RECENT DEVELOPMENTS IN INSURANCE COVERAGE

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I. Introduction 580
II. 2018 Case Review: Notable D&O and Bad Faith Decisions 581
A. D&O: SEC Disgorgement Is a Penalty and Not Covered Loss—*J.P. Morgan Securities, Inc. v. Vigilant Insurance Co.*, 84 N.Y.S.3d 436 (N.Y. App. Div. 2018). 581
B. D&O: State of Incorporation Trumps Principal Place of Business in Choice-of-Law Analysis—*Arch Insurance Co. v. Murdock*, No. N16C-01-104 EMD CCLD, 2018 WL 1129110 (Del. Super. Ct. Mar. 1, 2018). 582
C. Bad Faith: No Coverage for Claim and Resulting Settlement Tainted by Collusion—*Travelers Indemnity Co. of Connecticut v. Richard McKenzie & Sons, Inc.*, 326 F. Supp. 3d 1332 (M.D. Fla. 2018). 582

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D. Bad Faith: Excess Insurer Entitled to Judgment on Equitable Subrogation Claim Against Primary Insurer Due to Primary Insurer's Failure to Settle Claim Within Policy Limit—*Colony Insurance Co. v. Colorado Casualty Insurance Co.*, No. 2:12-cv-0172 RFB NJK7, 2018 WL 3312965 (D. Nev. July 5, 2018). 584
E. Bad Faith: Insurer Not Entitled to Create New Evidence to Support Earlier Coverage Decision—*Schultz v. GEICO Casualty Co.*, 429 P.3d 844 (Colo. 2018). 586
F. Bad Faith: Insurer Delayed Offering Policy Limit to Settle Plane Crash Claim Under No-Fault Voluntary Settlement Provision—*Gruber v. Estate of Marshall*, No. 14 CV 302 (Dist. Ct. Kan. Nov. 12, 2018). 587
G. Bad Faith: Despite Insurer's Tender of Policy Limit Nine Days After Accident, Insurer Failed to Act with Due Regard for Insured's Interests—*Harvey v. GEICO General Insurance Co.*, No. SC17-85, 2018 WL 4496566 (Fla. Sep. 20, 2018). 589
III. Up in Smoke? Examining Recent Developments in Insurance Coverage Pertaining to Marijuana-Related Claims 591
A. Sixth Circuit Holds Criminal Act Exclusion Bars Coverage for Property Damage Caused by Tenant's Illegal Marijuana Grow Operation 592
B. Other Federal Courts Have Reached Varying Conclusions Regarding Marijuana-Related Claims 593
C. Likely Marijuana-Related Coverage Questions That Still Exist 598
IV. Negligent Hiring, Retention, and Supervision of an Employee May Constitute an "Occurrence" Under CGL Policy—*Liberty Surplus Insurance Corp. v. Ledesma & Meyer Construction Co.* 601
V. It Cannot Be Hearsay If You Said It: Statements of Brokers as Representations of the Insurer in Minnesota 608
VI. E-Scooters Are Everywhere Now, but Insurance Coverage for Riders Is Nowhere 610

I. INTRODUCTION

Damian J. Arguello

In this update, the ICLC committee covers considerable ground, including notable D&O and bad faith decisions; cannabis coverage issues; whether "occurrence" under the CGL policy extends to negligent hiring, retention, and supervision of an employee who sexually assaults someone; the legal effect of statements made by an insurance producer in Minnesota; and an electric scooter user's liability coverage if the user injures someone with an e-scooter.

II. 2018 CASE REVIEW: NOTABLE D&O AND BAD FAITH DECISIONS

Jeffrey J. Ward, Charles W. Chotvacs, and Jason C. Reichlyn

A. *D&O: SEC Disgorgement Is a Penalty and Not Covered Loss—* J.P. Morgan Securities, Inc. v. Vigilant Insurance Co., *84 N.Y.S.3d 436 (N.Y. App. Div. 2018).*

In *J.P. Morgan Securities, Inc. v. Vigilant Insurance Co.*—a long-standing coverage dispute arising from Bear Stearns' 2006 settlement of an SEC proceeding—the insureds sought coverage for amounts that Bear Stearns paid to the SEC as "disgorgement." On September 20, 2018, the New York Supreme Court, Appellate Division, held that the subject D&O policies, which expressly stated that covered "Loss" did not include "fines or penalties imposed by law," did not provide coverage for the "disgorgement" paid to the SEC because the U.S. Supreme Court has "conclusively defined the nature of the SEC disgorgement remedy as a penalty, not a loss."[1]

In *Kokesh v. SEC*,[2] the Supreme Court held that SEC disgorgement is a penalty subject to the five-year statute of limitations in 28 U.S.C. § 2462 applicable to any "proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise," reasoning that SEC disgorgement punishes wrongdoing that harms the public interest and does not compensate the victims of securities law violations.[3] Based on the Supreme Court's reasoning, the *J.P. Morgan* court determined that the $140 million Bears Stearns paid to the SEC was a "penalty," even though that amount was designated as "disgorgement," and therefore held that the payment fell within the "fines or penalties" exception from the definition of "Loss."[4] The court acknowledged "that the disgorgement payment was later placed in a Fair Fund for distribution [to injured investors] and could be used to offset Bear Stearns's civil liability," but denied coverage because the benefit for investors "does not change the fact that disgorgement orders 'are intended to punish' and 'represent a penalty.'"[5]

1. J.P. Morgan Sec., Inc. v. Vigilant Ins. Co., 84 N.Y.S.3d 436, 441 (N.Y. App. Div. 2018)
2. 137 S. Ct. 1635 (2017).
3. *Id.* at 1639, 1641.
4. *J.P. Morgan*, 84 N.Y.S.3d at 444.
5. *Id.* (citing *Kokesh*, 137 S. Ct. at 1645).

B. *D&O: State of Incorporation Trumps Principal Place of Business in Choice-of-Law Analysis*—Arch Insurance Co. v. Murdock, *No. N16C-01-104 EMD CCLD, 2018 WL 1129110 (Del. Super. Ct. Mar. 1, 2018).*

In *Arch Insurance Co. v. Murdock*, Dole Food Company sought coverage for a settlement of two shareholder lawsuits brought against it and two of its officers in Delaware.[6] Dole's D&O insurers argued that California law applied to the policies' interpretation because Dole's management and board were located in California and because the events giving rise to the underlying lawsuits and their settlement took place in California.[7] The insureds countered that Delaware law applied because Dole is a Delaware corporation and because Delaware law governed the underlying shareholder lawsuits that were brought in Delaware.[8]

The Delaware Superior Court held that Delaware law controls the interpretation of a D&O insurance policy issued to an insured incorporated under Delaware law.[9] The court adopted the holding in *Mills Ltd. Partnership v. Liberty Mutual Insurance Co.*,[10] the first time that eight-year-old decision had been cited as choice-of-law precedent by another court. According to the *Murdock* court, "[w]hen the insured risk is the directors' and officers' 'honesty and fidelity' to the corporation, and the choice of law is between the headquarters or the state of incorporation, the state of incorporation has the most significant relationship."[11]

C. *Bad Faith: No Coverage for Claim and Resulting Settlement Tainted by Collusion*—Travelers Indemnity Co. of Connecticut v. Richard McKenzie & Sons, Inc., *326 F. Supp. 3d 1332 (M.D. Fla. 2018).*

In *Travelers Indemnity Co. of Connecticut v. Richard McKenzie & Sons, Inc.*, Travelers' insured was hired to operate and manage the claimant's citrus grove. The claimant discovered purported billing irregularities and pressed the State Attorney to charge the insured with theft, which the State Attorney subsequently did.[12] Additionally, the claimant sued the insured, alleging breach of contract and breach of fiduciary duty, and demanding an equitable accounting for the money paid under the management contract.[13] Specifically, the claimant alleged that the insured acted with intent

6. Arch Ins. Co. v. Murdock, No. N16C-01-104 EMD CCLD, 2018 WL 1129110, at *1 (Del. Super. Ct. Mar. 1, 2018).
7. *Id.* at *8.
8. *Id.*
9. *Id.* at *11.
10. No. 09C-11-174 FSS, 2010 WL 8250837 (Del. Super. Ct. Nov. 5, 2010).
11. *Id.* at *10 (quoting Mills Ltd. P'ship v. Liberty Mut. Ins. Co., No. 09C-11-174 FSS, 2010 WL 8250837, at *6 (Del. Super. Ct. Nov. 5, 2010)).
12. Travelers Indem. Co. of Conn. v. Richard McKenzie & Sons, Inc., 326 F. Supp. 3d 1332, 1336 (M.D. Fla. 2018).
13. *Id.*

to permanently deprive the claimant of its monies and appropriate those monies for its own use. The claimant sought breach of contract damages that included the money paid to the insured and profits lost due to mismanagement of the grove.[14]

