. Dole Food Company Inc., 248 A.3d 887 (Del. Mar. 3, 2021) that an excess D&O policy that insured a Delaware corporation and its directors and officers should be interpreted under Delaware law notwithstanding the fact that the policy in question was negotiated and issued in California. The court emphasized that the subject matter of the policy was the liability of directors and officers in the corporation and that Delaware law was therefore highly relevant to the scope of this liability. Having found the Delaware law applied, the court refused to find the public policy precluded coverage for the underlying fraud claims.

The court ruled that Delaware does not have a public policy against the insurability of losses occasioned by fraud so strong as to "vitiate the parties' freedom of contract." The court also rejected RSUI's argument that the trial court had erred in failing to allocate defense costs between covered and non-covered claims based on the "relative exposure" that they presented to the insured, ruling instead that the "larger settlement" rule should apply. Nevertheless, the Supreme Court declined to find that RSUI had acted in bad faith, declaring these were close issues that reflected a "bona fide" dispute.

In JP Morgan Securities v. Vigilant Ins. Co., 2021 WL 5492781 (N.Y. Nov. 23, 2021), the New York Court of Appeals has reinstated a trial court's finding that Bear Stearns was entitled to "wrongful acts" coverage for $140 million of a disgorgement payment that it made to the SEC to resolve various allegations of unfair trading and deceptive market activity. In reversing the Appellate Division's declaration that this payment was not covered, the Court of Appeals ruled that the payment was not a penalty imposed by law outside the policy's definition of "loss." In this case, the court found that a "penalty" is a monetary sanction designed to address a public wrong that is sought for purposes of deterrence of punishment rather than to compensate injured parties for their loss.

Further, the court ruled that where a sanction has both compensatory and punitive components, it should not be characterized as punitive in the context of interpreting insurance policies. As a result, the court found that Bear Stearns had demonstrated that in the course of its negotiations with the SEC the $140 million payment was calculated based on valuations of gains that its customers made as the result of the improper trading conduct and the corresponding injuries suffered by investors as a consequence of the challenged trading practices. As a result, the court found that Bear Stearns had shown that the $140 million disgorgement payment was calculated based on wrongfully obtained profits as a measure of the harm or damages caused by the alleged wrongdoing and was therefore in the nature of a compensatory remedy, rather than a

penalty. The court also found that requiring coverage was consistent with the expectations of a reasonable insured purchasing a policy insuring "the wrongful acts of a securities broker and dealer subject to regulatory oversight by the SEC. A lengthy dissent offered by Justice Rivera argued that the payment was clearly a penalty, as the "primary purpose of disgorgement is to deter wrongdoing by depriving the wrongdoer of wrongfully obtained profits, their own or those of another party, and thus punish the wrongdoer."

On a certified question from the Ninth Circuit, the Arizona Supreme Court ruled in in Apollo Education Group Inc. v. National Union Fire Insurance Company of Pittsburgh, PA, 480 P.3d 1225 (Ariz. Feb. 17, 2021) that the standard for evaluating whether a D&O insurer was unreasonable in withholding consent to the policy holder's settlement should be determined from the perspective of the insurer and not the policy holder. The Supreme Court declared that "the insurer must independently assess and value the claim, giving fair consideration to the settlement offer, but need not prove a settlement simply because the insured believes it is reasonable." The Court distinguished its 1987 opinion in USAA v. Morris, in which it had declared that "the test is to whether the settlement was reasonable and prudent is what a reasonably prudent person in the insured's position would have settled for on the merits on the claimant's case," as Morris was decided on the basis of the fact that the insurer had a duty to defend whereas D&O policies do not contain duty to defend language.

A District Court has ruled that allegations that corporate directors abetted various fraudulent transfers and engaged in civil conspiracy by approving an underlying corporate transaction triggered coverage under AIG's D&O policy and that AIG had failed to fulfill its policy obligations by failing to advance its $1 million Side A limit. In XL Specialty Ins. Co. v. AIG Specialty Ins. Co., No. 20-6540 (C.D. Cal. July 13, 2021), Judge Phillips declared that AIG must reimburse XL for sums that it had paid pursuant to an excess policy, rejecting AIG's contention that XL was primarily liable for the defense cost of its own insureds and could not therefore obtain subrogation or contribution from it.

The Eighth Circuit ruled in Verto Medical Solutions, LLC v. Allied World Specialty Ins. Co., 996 F.3d 912 (8th Cir. May 11, 2021) that a Missouri District Court erred in granting summary judgment to a D&O insurer based on a contractual-liability exclusion in its policy. Unlike the District Court, the Eighth Circuit ruled that Endorsement 11 to the policy, which Allied World had relied on and which excluded "loss in connection with any claim... based upon, arising from, or in consequence of any actual or alleged liability of any Insured under any express contract or agreement" was ambiguous inasmuch as a second exclusion (Endorsement 13) also purported to replace the original contractual liability exclusion in the policy with different language. In light of the uncertainty resulting from these conflicting policy terms, the court held that Endorsement 11 was ambiguous and therefore unenforceable.

By contrast, the Sixth Circuit ruled in Global Fitness Holdings, LLC v. Navigators Management Co., 2021 WL 1994593 (6th Cir. May 11, 2021) that a class action claim brought against a chain of physical gym and fitness clubs in which the claimants alleged that the insured had misrepresented and concealed the terms of membership agreements and overcharged customer accounts for services provided were subject to an exclusion in Navigators D&O policy for losses relating in any way to "liability under any contract or agreement ...". Further, the court declined to find that the claims in question fell within the exclusion's exception for liability that the insured would have had in any event without regard to the contract or agreement.

6. ENVIRONMENAL AND MASS TORT CLAIMS

While not the dominant source of insurance litigation that it once was, environmental and mass torts continue to generate important new rulings with respect to diverse issues, including trigger of coverage, allocation and pollution exclusions. Meanwhile, the growing number of liability claims involving "forever chemicals" and climate change suggest that more insurance claims are in the offing.

Long Tail Issues

In a lengthy opinion arising out of the asbestos problems in Libby, Montana, the Montana Supreme Court ruled in National Indemnity Company v. State of Montana, 2021 MT 300 (Mont. Nov. 23, 2021) that the claims against the State were not a "known loss" under a policy issued in 1973 and that a "sudden and accidental" exclusion in the 1973 policy was ambiguous as insofar as the insurer sought to apply it to all discharges not really those for which the State was responsible. Also, even though the NIC policy was only in effect for two years, the court ruled that the failure of the insured to include any express provision calling for allocation precluded a "time on the risk" approach and instead declared that it would follow an "all sums" analysis.

Justices Davies and Gustavson issued a separate concurring opinion expressing concern that the court's acknowledgment of an insurer's right to recoupment in a case involving sophisticated parties such as the State should not be applied broadly to all policy holders in all circumstances. In particular, she expressed concern that such a remedy could be pernicious when applied in the context of recoupment of defense costs. Writing in dissent, Justice McKinnon argued that NIC had not breached its duty to defend and was therefore not estopped to contest coverage. Further, she argued that the State's knowledge of the dangers posed by asbestos dust since at least 1956 mandated a finding that these were a "no loss" under a policy issued between 1973 and 1975. Specifically, she disputed the majority of this conclusion that NCI's insistence that the State pay a *pro rata* share of defense costs was unreasonable or constituted a breach.

"As Damages"

The South Dakota Supreme Court has ruled in Sapienza v. Liberty Mutual Fire Ins. Co., 2021 S.D. 35 (S.D. June 2, 2021) that a liability insurer's coverage for damages extends to all payments to satisfy the insured's liability and are not limited to sums paid in compensation to third parties. As a result, the court ruled that Liberty Mutual was obliged to pay for the cost of complying with an injunctive remedy in rebuilding the insured's home. The court ruled that this broader conception of damages was consistent with the common and ordinary meaning of that term, as confirmed by numerous dictionary definitions. The court ruled that is interpretation also reflected the fact that these costs were predicated on the insured's legal liability for what would otherwise had to be assessed as money damages had the court determined that a monetary payment to the neighbors would have been adequate to remedy the harm suffered by the insured's conduct. The court also distinguished between injunctive remedies that restrict action and those that compel it, as in this case.