During discovery, the claimant learned of CGL coverage provided by Travelers and amended the complaint to include a negligence claim. The claimant also provided the insured with an "expert" opinion letter from the grove's replacement manager stating that the net income lost due to the insured's negligent care and maintenance of the grove would exceed $2.96 million over the coming years.[15] The insured's attorney never retained a rebuttal expert to analyze or refute the damages calculation. Instead of proceeding to trial, the claimant and insured agreed to settle. Under the settlement, the insured agreed to pay $200,000 to resolve the breach of contract, breach of fiduciary duty, and equitable accounting claims.[16] As to the negligence claim, the insured agreed to a consent judgment against him for $2.96 million, with an agreement by the claimant not to execute against the insured and an assignment of all rights under the CGL policy (which is known as a *Coblentz* agreement under Florida law).[17] The claimant also agreed to recommend favorable treatment of the insured to the State Attorney.[18]

Travelers filed a declaratory judgment action against the insured and the claimant. As assignee of the insured's rights under the policy, the claimant counterclaimed for breach of contract and a declaration that Travelers owed a duty to indemnify the claimant for the consent judgment. Travelers moved for summary judgment. The court granted Travelers' motion, noting that the claimant must show that the policy covered the settlement, that Travelers wrongfully refused to defend the insured, that the settlement was reasonable, and that the parties settled in good faith and without colluding.[19]

The court found that two exclusions barred coverage for the settlement.[20] First, the policy excluded coverage for property damage expected or intended by the insured, and the court determined that the claimant alleged damage from an intentional scheme to misappropriate the claimant's money and property.[21] Second, the policy excluded coverage for property damage to that particular part of real property on which the insured

14. *Id.*
15. *Id.* at 1337.
16. *Id.*
17. *Id.*
18. *Id.* at 1348.
19. *Id.* at 1337.
20. *Id.* at 1339–40.
21. *Id.*

was performing operations, which the court found excluded all damage to the citrus grove.[22] As to the settlement's reasonableness, the court determined that it was wholly unreasonable because it failed to adequately account for operating costs and a reduction in crop yield due to a statewide citrus disease, and that the damages resulted from theft or breach of contract, not negligence.[23] Lastly, the court found that both collusion and bad faith tainted the settlement.[24] Among other things, the court found that the insured's counsel accepted the claimant's damages figure at face value without any independent investigation, that several defenses likely would have diminished or eliminated the insured's liability for negligence, and that the settlement included a provision requiring the claimant to recommend a favorable resolution in the criminal action, which defense counsel admitted was more important to the insured than minimizing civil liability.[25]

D. *Bad Faith: Excess Insurer Entitled to Judgment on Equitable Subrogation Claim Against Primary Insurer Due to Primary Insurer's Failure to Settle Claim Within Policy Limit*—Colony Insurance Co. v. Colorado Casualty Insurance Co., *No. 2:12-cv-0172 RFB NJK7, 2018 WL 3312965 (D. Nev. July 5, 2018).*

An HVAC company purchased a commercial auto policy from Colorado Casualty Insurance Co. ("Colorado") and a commercial liability umbrella policy from Colony Insurance Co. ("Colony"), each with a $1 million limit, in *Colony Insurance Co. v. Colorado Casualty Insurance Co.*[26] The insured's employee was involved in a two-car accident during the course of his employment, causing damage to both vehicles and injuring the other driver.[27] The accident was immediately reported to Colorado and, within two months, Colorado paid the accident victim's property damage claim because it believed the insured's liability was reasonably clear.[28] Within four months of the accident, Colorado learned from the claimant's counsel that an MRI had been conducted and that the claimant was experiencing pain due to a herniated disk.[29] The claims adjuster advised Colorado to settle the bodily injury claim because liability was clear.[30] Over the course of the next eight months, Colorado learned that the claimant needed back surgery and

22. *Id.*
23. *Id.* at 1340–46.
24. *Id.* at 1347–48.
25. *Id.* at 1347–49.
26. Colony Ins. Co. v. Colo. Cas. Ins. Co., No. 2:12-cv-0172 RFB NJK7, 2018 WL 3312965, at *1 (D. Nev. July 5, 2018).
27. *Id.*
28. *Id.* at *2.
29. *Id.*
30. *Id.*

continued to experience severe pain, that there would be future medical expenses, that there was a strong possibility of permanent impairment, and that the claimant was the sole provider for his family.[31] The claims adjuster reiterated internally that there was clear liability for the claim.

One year and ten months after the accident, the claimant's counsel sent Colorado an offer to settle the claim for its policy limit.[32] Colorado responded that, based on the documentation, it was not a policy-limit case, but that it did not dispute liability.[33] Colorado did not provide a counteroffer.

The claimant and his wife filed suit against the insured, the insured's owner, and the driver of the car.[34] Shortly thereafter, the claimant's counsel informed Colorado that the claimant underwent emergency spinal fusion surgery and was not doing well. Colorado's claims adjuster requested certain medical billing records but assured counsel that the failure to settle had nothing to do with liability, which Colorado had accepted and was not disputing.[35]

Upon learning that suit had been filed, Colony (the excess insurer) demanded that Colorado resolve the claim within its primary policy limits, while also expressing its belief that Colorado was acting in bad faith.[36] The claimant's counsel then served the insured and its owner with a $999,999.99 offer of judgment, which Colorado let lapse.[37] At the time of the offer, Colorado was aware of the claimant's continuing medical treatment and $300,000 in medical expenses, and that the claimant was the sole provider, had lost wages, and was likely to be permanently disabled.[38] Colorado also was aware that the driver suffered from chronic fatigue syndrome, took pain medication, had been involved in prior accidents while driving insured vehicles, and had passed away. Further, Colorado understood from its experience that the case had a settlement value of at least its policy limit, which would increase with time.[39]

Following the offer of judgment, Colorado retained new counsel, disputed liability for the insured, and declined a defense for the driver.[40] However, Colorado did not obtain any information that decreased the certainty of the insured's liability or demonstrated that the value of the claim was less than the previous offers. Finally, three and a-half years after the accident, the claimant sent a $1.95 million settlement offer, which Colony

31. *Id.* at *3.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at *4.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*

demanded Colorado pay in its entirety.[41] Colorado refused to pay the full amount but agreed to contribute its remaining policy limit. Colony contributed approximately $950,000 towards the settlement.[42]

Colony filed suit against Colorado for equitable subrogation, seeking reimbursement for the costs Colony paid towards the settlement based upon Colorado's alleged bad faith failure to settle the claim within the primary policy limit. Following a five-day bench trial, the court ruled in favor of Colony.[43] The court found that Colorado acted in bad faith when it failed to settle the claim when liability was clear and when the claim would have settled within Colorado's primary limit.[44] The court determined that Colorado had no reasonable basis to deny liability or delay settlement.[45] The bad faith conduct caused damage to the insured, and hence Colony, because it resulted in the settlement amount reaching Colony's excess layer, thereby providing Colony with an equitable subrogation claim. As such, the court awarded judgment in favor of Colony for its entire $950,000 settlement contribution.