A federal district court has ruled in Motorists Mutual Insurance Company (Mut. Ins. Co. v. Quest Pharmaceuticals, Inc., No. 19-187 (W.D. Ky. May 5, 2021)) that a pharmaceutical distributor was not entitled to coverage for dozens of lawsuits in which governmental entities are seeking to recover costs due to the opioid epidemic that are attributable in part to the insured's distribution of drugs. The court distinguished the Seventh Circuit's opinion in H.D. Smith as being based on Illinois principles of contract interpretation that are not followed in Kentucky. Citing a 2000 opinion of the Kentucky Supreme Court that had found "because the bodily injury to be synonymous with "for bodily injury," the District Court ruled that there was no coverage in this case because none of the underlying claimants had themselves suffered bodily injury for which they were seeking damages.

Exclusions

The Ohio Supreme Court has ruled that a standard exclusion in a commercial property insurance policy for damage caused by "water that backs up or overflows from a sewer" includes damage caused by sewage carried into an insured property by a backup or overflow event. In AKC, Inc. dba Cleantech v. United Specialty Ins. Co., No. 2021-Ohio 3540 (Ohio Oct.6, 2021), the court found that damage to a night club after sewage backed up from a local sewer system was excluded, rejecting the insured's argument that the exclusion was ambiguous because it did not include the word "sewage. The Sixth Circuit has affirmed a Kentucky judge's declaration that a pollution exclusion in a D&O policy precluded coverage for allegations that the insured criminally concealed high levels of coal dust in its mines that caused Black Lung disease. In Barber v. Arch Ins. Co., 2021 WL 2828021 (6th Cir. July 7, 2021), the court rejected the insured's argument that coal dust is not a pollutant. The court also rejected arguments that the criminal proceedings did not arise out of the discharge or release of coal dust. While acknowledging that there might be other causes, such as the insured's criminal

conduct, the Court held that "arising from... does not require a direct proximate causal connection but instead merely requires some causal relation or a connection."

7. BAD FAITH

Consent Judgments

The Minnesota Supreme Court has clarified the means by which courts must evaluate so-called "Miller-Shugart" consent judgments in cases where some damages are covered and others are not. In King's Cove Marina LLC v. Lamberts Commercial Construction, LLC, 2021 WL 1396596 (Minn. April 16, 2021), the Supreme Court ruled that Exclusion L in the CGL Form precludes coverage for damage to the insured's own completed work, including damages that occurs after the work is completed. The court rejected any suggestion that the "products-completed operations hazard" is a distinct category of coverage finding, instead that it merely set forth a different applicable limit for certain categories of claims. Second, while therefore finding that part of the underlying case was not covered by insurance, the Supreme Court diverged from the intermediate appellate court, which had ruled that the absence of any internal allocation between covered and non-covered claims in a Miller-Shugart agreement renders it *per se* unreasonable and unenforceable.

Furthermore, the court declared that whether a Miller-Shugart settlement is reasonable is not dependent solely on how much of the settlement is covered. It concluded, therefore, that courts should apply a two-step inquiry wherein the District Court should first consider the overall reasonableness of the settlement. If the settlement is reasonable, the court should then consider "how a reasonable person in the position of the insured would have valued and allocated the covered and uncovered claims at the time of the settlement." Finally, the court declared that the insured bears the burden of proof on allocation.

In Wood v. Milionis Construction Inc. 2021 WL 3412516 (Wash. Aug. 5, 2021). The Washington Supreme Court has reinstated a $1.7 million consent judgment that a divided panel of the Court of Appeals had erred in substituting its own judgment for that of the trial judge with respect to whether the amount of the judgment reflected the insured's damages. Whereas the Court of Appeals had pointed to documents in which defense counsel consistently valued the claims at $400,000 or less, the Supreme Court held that the trial court had conducted an appropriate reasonableness analysis and that the Court of Appeals had failed to consider the value of the plaintiff's extra contractual claims as well as allowable attorney's fees.