E. *Bad Faith: Insurer Not Entitled to Create New Evidence to Support Earlier Coverage Decision*—Schultz v. GEICO Casualty Co., *429 P.3d 844 (Colo. 2018).*

In *Schultz v. GEICO Casualty Co.*, the insured was involved in a motor vehicle accident and subsequently underwent knee replacement surgeries. After settling with the at-fault driver's insurance for its $25,000 policy limit, the insured sought uninsured/underinsured motorist ("UM/UIM") benefits under her policy with GEICO, which provided for $25,000 in UM/UIM coverage.[46] In connection with her demand, the insured provided GEICO with medical record authorizations. Two years after the accident, and after months of correspondence and a review of an MRI performed shortly following the accident, GEICO offered the insured its full policy limit.[47] In doing so, GEICO did not request that she undergo an independent medical examination ("IME"), nor did GEICO's claim log entries indicate that peer review was necessary.[48]

Because of the delay, the insured sued GEICO, asserting claims for common law bad faith and violation of statutory obligations to timely evaluate and pay insurance claims.[49] GEICO denied liability, asserting that causation

41. *Id.* at *5.
42. *Id.*
43. *Id.* at *1.
44. *Id.* at *6–7.
45. *Id.*
46. Schultz v. GEICO Cas. Co., 429 P.3d 844, 846 (Colo. 2018).
47. *Id.*
48. *Id.*
49. *Id.*

surrounding the knee replacement surgeries was fairly debatable because the insured had a preexisting condition.[50] To support its defense, GEICO requested that the insured undergo an IME, to which the insured objected. At the hearing before the district court, GEICO argued that it decided to pay the claim even though the question of causation was unresolved, and that causation was again a live issue because it could not delay a benefit that was never owed.[51] The insured disagreed, arguing that the reasonableness of GEICO's conduct had to be evaluated based on the information it had at the time it evaluated the claim.[52] The district court agreed with GEICO and ordered the IME.[53]

The insured sought direct review of the district court's order by the Colorado Supreme Court via a petition for a rule to show cause, which the Supreme Court granted. At the outset, the Supreme Court noted that both the common law and statutory claims require that the insurer's conduct in handling the claim be unreasonable.[54] The Supreme Court reaffirmed that the reasonableness of the insurer's decision to deny or delay benefits must be evaluated based on the information before the insurer at the time it made its coverage decision.[55] The Supreme Court accordingly concluded that the requested IME would not provide information relevant to the coverage decision GEICO made over a year prior.

F. *Bad Faith: Insurer Delayed Offering Policy Limit to Settle Plane Crash Claim Under No-Fault Voluntary Settlement Provision*—Gruber v. Estate of Marshall, *No. 14 CV 302 (Dist. Ct. Kan. Nov. 12, 2018).*

In April 2013, pilot, Dr. Ron Marshall, and his sole passenger, Chris Gruber, were killed in a single-engine plane crash. United States Aircraft Insurance Group ("USAIG") issued a policy covering the plane, which named both Dr. Marshall and his adult son, Rhen, as insureds.[56] The policy contained both liability and voluntary settlement coverages, which were subject to a $100,000 limit. The voluntary settlement coverage provided that, if requested by the insured within one year of the accident, USAIG will offer the $100,000 limit to or for a passenger who is injured or killed while riding in the plane in return for a complete and final release.[57] In essence, the coverage provided the insured an opportunity to dispose of potential

50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 847.
55. *Id.* at 848–49.
56. Gruber v. Estate of Marshall, No. 14 CV 302, at 2 (Dist. Ct. Kan. Nov. 12, 2018).
57. *Id.* at 4–5.

liability claims and did not require a showing of liability or that the passenger make a claim as a condition precedent to payment.

Following the accident, USAIG immediately began its investigation. It determined that coverage was available, that the passenger was married with children, and that his wife had retained counsel. In discussions with Rhen, USAIG's claims handler learned that the Marshall estate had material assets at risk and that Rhen and the estate were concerned about being sued and steps they could take to protect themselves financially.[58] Nothing in USAIG's investigation or the NTSB's preliminary report showed pilot error.

However, early on, USAIG decided to offer the policy limits at the "first reasonable opportunity" due to the risk of exposure to substantial damages.[59] Notwithstanding, for almost a year, USAIG did not discuss liability coverage or settlement with the claimant's attorney. Finally, in May 2014, past the one-year deadline under the voluntary payment coverage, USAIG advised claimant's counsel that the $100,000 policy limit was available in exchange for a release.[60] Months later, the NTSB issued its final report, finding that the probable cause of the accident was a loss of control by the pilot.

About eighteen months after the accident, Gruber's estate filed a negligence suit against the Marshall estate as well as the airplane maintenance facility and its subcontractor. The claimant's counsel then informed counsel for the Marshall estate that it was too late to resolve the claim and that a bad faith claim would be asserted against USAIG. The Gruber and Marshall estates eventually entered into an assignment agreement, wherein the Gruber estate covenanted not to execute on any judgment reached in exchange for the Marshall estate's assignment of its rights against USAIG for failure to timely settle the claim.[61] After a bench trial, the court entered judgment in favor of the Gruber estate for $11.6 million.[62]

Pursuant to the assignment agreement, the Gruber estate filed suit against USAIG, seeking to collect the underlying judgment based on USAIG's alleged negligent or bad faith breach of contract that led to the judgment. Following a week-long bench trial, the court ruled that USAIG negligently and in bad faith breached the voluntary settlement coverage of the policy (though not the general liability coverage).[63] The court noted conflicting testimony between USAIG's claims handler and Rhen, concerning discussions regarding the voluntary settlement coverage and

58. *Id.* at 9.
59. *Id.* at 13.
60. *Id.* at 21.
61. *Id.* at 24–25.
62. *Id.* at 29.
63. *Id.* at 34.

Rhen's knowledge of same. However, the court determined that, based on the communications with Rhen, USAIG was aware within months of the crash that he wanted the matter resolved.[64] The court found no distinction between an insured expressing a desire to resolve a claim and expressly requesting payment of the $100,000 limit.[65] Thus, the court held that USAIG should have paid the voluntary settlement coverage early on. Further, the evidence at trial demonstrated that if an offer of the policy limit had been made within the first months of the claim, Gruber's wife would have accepted it. Accordingly, USAIG's waiting for over a year to offer the voluntary settlement coverage caused the $11.5 million excess judgment for which the court found USAIG liable.

G. *Bad Faith: Despite Insurer's Tender of Policy Limit Nine Days After Accident, Insurer Failed to Act with Due Regard for Insured's Interests—* Harvey v. GEICO General Insurance Co., *No. SC17-85, 2018 WL 4496566 (Fla. Sep. 20, 2018).*

GEICO's insured, with $100,000 in liability coverage, was involved in an automobile accident on August 8, 2006. The other driver died, leaving behind a wife and three children. The accident was immediately reported to GEICO, and by August 10, GEICO concluded that its insured was liable and knew of significant financial exposure to its insured.[66] GEICO notified the insured of a likely excess claim and his right to hire his own counsel.

On August 14, counsel for the decedent's estate contacted GEICO's claims adjuster, requesting a recorded statement from the insured in order to determine the extent of his assets and if any additional insurance was available.[67] The claims adjuster failed to immediately communicate the request to the insured and, according to counsel's office, denied the request.[68] On August 17 (nine days after the accident), GEICO tendered its $100,000 policy limits to the estate's attorney, along with a release and affidavit of coverage.[69] On August 31, the claims adjuster received a response letter, acknowledging receipt of the check and GEICO's refusal to make the insured available for a statement.[70] The letter was faxed to the insured, who learned for the first time about the requested statement. Following receipt of the letter, the claims adjuster spoke with the estate's counsel regarding the statement, who reiterated on the call and in another letter that the

64. *Id.* at 35–37.
65. *Id.* at 37.
66. Harvey v. GEICO Gen. Ins. Co., No. SC17-85, 2018 WL 4496566, at *1 (Fla. Sep. 20, 2018).
67. *Id.* at *2.
68. *Id.*
69. *Id.*
70. *Id.*

information was needed to determine what other coverage or assets may be available.[71] On September 1, the insured called the claims adjuster to discuss counsel's letter and to inform the adjuster that he had hired counsel but would not be able to meet with his attorney until September 5.[72] The insured informed the adjuster that he did not want the estate's counsel to think they were not acting promptly and asked what they could do to address that concern. The claims adjuster's supervisor instructed her to relay the insured's message to the estate's counsel, which the adjuster failed to do. On September 13, the estate returned GEICO's check and filed a wrongful death suit against the insured.[73] The jury awarded the estate $8.47 million in damages.[74]

The insured filed a bad faith suit against GEICO, winning a jury verdict in the amount of $9.2 million.[75] The trial court denied GEICO's motion for directed verdict. The Fourth District Court of Appeal reversed, finding that the evidence was insufficient as a matter of law to demonstrate that GEICO acted in bad faith in failing to settle the estate's claim.[76] The Court of Appeal also found that the insurer could not be liable if the insured's own actions, at least in part, lead to the excess judgment.[77]