Damages

In a dispute between a landlord and its property insurer with respect to lost rental income due to Hurricane Frances, the Florida Supreme Court ruled in Citizens Property

Ins. Corp. v. Manor House LLC, 2021 WL 208455 (Fla. Jan. 21, 2021) that Florida law does not allow insureds to recover extra-contractual, consequential damages in a first-party breach of insurance contract action brought by an insured against its insurer, not involving suit under section 624.155, Florida Statutes (2019). In a major victory for insurers, the Florida Supreme Court ruled that "extra-contractual, consequential damages are not available in a first-party breach of insurance contract action because the contractual amount due to the insured is the amount owed pursuant to the express terms and conditions of the insurance policy. Extra-contractual damages are available in a separate bad faith action pursuant to section 624.155 but are not recoverable in this action against Citizens because Citizens is statutorily immune from first-party bad faith claims."

Discovery

The Texas Supreme Court has ruled in In Re USAA General Ind. Co., 624 S.W.3d 782 (Tex. Mar. 4, 2021) that an auto insurer may not categorically refuse to submit to a 30(B)(6) deposition in a UIM dispute where it is contesting both the amount of damages and the liability of the other motorist. While refusing to grant USAA's motion to quash entirely, this Supreme Court did caution that the discovery should be proportional and may not intrude into matters that are privileged or beyond the scope of dispute. The case was therefore remanded with instructions to the trial court to allow portions of USAA's motion to quash that had exceeded the appropriate scope for the deposition or dealt with privileged matters.

Failure to Settle Claims

The U.S. Court of Appeals for the Seventh Circuit ruled in Creation Supply, Inc. v. Selective Ins. Co. of the Southeast, 995 F.3d 796 (7th Cir. April 26, 2021) that an Illinois District Court erred in awarding bad faith damages against a liability insurer. The court held that Section 155 only imposes liability in cases where the insurer's liability is undecided or the amount of loss undecided or whether there has been an unreasonable delay in settling a claim. In this case, the court ruled that prior rulings in the state court had declared not only that Selective owed coverage but had defined the amount of its loss as the $195,000.00 that the insured spent to resolve an intellectual property claim against it, "nothing more and nothing less." The Seventh Circuit refused to allow the insured to pursue a claim under Section 155 for additional consequential damages that had flowed from the insurer's original failure to pay this loss. Further, the court refused to find that Section155 extended to the alleged delay of Selective in paying the judgement after the court found coverage, declaring that Section 155 applies to the insured's failure to settle a claim against the insured.

The Eleventh Circuit has ruled in Eres v. Progressive American Ins. Co., 998 F.3d 1273 (11th Cir. June 1, 2021) that a Florida District Court did not err in holding that an automobile liability insurer did not act in bad faith in failing to settle a wrongful death

suit involving an intoxicated insured in light of the fact that Progressive had repeatedly offered its $20,000 policy. Although Progressive had sought to add language protecting its insureds from future subrogation claims which the claimants' attorney characterized as a rejection of the release, the court noted that Progressive had stated that counsel was free to strike out any portion of the draft release language that he found objectionable. The court observed that under Florida law an overbroad release can create a factual issue regarding bad faith but held in this case that there was no factual dispute in light of the uncontroverted evidence that Progressive had offered to strike any release language that the claimant objected to.

Post-Litigation Conduct

The Kentucky Supreme Court has ruled in Nichols vs. Zurich American Ins. Co., 2020-SC-0284 (Ky. Sept. 30, 2021) that lower courts erred in holding that Zurich did not act bad faith in raising in belatedly disputing a UIM claim after years of acting as if the claim was covered. In addition to holding that Zurich had acted with reckless disregard in raising this defense, the Supreme Court ruled that although Nichols had no right to the entire claim file, particular post-litigation documents, he was entitled to the internal Zurich documents relating to the insurer's initial denial of his claim. "Given the extraordinary delay between Nichols' notice to Zurich and Zurich taking any action, as well as Zurich's failure to meaningfully engage with Nichols for years before it ever sought reformation, evidence of Zurich's initial analysis regarding its own liability is highly probative to Nichols' bad-faith suit." The court cautioned, however, that Zurich's behavior in this case was an "outlier" and the trial courts should be vigilant and cautious prior to admitting any post-litigation evidence.