In a 4–3 decision, the Florida Supreme Court quashed the Court of Appeal's decision and ordered the verdict reinstated.[78] In reviewing its prior bad faith cases, which it contended the Court of Appeal misapplied, the Supreme Court highlighted that "the critical inquiry in a bad faith [case] is whether the insurer diligently, and with the same haste and precision as if it were in the insured's shoes, worked on the insured's behalf to avoid an excess judgment."[79] The Supreme Court noted that the evidence demonstrated that, within days of the accident, GEICO's independent investigation revealed that this was a case of clear liability, with catastrophic damages likely to exceed the policy limit. The court found that GEICO failed to act as if the financial exposure to its insured "was a ticking financial time bomb," and completely dropped the ball and failed to act with due regard for the insured's interests.[80] The court determined that, instead of doing everything possible to facilitate settlement, GEICO's claims adjuster was a considerable impediment to both the insured and the estate. By comparison, the court noted that if GEICO itself had been faced with paying

71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at *3.
76. *Id.*
77. *Id.*
78. *Id.* at *9.
79. *Id.* at *4.
80. *Id.* at *6.

the entire excess judgment, it undoubtedly would have done everything possible to comply with the estate's reasonable demands.[81]

The court therefore concluded that there was substantial evidence to support the jury's finding of bad faith.[82] Further, the Supreme Court also found that the Court of Appeal erred in stating that the insured's actions can relieve the insurer of bad faith liability.[83] Instead, the Supreme Court highlighted that the focus of the bad faith case is on the actions of the insurer in fulfilling its obligations to the insured, not on the actions of the insured or the claimant.[84] The Chief Justice wrote a vigorous dissent, arguing that the majority had misstated the law and adopted, in all but name, a negligence standard, which would "incentivize[] a rush to the courthouse steps by third-party claimants whenever they see what they think is an opportunity to convert an insured's inadequate policy limits into a limitless policy."[85]

III. UP IN SMOKE? EXAMINING RECENT DEVELOPMENTS IN INSURANCE COVERAGE PERTAINING TO MARIJUANA-RELATED CLAIMS

Gregory R. Giometti and Taylor R. Seibel

As of December 2018, ten states and the District of Columbia have legalized recreational marijuana use, including Michigan, which voted to legalize recreational marijuana in the November 2018 midterm elections.[86] An additional twenty-three states have legalized marijuana for medicinal purposes.[87] The trend toward legalization of marijuana for both recreational and medical purposes is gaining momentum. However, despite this trend towards legalization at the state level, the use, possession, sale, and manufacture of marijuana remains a crime with serious consequences under federal law.[88] In the insurance context, this chasm between the trend at the state level and federal law has created various issues that insurers have faced or likely will face in the coming years. For example, a common insurance policy exclusion is for criminal acts and/or activities. This article explores

81. *Id.*
82. *Id.* at *5.
83. *Id.* at *6.
84. *Id.*
85. *Id.* at *16 (Canady, C.J., dissenting).
86. *See, e.g.*, Alaska Stat. Ann. § 17.38.020 (West 2016); Colo. Const. art. XVIII, § 16 (West 2018); *see also* Jeremy Berke, *Michigan Just Became the 10th State To Legalise Marijuana*, Business Insider (Nov. 7, 2018), https://www.businessinsider.com.au/where-marijuana-is-on-the-ballot-in-the-midterms-2018-11; Jeremy Burke & Skye Gould, *This Map Shows Every U.S. State Where Pot Is Legal*, Business Insider (Jan. 4, 2019), https://www.businessinsider.com/legal-marijuana-states-2018-1.
87. *See, e.g.*, Ariz. Rev. Stat. Ann. § 36-2801 (2018); Mot. Code Ann. §§ 50-46-301 to 344 (West 2017); *see also* Berke & Gould, *supra* note 88.
88. *See* Controlled Substances Act, 21 U.S.C.A. § 844(a) (the "CSA").

recent case law developments about how courts have applied the criminal acts exclusions to marijuana-related activities, and how courts would likely apply such exclusions in other marijuana-related cases.

A. *Sixth Circuit Holds Criminal Act Exclusion Bars Coverage for Property Damage Caused by Tenant's Illegal Marijuana Grow Operation*

In August 2018, the Sixth Circuit in *K.V.G. Properties, Inc. v. Westfield Insurance Co.*,[89] examined whether an insurer properly denied coverage under a policy's criminal act exclusion for property damage caused by a Michigan marijuana-growing business.[90] In *K.V.G.*, a landlord discovered that one of its commercial tenants at a Michigan-based property had been the subject of a raid by the U.S. Drug Enforcement Agency, which caught the tenants growing a significant amount of marijuana.[91] The landlord evicted the tenants, and discovered that the marijuana grow operation had resulted in property damage of approximately $500,000.[92] The landlord then made a claim for such property damage, which was denied by its insurer based, in part, on a criminal acts exclusion contained within the parties' policy.[93] The landlord then initiated a lawsuit against the insurer for breach of the insurance agreement.[94] The United States District Court for the Eastern District of Michigan found that the claim for property damage was excluded under the policy and granted the insurer's motion for summary judgment.[95] The landlord then appealed that decision to the Sixth Circuit.[96]

The Sixth Circuit analyzed both federal law, under which cultivating marijuana is a crime,[97] as well as Michigan law, under which growing marijuana is protected in certain instances.[98] Ultimately, the *K.V.G.* court affirmed the district court's grant of summary judgment in favor of the insurer and held that the criminal acts exclusion precluded coverage for the property damage because the grow operation failed to comply with the Michigan Medical Marijuana Act ("MMMA"), which the landlord had admitted during the court proceedings necessary to evict the tenants from

89. 900 F.3d 818 (6th Cir. 2018).
90. *Id.* at 818.
91. *Id.* at 820.
92. *Id.*
93. *Id.* The criminal act exclusion at issue here stated that the insurer "will not pay for loss or damage caused by or resulting from [any] [d]ishonest or criminal act by you, any of your partners, members, officers, managers, employees (including leased employees), directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose." *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *See*, *e.g.*, 21 U.S.C.A. § 841(b)(1)(A)(vii).
98. *See* Mich. Comp. Laws §§ 333.26421-333.26430; *see also K.V.G.*, 900 F.3d at 821.

the property.[99] However, the Sixth Circuit noted that had the tenants complied with the MMMA, that there might have been a strong federalism argument in favor of coverage, as the court was sitting in diversity and had to act as a faithful agent of the state courts and legislature.[100] Further, the Sixth Circuit stated that because the MMMA was passed via ballot initiative—as has been the case with many of the recent laws legalizing recreational and/or medical marijuana—the court would exercise even more care in deciding whether a criminal acts exclusion would preclude coverage if the tenants had followed Michigan law.[101]

The Sixth Circuit also addressed the landlord's argument that the criminal acts exclusion could only apply where the tenants were actually convicted of a crime.[102] The Sixth Circuit dismissed this argument and noted that the language in the policy referred to a "criminal act" and not a "crime" or "criminal conviction." Accordingly, the Sixth Circuit declined to read a conviction requirement into the criminal acts exclusion in the policy.[103]

B. *Other Federal Courts Have Reached Varying Conclusions Regarding Marijuana-Related Claims*

The Sixth Circuit's holding in *K.V.G.* is the latest in a line of varying rulings from federal courts regarding the application of a criminal acts exclusion. In 2012, the United States District Court for the District of Hawaii addressed this issue in *Tracy v. USAA Casualty Insurance Co.*[104] In *Tracy*, the plaintiff claimed that she "lawfully possessed, grew, nurtured and cultivated [twelve marijuana] plants consistent with the laws of the State of Hawaii," which permitted individuals to possess and grow marijuana for medical purposes.[105] On or about July 30, 2010, the plaintiff's twelve plants were stolen, and nine of the twelve plants "were fully matured cannabis sativa, commonly known as marijuana plants."[106]

The theft occurred at the plaintiff's residence, which was insured under a homeowner's insurance policy issued by the defendant.[107] The policy included coverage for "loss to trees, shrubs, and other plants" that were caused by theft; thus, the plaintiff argued that she was entitled to coverage for the theft of the plants.[108] She presented a claim to the defendant

99. *K.V.G.*, 900 F.3d at 822–23.
100. *Id.* at 821–22.
101. *Id.* at 822.
102. *Id.* at 823.
103. *Id.*
104. Tracy v. USAA Cas. Ins. Co., No. 11-00487 LEK KSC, 2012 WL 928186 (D. Haw. Mar. 16, 2012).
105. *Id.* at *1.
106. *Id.*
107. *Id.*
108. *Id.* at *1, *3 (internal quotation omitted).