Safe Harbor Statutes

On certified questions from the Eleventh Circuit, the Georgia Supreme Court ruled in GEICO Ins. Co. v. Whiteside, 311 Ga. 346, 857 S.E.2d 654 (Ga. April 19, 2021) that an insured's failure to notify her auto insurer of a law suit that ultimately resulted in a $2.9 million default judgment could sustain a bad faith claim against GEICO for its claimed negligence in rejecting a pre-suit demand to settle for $15,000. The Supreme Court ruled that the insured's breach of the notice condition in the policy (as codified by OCGA § 33-7-15 (b)) did not interrupt the causal chain between GEICO's rejection of the pre-suit demand and the eventual default judgment. The court ruled that OCGA § 33-7-15 (b) only pertain to contractual obligations under a policy and therefore did not waive the tort claim arising from the failure to settle.

However, the court left open the possibility that lack of notice could be the sole cause of an award of damages against an insured-as in the case of a failure to cooperate. The Supreme Court also declared that even though the insured lost its contractual rights to coverage due to its failure to give notice, the tort liability of GEICO became fixed during its pre-suit handling of the case when it rejected the $15,000 settlement demand.

Finally, the court rejected GEICO's argument that the $2.7 million default judgment was not the proper measure of damages for its claimed negligence, despite GEICO's contention that doing so violated its rights to due process since it had been denied the opportunity to defend its insured and contest the plaintiff's claims of liability and damages.

8. MISCELLANEOUS RULINGS OF CONSEQUENCE

In a tripartite case that had been pending before it for nearly two years, the Florida Supreme Court has ruled in Arch Ins. Co. v. Kubicki Draper, LLC, 2021 WL 2230283 (Fla. June 3, 2021) that a professional liability insurer could bring a malpractice claim against appointed defense counsel based on the subrogation clause in its policy. As had the courts below, the Supreme Court ruled that the insurer was not in privity with the law firm, nor was it an intended third-party beneficiary of the relationship between the law firm and the insured. However, whereas the lower courts had therefore ruled that the insurer lacked standing to pursue a malpractice claim against the firm, the Supreme Court declared that Arch could bring an action based upon the subrogation clause in its professional liability insurance policy.

Inasmuch as Arch was contractually subrogated to the rights of its insured law firm, which included claims for legal malpractice against counsel retained by defendant, the Supreme Court held that the insurer was likewise entitled to bring such an action. Whereas the law firm had argued that the supreme court had generally prohibited assignment of legal malpractices claims on the grounds of public policy, the Supreme Court declared that there are exceptions when public policy is inapplicable including this one and that Florida public policy does not support shielding a law firm from accountability for its professional malpractice. The court observed that subrogation exists to hold the premium rates down by allowing insurers to recover indemnification payments from the tortfeasor who caused the injury and that allowing an insurer to recoup payments from a law firm who created a liability by missing a statute of limitations defense to the detriment of the insured was actually consistent with Florida public policy.

A federal bankruptcy court has granted a Japanese insurer's motion to dismiss an adversary proceeding that had been brought against it by the Trust that was created to adjust personal injury suits by individuals who suffered injury due to defective Takata air bags. In In Re TK Holdings, Adv. Proc. No. 20-51004 (D. Del. (Bkr.) Dec. 20, 2021), Judge Shannon rejected the Trust's claim its effort to compel MSI to pay on an accelerated basis was within the jurisdiction of the Bankruptcy Court as relating to the enforcement of the bankruptcy reorganization plan for Takata Corporation. To the contrary, the Bankruptcy Court ruled that this was clearly an insurance coverage dispute. Having rule that this was a "non-core" proceeding, Judge Shannon ruled that he was bound to give effect to a mandatory forum selective clause in the MSI policies

that required that all disputes concerning the policy be resolved in a Japanese court in accordance with Japanese law.

A federal district court in Kentucky ruled in Travelers Indemnity Company of America v. Bernard Tew, No. 20-292 (E.D. Ky. Nov. 17, 2021) that tax refund fraud claims involving the insured failed to seek recovery for "bodily injury" or "property damage" under the insured's CGL policies. Notwithstanding the insured's claims that these tax refund claims involved a "loss of use" of "property", Judge Wood declared that money is not a form of "tangible property" under Kentucky law. The court observed that "money is intangible property, as it does nothing more than represent value having no intrinsic value of its own."

A narrowly divided Nevada Supreme Court has ruled that a general liability insurer is entitled to recoup defense costs that it paid under protest in a case that it had no duty to defend. On a certified question from the Ninth Circuit, the majority declared in Nautilus Insurance Company v. Access Medical, LLC, 482 P.3d 683 (Nev. Mar. 11, 2021) that "when a court determines that an insurer never owed a duty to defend, the insurer expressly reserved its right to seek reimbursement in writing after defense was tendered, and the policy accepted the defense from the insurer, then the insurer is entitled to that reimbursement. Three justices dissented, arguing that a court should not rely on equitable principles to imply contractual terms where an express agreement existed between the parties that lacked such terms, nor was it appropriate to permit Nautilus to create a remedy through a unilateral reservation of rights that are not set forth in the agreed terms of the policy itself.

9. THE EVOLVING INSURANCE MARKETPLACE

S&P Global Ratings reported in 2021 that the COVID-19 pandemic has cost global multiline insurers about $8 billion in 2020. Although insurers still earned a net profit of $36 billion, that result was down from $56 billion in 2019 and $48 billion in 2018. In March, The Hartford's Board of Directors rejected persistent efforts by Chubb to buy it. Meanwhile, merger talks between AON and Willis Towers Watson collapsed in the face of sustained pressure from European regulators and a law suit by the U.S. Justice Department.

In August, an Atlanta jury returned a guilty verdict last week against former Georgia Insurance Commissioner Jim Beck on 37 counts of fraud and money laundering for stealing more than $2.5 million from the state-chartered Georgia Underwriting Association. In November, Allstate announced plans to sell most of its Northbrook, Illinois headquarters complex for $232 million. A new Optis Partners report states that the 339 mergers and acquisitions among agents and brokers during the first half of 2021 were up 18% over 2020. Marsh & McLennan, which was formed 118 years ago when Henry Marsh of Illinois and Donald McLennan of Minnesota merged their brokerages announced in 2021 that it will henceforth be known simply as "Marsh

McLennan," the boldest branding move since Cozen & O'Connor dropped its ampersand two decades ago.

10. APPEALS TO WATCH IN 2022

In Whiteside v. GEICO Ind. Co., No. 18-15074 (11th Cir. Sept. 28, 2021), the Eleventh Circuit has asked the Georgia Supreme Court to answer:

> 1. When an insurer has no notice of a lawsuit against its insured, does O.C.G.A. § 33- 7-1...relieve the insurer of liability from a follow-on suit for bad faith?
> 2. If the notice provisions do not bar liability for a bad-faith claim, can an insured sue the insurer for bad faith when, after the insurer refused to settle but before judgment was entered against the insured, the insured lost coverage for failure to comply with a notice provision?
> 3. Does a party have the right to contest actual damages in a follow-on suit for bad faith if that party had no prior notice of or participation in the original suit?

In Lionbridge Technologies LLC v. Valley Forge Ins. Co., No. 21-1698, the First Circuit is considering whether a Massachusetts judge erred in refusing to require an insurer to defend trade secret claims and whether, even if the court was correct in holding that there was no duty to defend, the insurer was nonetheless obligated to reimburse the insured for all defense costs incurred up until the date that the court ruled that no such duty existed.

On March 4, 2021, the Ohio Supreme Court heard argument in Motorists Mutual Insurance Co. v. Ironics Inc. (2020-0306). At issue is whether the Court of Appeals erred in ruling that Motorists Mutual had allegations that the insured's inclusion of a defective component in its glass bottles that caused them to become brittle and break had regulated in "property damage."

On September ,8 2021, the Ohio Supreme Court heard oral argument in Acuity Ins. Co. v. Masters Pharmaceutical Co. on the issue of whether a liability insurer must indemnify a pharmaceutical manufacturer for damages awarded to governmental entities for the cost of responding to the opioid epidemic.

In Vermont Mutual Ins. Co. v. Poirier, No. SJC-13209, the Vermont Supreme Court is presently considering whether an award of attorney's fees against a policyholder for engaging in unfair trade practices in violation of the Massachusetts Consumer Protection Act (G.L. c.93A) must be paid by a liability insurer as constituting sums that the insured is legally obligated to pay as damages because of bodily injury.