for the loss of the twelve plants, seeking $45,600 attributable in the following fashion: $4,000 for each mature plant, and $3,200 for each of the less mature plants.[109] Although the defendant initially agreed and issued payment to the plaintiff, the plaintiff claimed that the amount was insufficient.[110] On or about May 27, 2011, the defendant notified the plaintiff that it would not make any further payments, arguing that the plaintiff did not have an insurable interest in the plants as they "could not be lawfully replaced."[111] Among other things, the plaintiff argued that "Hawai'i law permit[ted] individuals such as [the p]laintiff to lawfully grow marijuana for medical purposes."[112]

Ultimately, the plaintiff brought suit against the defendant, alleging claims for breach of the insurance contract, unreasonable/bad faith denial of the plaintiff's insurance claim, and a violation of Hawaii's statutory chapter 480.[113] The defendant moved for summary judgment on the plaintiff's claims, arguing that the "[p]laintiff lack[ed] an insurable interest in the marijuana plants under State and Federal law, and therefore [the d]efendant [wa]s not obligated to provide coverage under the Policy."[114]

With respect to whether the plaintiff could assert an insurable interest in the plants, the defendant argued:

> [I]n order to have an insurable interest, the insured's interest in the property must be "lawful" property under Hawai'i Revised Statutes § 431:10E-101. Second, Hawai'i law generally prohibits the enforcement of illegal contracts, and [the p]laintiff cannot insure her marijuana plants unless her possession was legal. Third, [the d]efedant argue[d] that Hawaii's [sic] medical marijuana law, . . . , d[id] not create an insurable interest because it merely "provide[d] an affirmative defense to marijuana-related state law crimes for the medical use of marijuana." [The d]efendant argue[d] that there [wa]s no affirmative defense for the promotion, purchase, or sale of marijuana, even for medical use, and therefore [the p]laintiff cannot legally use the insurance proceeds to purchase replacement marijuana plants.
>
> . . .
>
> [The d]efendant contend[ed] that requiring insurance coverage for marijuana plants would be against federal public policy because coverage presupposes that the insured will purchase, sell, and/or distribute marijuana plants with

109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at *2. Among other things, Chapter 480 precludes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Haw. Rev. Stat. § 480-2 (2018).
114. *Tracy*, 2012 WL 928186 at *2.

> insurance proceeds. . . . [The d]efendant argue[d] that Hawaii's [sic] medical marijuana laws do not purport to legalize medical use and do not require insurance coverage for medical use. Even if Hawai'i law required insurance coverage for medical marijuana use, such coverage would conflict with, and therefore be preempted by, federal law prohibiting such use.[115]

In opposition, the plaintiff offered the following arguments on this issue:

> [The d]efendant [wa]s a sophisticated and experienced insurance company that likely provided similar services in Hawai'i for many years prior to the events at issue in this case. [Plaintiff] contend[ed] that the Policy, which [the d]efendant prepared, specifically contemplated the coverage of marijuana plants, and [the d]efendant was aware of both the federal law and Hawai'i law relevant to this issue when it issued the Policy. . . .
>
> [The p]laintiff point[ed] out that Haw. Admin. R. § 23-202-13(b)(1) provide[d] that an individual who qualifies for medical marijuana use may supply herself by growing the plant at her home address. [She] argue[d] that there [wa]s no basis for [the d]efendant to deny coverage because [the d]efendant was on notice that, by covering "trees, shrubs or plants", [sic] it was required to cover marijuana/cannabis plants where the insured was a licensed medical marijuana user. . . .
>
> [The p]laintiff [further] argue[d] that she had an insurable interest in the plants . . . because she [wa]s permitted by Hawai'i law to have the plants for medical use . . . .[116]

One of the central issues raised in *Tracy* was whether the plaintiff had an insurable interest in the twelve plants.[117] Pursuant to Hawaii law,

> [n]o contract of insurance on property or of any interest therein or arising therefrom shall be enforceable except for the benefit of persons having an insurable interest in the property insured. *Insurable interest means any lawful and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage*.[118]

The court noted that "[t]here [wa]s no Hawai'i Supreme Court case law analyzing the Hawai'i medical marijuana laws"; however, after reviewing the legislative history surrounding Hawaii's medical marijuana laws, the court "predict[ed] that the Hawai'i Supreme Court would hold that a qualifying patient who is in strict compliance with the Hawai'i medical marijuana laws ha[d] a lawful interest in her marijuana supply for purposes

115. *Id.*
116. *Id.* at *4.
117. *See id.* at *9 ("The dispute in this case centers around whether the [p]laintiff's interest in the plants was lawful.").
118. *Id.* (quoting Haw. Rev. Stat. § 431:10E-101) (emphasis added).

of Haw. Rev. Stat. § 431:10E101."[119] Thus, the plaintiff had an insurable interest in her marijuana plants.[120]

The court next turned to the defendant's argument that it was "precluded from providing coverage for the plants because it would be contrary to federal law and federal public policy."[121] The defendant argued that, "even if a layperson would have reasonably expected that [the p]laintiff's Policy included coverage for the loss of medical marijuana plants, th[e] Court should not enforce that interpretation of the Policy because it would be contrary to federal public policy," relying upon *Gonzales v. Raich*.[122] "Other federal courts have repeatedly recognized that *Gonzales* establishe[d] that the possession and cultivation of marijuana for medical use is illegal under federal law, even when it is permitted under state law."[123] Notably, returning to the legislative history, the court noted that "the State Legislature expressly recognized that the use of marijuana was prohibited under federal law," when it enacted Hawaii's medical marijuana laws.[124] Moreover, the "rule under Hawai'i law that courts may decline to enforce a contract that is illegal or contrary to public policy applies where the enforcement of the contract would violate federal law."[125]

Before rendering its decision, the court assumed, "for purposes of the [defendant's] Motion, that the 'Trees, Shrubs and Other Plants' provision of the Policy covered the loss of [the p]laintiff's medical marijuana plants."[126] However, the "Court c[ould not] enforce the provision because [the p]laintiff's possession and cultivation of marijuana, even for State-authorized medical use, clearly violate[d] federal law," explaining that "[t]o require [the d]efendant to pay insurance proceeds for the replacement of medical marijuana plants would be contrary to federal law and public policy."[127] Thus, the defendant's "refusal to pay for [the p]laintiff's claim for the loss of her medical marijuana plants did not constitute a breach the [sic] parties' insurance contract."[128]

The United States District for the District of Colorado also analyzed these issues in *Green Earth Wellness Center, LLC v. Atain Specialty Insurance Co.*[129] At all relevant times, Green Earth Wellness Center, LLC ("Green Earth") operated a retail medical marijuana business and an adjacent

119. *Id.* at *9–10.
120. *Id.* at *10.
121. *Id.* at *11.
122. *Id.* (citing *Gonzalez v. Raich*, 545 U.S. 1 (2005)).
123. *Id.* at *12.
124. *Id.* at *13.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. 163 F. Supp. 3d 821 (D. Colo. 2016).

growing facility in Colorado Springs, Colorado.[130] Recreational marijuana, as well as medical marijuana, is legal under Colorado law.[131] At Green Earth's request, Atain Specialty Insurance Company ("Atain") issued Green Earth a commercial insurance policy, which became effective on June 29, 2012.[132]

On June 23, 2012, a wildfire began in Waldo Canyon outside of Colorado Springs, and the wildfire, according to Green Earth, damaged Green Earth's marijuana plants through the smoke and ash generated by the fire.[133] In November 2012, Green Earth made a claim for damage caused by the smoke and ash.[134] On June 7, 2013, thieves entered Green Earth's grow facility and stole several marijuana plants.[135] Following the theft, Green Earth submitted a claim to Atain for damages to the facility's roof and ventilation system that purportedly resulted from the theft.[136] Atain denied both claims.[137]

During the subsequent litigation, which was initiated by Green Earth, Atain filed, *inter alia*, a motion for determination of questions of law.[138] For purposes of this article, the pertinent motion proffered the following two questions: (1) "Whether, in light of Colorado's Medical Marijuana Act, federal law, and federal public Policy [sic], it is legal for Atain to pay for damages to marijuana plants and products, and if so, whether the Court can order Atain to pay for these damages;" and (2) "Whether, in light of those same authorities, the Policy's Contraband Exclusion removes Green Earth's marijuana plants and marijuana material from the Policy's coverage."[139]

With respect to the contraband exclusion, the court noted that the policy did not define the term; thus, it turned to the word's common and ordinary meaning, which is "goods or merchandise whose importation, exportation, or possession is forbidden."[140] Although the court accepted the proposition that "the possession of marijuana for distribution purposes continues to constitute a federal crime under 21 U.S.C. § 841(a)(1) and (b)(1)(D)," the court noted that federal policy related to marijuana regulation is far from clear.[141] The *Green Earth* court noted that Atain failed to offer evidence showing that the application of federal law would result in criminal enforcement against Green Earth, or that the grow operation

130. *Id.* at 823.
131. Colo. Const. art. XVIII, § 16 (West 2018).
132. *Green Earth*, 163 F. Supp. 3d at 823.
133. *Id.*
134. *Id.*
135. *Id.* at 824.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 832–33 (citing Meriam-Webster Collegiate Dictionary (10th ed.)).
141. *Id.*

was in violation of Colorado law.[142] Accordingly, the court found that the contraband exclusion was "rendered ambiguous by the difference between the federal government's *de jure* and *de facto* public policies regarding state-regulated medical marijuana."[143]

The *Green Earth* court then looked to the parties' intentions regarding coverage, and noted that "it is undisputed that, before entering into the contract of insurance, Atain knew that Green Earth was operating a medical marijuana business . . . [and] that federal law nominally prohibited such a business."[144] Despite this knowledge, Atain elected to issue the policy to Green Earth, and the court concluded that the parties intended that the policy would insure Green Earth's marijuana grow operation and the contraband exclusion would not apply.[145] To that end, the court held that Atain was not entitled to summary judgment on the breach of contract cause of action.[146]

The *Green Earth* court also discussed whether public policy would prohibit Atain from paying for damage for marijuana plants and products.[147] The court declined to provide assurances regarding the legality of entering into a contract to provide insurance for a marijuana-related business, or provide direction as to how an insurer should proceed.[148] Further, the court noted that even if it had determined public policy would void the contractual agreement, it would allow Green Earth to amend its complaint to assert an unjust enrichment claim for its "payment of premiums for an illusory promise of insurance[.]"[149] The court also determined that, based on the "continued erosion of any clear and consistent federal public policy in this area," it would not follow *Tracy*, discussed more fully above.[150] Accordingly, the court held that "Atain, having entered into the Policy of its own will, knowingly and intelligently, is obligated to comply with its terms or pay damages for having breached it."[151]

C. *Likely Marijuana-Related Coverage Questions That Still Exist*

For decades, marijuana manufacturing and use did not pose an issue to various forms of insurance coverage. However, recent legislative enactments and ballot initiatives legalizing marijuana manufacturing and use for

142. *Id.* at 833.
143. *Id.*
144. *Id.*
145. *Id.* at 833–34.
146. *Id.* at 834.
147. *Id.*
148. *Id.*
149. *Id.* at 834 n.8.
150. *Id.* at 835.
151. *Id.*

medicinal or recreational purposes raise the question of insurance coverage in a variety of scenarios, particularly when insurance policies that contain an exclusion for criminal acts are involved. Clearly, states that have not legalized marijuana manufacturing and use do not wrestle with the complications posed between differing approaches to marijuana between the state and federal levels. Yet, states in which marijuana manufacturing and use is legalized, even if only for medicinal purposes, must address whether marijuana manufacturing and use constitute criminal acts within the meaning of an insurance policy's exclusionary language. Given the relative infancy of the state-based policies favoring marijuana legalization, in various circumstances, little word from the courts on this question has been offered. However, while the *Tracy* court determined otherwise, it appears that the recent judicial trend, based on *K.V.G.* and *Green Earth*, on this issue is to at least entertain whether the policyholder engaged in a marijuana-related enterprise lawful under state law is entitled to coverage particularly where the insurer knew that the policyholder was engaging in a marijuana-related enterprise prior to issuing the policy.

What is the practical implication of this trend? Many, if not all, insurance policies include language that excludes coverage for occurrences arising out of the criminal acts of an insured or a putative insured. With this in mind, one can conceive various sets of circumstances under which coverage may be implicated on the basis of marijuana use and/or cultivation.

In one potential scenario, an insurer issues a personal liability and property policy to an insured homeowner. This homeowner cultivates marijuana for his or her medicinal purposes.[152] During the policy's effective period, a fire breaks out at the insured's property, damaging personal goods as well as real property. The insured files an insurance claim under the policy, but the resulting investigation reveals that the origin of the fire was the marijuana manufacturing process. Under the recent trend, an attempt by the insurer to apply a criminal acts exclusion would likely depend on whether the insurer knew if the homeowner cultivated marijuana, as well as whether the homeowner was in compliance with state law pertaining to such activity. If the homeowner failed to comply with such state laws, the criminal acts exclusion would almost certainly apply to preclude coverage following the reasoning of both *K.V.G.* and *Green Earth*. However, if the homeowner was in compliance with state law, and the insurer knew that the homeowner cultivated marijuana, coverage may very well exist, and an insurer's denial of the claim may put the insurer at risk of facing a breach

152. The scenario could be slightly changed to include an insured who cultivates marijuana on the premises for his or her own recreational use. Clearly, the recreational issue would only arise within the states that have legalized marijuana for such purposes; otherwise, it would clearly be excluded from coverage in states where recreational marijuana remains illegal.

of contract claim and/or an unjust enrichment claim as discussed in *Green Earth*.

Another interesting hypothetical arises within the context of claims predicated on a Dram Shop Act theory.[153] For example, an insurer issues a homeowner's policy to an insured who throws a party on a non-descript Friday night. During the party, marijuana is used by several of the partygoers. When the party concludes, one of the partygoers drives home, causing a motor vehicle accident that injures a separate motorist. Subsequently, the motorist who suffered the personal injuries makes a claim against the homeowner under the dram shop act, asserting that the illegal use of marijuana was a cause of the accident. The occurrence under these circumstances arose out of the use of marijuana during the homeowner's party. In states where recreational marijuana use is illegal, it is likely that a criminal acts exclusion would preclude coverage, particularly where, as in this scenario, the insurer would unlikely have knowledge of the marijuana-related activity. However, in states where recreational marijuana use is legal, it is entirely possible that a court would follow the *Green Earth* court's reasoning, as well as the *K.V.G.* court's analysis, regarding the *de facto* enforcement of federal law and determine that coverage exists.

Insurance coverage for marijuana dispensaries also poses an additional interesting conundrum in states that have legalized marijuana for medicinal or recreational purposes. Assuming the insurance policy contains an exclusion of criminal acts, does the policy actually provide coverage to the dispensary? As acknowledged in *Green Earth*, where the insurer has knowledge of the marijuana-related business prior to issuing the policy, even if the policy is void under public policy, the policyholder would likely have an unjust enrichment claim based on illusory coverage if the insurer denied coverage for a claim pursuant to the criminal acts exclusion. Such a claim may be small consolation to a policyholder that suffered loss for which it purchased insurance coverage, when its only available recovery is the amount it spent on premiums rather than the full policy limit.

The last several years have seen sea changes in public policy on a host of issues, including the legality of marijuana cultivation and use. One simmering question that has not received a significant amount of media coverage is the implication of insurance coverage in matters involving marijuana cultivation and use. Although the courts have not had many opportunities to address this question, the recent trend appears to focus on whether the marijuana-related business was in compliance with state law and whether the insurer had knowledge of the marijuana-related purpose before issuing

153. *See, e.g.*, Haw. Rev. Stat. § 663-41 (2018) (Hawaii's statute regarding dram shop actions).

any policy. However, it is clear that the public debate over marijuana legalization will continue unabated into the future. As a result, tension between insurers and insureds under circumstances involving marijuana will continue to be a burgeoning field of law. Until federal law changes, the resolution of such questions will likely depend on several factors and legal principles, which likely will evolve differently in individual states, and may lead to inconsistent results.

IV. NEGLIGENT HIRING, RETENTION, AND SUPERVISION OF AN EMPLOYEE MAY CONSTITUTE AN "OCCURRENCE" UNDER CGL POLICY—LIBERTY SURPLUS INSURANCE CORP. V. LEDESMA & MEYER CONSTRUCTION CO.

Timothy M. Thornton, Jr.

In *Liberty Surplus Insurance Corp. v. Ledesma & Meyer Construction Co.*,[154] the Supreme Court of California addressed the issue of whether negligent hiring, retention, and supervision of an employee who commits a sexual assault is covered. The precise issue was whether that constitutes an "occurrence" within the meaning of a commercial general liability policy. The court held that negligent hiring, retention, and supervision of an employee who commits a sexual assault can constitute an accident from the employer's perspective.

Some background helps explain why this issue arose. The perpetrator of a sexual assault never has coverage for the sexual assault. It is one of the types of conduct treated as uninsurable by its very nature, not an "accident," and expected and intended to result in injury.[155] Insurance coverage for such damages—if they are to be covered at all—must be found under a theory of wrongful conduct on the part of another. Those other types of conduct that lawsuits have focused on have been employers or principals (where an employee or agent committed the sexual assault) or spouses or parents (where a spouse or a child committed the sexual assault). However, under California law, *respondeat superior* generally does not apply in the employer-employee context because sexual assault is almost always held to be outside the course and scope of employment.[156] The tack taken, therefore, has been to allege negligent hiring, retention, and supervision by an employer of the employee-perpetrator. With regard to cases involving family relationships, the tack taken has been similar—to assert that the spouse in some way failed to prevent the molestation by the other spouse,

154. 418 P.3d 400 (Cal. 2018)
155. J. C. Penney Cas. Ins. Co. v. M. K. 804 P.2d 689, 698 (Cal. 1991) (en banc).
156. *See* John R. v. Oakland Unified Sch. Dist., 769 P.2d 948, 954-56 (Cal. 1989) (en banc).

or that the parents failed to stop the molestation by their child, usually expressed in similar terms as a negligent failure to supervise the spouse or child, or a failure to prevent access to the victim.

In *Ledesma*, the California Supreme Court addressed this issue on a certified question from the United States Court of Appeals for the Ninth Circuit.[157] Ledesma & Meyer Construction Company, Inc. ("L&M") contracted with a school district to manage a construction project at a middle school.[158] L&M hired Hecht as an assistant superintendent and assigned him to this project. Jane Doe, a 13-year-old student at the school, sued in state court alleging that Hecht had sexually abused her. Doe's claims included a cause of action against L&M for negligently hiring, retaining, and supervising Hecht.[159]

L&M tendered the defense to Liberty Surplus Insurance Corp. and Liberty Insurance Underwriters, Inc. (collectively "Liberty"). Liberty agreed to defend L&M under a reservation of rights.[160] Liberty then sued for declaratory relief in federal district court. It argued that it had no obligation to defend or indemnify L&M.[161] The commercial general liability policy at issue provided coverage for "'bodily injury'" "caused by an 'occurrence.'" "Occurrence" was defined in part as "an accident." The district court granted summary judgment to Liberty on its claim for declaratory relief.[162]

L&M appealed to the Ninth Circuit, and the Ninth Circuit sought the opinion of the California Supreme Court under California Rules of Court, Rule 8.548.[163] The question presented by the Ninth Circuit was "[w]hen a third party sues an employer for the negligent hiring, retention, and supervision of an employee who intentionally injured that third party, does the suit allege an 'occurrence' under the employer's commercial general liability policy?"[164]

The meaning of "accident" in a liability insurance policy is settled in California. An accident is "an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause."[165] The word "accident" in the insuring agreement of a liability policy "refers to the conduct of the insured for which liability is sought to be imposed . . . ."[166]

157. *Ledesma*, 418 P.3d 400.
158. *Id*. at 402.
159. *Id*.
160. *Id*.
161. *Id*.
162. *Id*.
163. Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co., 834 F.3d 998, 1003 (9th Cir. 2016).
164. *Ledesma*, 418 P.3d at 402.
165. *Id*. at 403 (quoting Delgado v. Interinsurance Exch. of Auto. Club, 211 P.3d 1083, 1086 (Cal. 2009)).
166. *Id*. (citations omitted).

"Accident" is a more comprehensive term than "negligence" and thus includes negligence.[167] Therefore a policy providing defense and indemnification for bodily injury caused by "an accident" promises "coverage for liability resulting from the *insured's* negligent acts."[168]

The court noted that it was undisputed that Hecht's sexual misconduct was a "willful act" beyond the scope of insurance coverage as restricted by California Insurance Code section 533.[169] However, the court held, Hecht's intentional conduct did not preclude potential coverage for L&M. The Supreme Court distinguished between an intentional act of molestation and negligent act of supervision.[170]

In *Minkler v. Safeco Insurance Co.*, the plaintiff sued his Little League coach for sexual molestation.[171] He also sued the coach's mother, accusing her of negligent supervision for failing to prevent molestations that occurred in her home.[172] The son was listed as an additional insured on the mother's homeowners insurance policy, which also contained an exclusion for injuries arising from "an" insured's intentional acts.[173] The court held that this exclusion did not apply to the mother's liability for negligence, in part relying on the separation of insureds provision.

> [T]his is not a situation where the only tort was the intentional act of one insured, and where the liability of a second insured, who claims coverage, is merely *vicarious* or *derivative*. On the contrary, [the plaintiff's] claim against [the mother] clearly depends upon allegations that she herself committed an *independent tort* in failing to prevent acts of molestation she had reason to believe were taking place in her home. Under such circumstances, she had objective grounds to assume she would be covered, so long as she herself had not acted in a manner for which the intentional acts exclusion barred coverage.[174]

Minkler did not address whether the claims involved "accidents" under the policies. However, in *Ledesma* the Supreme Court felt that its reasoning

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167. *Id.* (citation omitted).

168. *Id.* (citations omitted). Of course, allegations casting clearly intentional uncovered conduct do not transmute such conduct into an accident. *See J. C. Penney*, 804 P.2d at 695 (victim at trial dismissed intentional tort claim and submitted cause to the jury only on negligence, resulting in a jury verdict based on negligence; but this was nonetheless not covered, as the court held that under California Insurance Code section 533 no form of negligence on the part of the insured, or his agents or others, leading to a loss avoids the policy, unless it amounts to a willful act on the part of the insured—which the act at issue was)

169. Ca. Ins. Code § 533 ("An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others.").

170. *Ledesma*, 418 P.3d at 404 (citing Minkler v. Safeco Ins. Co., 232 P.3d 612 (Cal. 2010)).

171. *Minkler*, 232 P.3d at 615.

172. *Id.*

173. *Id.* at 616.

174. *Id.* at 619.

in *Minkler* established that L&M may be covered even though Hecht's intentional acts were beyond the scope of coverage.[175] L&M's allegedly negligent hiring, retention, and supervision were independently tortious acts, which form the basis of its claim against Liberty for defense and indemnity.

The district court's ruling did not rely on the fact that Hecht's conduct was intentional, but on two other grounds: a causation analysis, and the district court's reading of case law.[176] The Supreme Court held that both lines of reasoning were faulty.

First, tort causation principles govern causation questions in liability insurance.[177] The insurer agrees to indemnify the insured for all sums which the insured shall become obligated to pay for damages because of bodily injury or property damage, or similar language. Therefore "coverage necessarily turns on whether the damages for which the insured became liable resulted—*under tort law*—from covered causes."[178] Causation is established for purposes of tort law if the defendant's conduct is a "substantial factor" in bringing about the plaintiff's injury.[179]

The district court had ruled that L&M's alleged negligence was "too attenuated" from Hecht's acts of molestation, as a matter of law.[180] It reasoned that L&M's actions may have set the chain of events in motion, but they did not legally cause Doe's injuries.[181] The Supreme Court rejected this reasoning as counter to California case law expressly recognizing that negligent hiring, retention, or supervision may be a substantial factor in a sexual molestation perpetrated by an employee, depending on the facts presented.[182] The Supreme Court noted that "[i]ndeed, molestation was the alleged cause of injury in a significant number of cases based on negligent hiring, retention, or supervision."[183]

Second, the district court also relied on case law to reject the idea that L&M's "intentional acts of hiring, supervising, and retaining [Hecht] are accidents, simply because the insured did not intend for the injury to occur."[184] In particular, two cases bear on issues of intent, causation, and perspective in assault cases, and thus bear directly on the matters at issue in *Ledesma*.

175. *Ledesma*, 418 P.3d at 404.
176. *Id.* at 404–05.
177. *Id.*
178. *Id.* at 404 (citations omitted).
179. *Id.* (citations omitted).
180. *Id.*
181. *Id.*
182. *Id.* at 404–05.
183. *Id.* at 405. This brings us back to the background analysis that molestation is not in the course and scope of employment, so that *respondeat superior* will not apply.
184. *Id.*

In *Delgado v. Interinsurance Exchange of the Automobile Club of Southern California*,[185] the insured was sued for assault and battery. He settled and assigned his claim against the homeowners insurer to the injured party, Delgado.[186] Delgado urged that the attack was an "accident" from his point of view because he did not expect or intend to be assaulted.[187] The Supreme Court disagreed with the premise of Delgado's argument. Accident in the insuring agreement of a liability policy refers to the conduct of the insured for which liability is sought to be imposed on the insured.[188] Because liability insurance is a contract between insurer and insured, and the policy is read in light of the parties' expectations, the relevant viewpoint is that of the insured rather than the injured party.[189]

Delgado further argued that the attack was accidental because the insured unreasonably believed he was required to act in self-defense.[190] The Supreme Court disagreed, holding that such a belief could not convert the assault into an accident. "In a case of assault and battery, it is the use of force on another that is closely connected to the resulting injury. To look to acts within the causal chain that are antecedent to and more remote from the assault would render legal responsibilities too uncertain."[191] (To be sure, the *Ledesma* court noted in footnote 7 that "[a]ny claim alleging negligent hiring by an employer will be based in part on events predating the employee's tortious conduct. Plainly, that sequence of events does not itself preclude liability."[192])

In *Delgado*, the insured's intentional tortious conduct was the immediate cause of injury. But, the Supreme Court noted, in *Ledesma* "Hecht's molestation was the act directly responsible for the injury, while L&M's negligence in hiring, retaining, and supervising him was an indirect cause."[193] Nevertheless, the court considered L&M's acts as the starting point of the series of events leading to the molestation. The court noted that L&M did not point to any event preceding its own negligence to establish potential coverage.[194] The court characterized Doe's complaint as alleging that the "'occurrence'" "began with L&M's negligence and ended with Hecht's act of molestation."[195]

185. 211 P.3d 1083 (Cal. Ct. App. 2009).
186. *Id.* at 1085.
187. *Id.* at 1086.
188. *Id.* at 1088.
189. *Id.*
190. *Id.*
191. *Id.* at 1091.
192. 418 P.3d at 406, n.7.
193. *Id.* at 405.
194. *Id.* at 406.
195. *Id.*

The district court also relied upon *Merced Mutual Insurance Co. v. Mendez.*[196] The insured in *Merced* was sued for sexual assault. He claimed his conduct could be considered an accident because he mistakenly believed the victim had consented.[197] He conceded that he intentionally engaged in the sexual conduct but urged that he intended no injury. The court rejected this argument, which the Supreme Court in *Ledesma* described as "a minimalist understanding of the term 'accident.'"[198] The court stated that an accident "'is never present when the insured performs a deliberate act *unless* some additional, unexpected, independent, and unforeseen happening occurs that produces the damage.'"[199] In *Merced*, "[a]ll of the acts, the manner in which they were done, and the objective accomplished occurred exactly as [the insured] intended. No additional, unexpected, independent or unforeseen act occurred."[200]

In *Ledesma*, however, the Supreme Court distinguished *Merced.* First, *Merced* did not involve claims of negligent hiring, retaining, or supervising.[201] "Instead, the intentional acts of the insured himself caused the alleged injury."[202] Second, in *Merced* the insured "acknowledged that he intended the acts that caused the injury, but not the injury."[203] In contrast, "L&M argue[d] that Hecht's acts were neither intended nor expected from its perspective."[204] Even though L&M's "hiring, retention, and supervision of Hecht may have been 'deliberate acts,' . . . [Hecht's] molestation of Doe could be considered an 'additional, unexpected, independent, and unforeseen happening . . . that produce[d] the damage.'"[205]

The remaining cases were found to be inapposite because they focused on the use of the term "accident" in coverage territorial limitation clauses or the use of that term in ascertaining date of loss or trigger of coverage.[206] No "all-inclusive definition of the word 'accident' can be given."[207] "Context matters."[208] "Factors relevant to the application of a territorial limitation clause or the resolution of a dispute over whether an accident occurred during the policy period are not necessarily pertinent to all coverage questions."[209]

196. 261 Cal. Rptr. 273 (Ct. App. 1989).
197. *Id.* at 280–81.
198. *Ledesma*, 418 P.3d at 406.
199. *Id*. (quoting *Merced*, 261 Cal. Rptr. at 279).
200. *Id*. (quoting *Merced*, 261 Cal. Rptr. at 280).
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* (quoting *Merced*, 261 Cal. Rptr. at 279).
206. *Id.* at 406–07.
207. *Id.* at 407 (citations omitted).
208. *Id.* at 408.
209. *Id.*

Justice Liu concurred with the *Ledesma* majority. He wrote separately to clarify three aspects of the understanding of an "accident."[210] He agreed with the majority opinion holding that when an employee intentionally causes injury to a third party, that injury can be considered an accident if it was caused by the employer's negligent hiring, retention, or supervision of the employee.[211]

Justice Liu argued that the majority's formulation improperly conflated "accident" with the conduct that eventually and proximately causes injury.[212] He observed that "L&M's hiring, supervising, and retaining Hecht were not 'accidents'; [sic] those were deliberate, intentional acts."[213] But, from L&M's perspective, Hecht's actions and the injury to the victim were "unexpected, unforeseen, or undesigned happenings or consequences," so that "they were accidents in the context of a policy insuring L&M."[214] Thus, in Justice Liu's view, "an 'accident' does not necessarily refer to the conduct of the insured; rather, it is an '"unexpected, unforeseen, or undesigned happening or consequence"' *resulting from* the conduct of the insured."[215]

Second, he took issue with the causal connection analysis. Justice Liu argued that it was incorrect to hold that "'taking into consideration acts or events before the insured's acts would be illogical and contrary to California case law.'"[216] Antecedent events can and should be considered. It is true that tort causation theory looks to causes that are so closely connected with the result and of such significance that the law imposes liability. That is the basis for the majority statement that "a finder of fact could conclude that the causal connection between L&M's alleged negligence and the injury inflicted by Hecht was close enough to justify the imposition of liability on L&M."[217]

Finally, Justice Liu took issue with the majority's attempt to harmonize the *Ledesma* holding with *Merced.* He argued that "[i]f one were to accept the insured's claim that he had an honest belief that the victim consented to the sexual conduct, then the injury to the victim could be an '"'unexpected, unforeseen, or undesigned happening or consequence'"' resulting from the insured's conduct."[218] He stated that the result in *Merced* was "better explained by the fact that the court implicitly rejected the insured's contention that he honestly believed that the victim was consenting."[219]

210. *Id.* at 409.
211. *Id.* at 410.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* at 411 (quoting *Delgado*, 211 P.3d at 1091).
217. *Id.*
218. *Id.* at 412 (quoting *Delgado*, 211 P.3d at 1091).
219. *Id.*

If an insured believed the victim to not be consenting, then the insured's acts would be intentional, not accidental, and there would be no insurance coverage. Justice Liu rejected the idea that that a mistake in apprehending another's consent (or lack thereof) categorically can never give rise to an accident.[220]

V. IT CANNOT BE HEARSAY IF YOU SAID IT: STATEMENTS OF BROKERS AS REPRESENTATIONS OF THE INSURER IN MINNESOTA

Christopher Yetka

Recent legislation and decisions in Minnesota have changed how courts treat representations by insurance brokers and agents. Historically, determining who would be held responsible for the communications and actions of insurance brokers or agents was a question of authority. The possession of authority, whether actual, apparent, or implied, was a question of fact to be determined by the context of the act and/or representation.[221] However, that approach changed in 2001 with the passage of legislation that makes any person performing acts that require a producer license the agent of the insurer and not the policyholder.[222] The Minnesota Supreme Court[223] and Court of Appeals[224] have both addressed this change.

A recent case brought the change in law into clearer focus. In *Western National Mutual Insurance Co. v. Prospect Foundry*, the parties had a dispute over whether the policyholder was entitled to the return of a premium dividend based upon its claims history.[225] At the heart of the case, which went to trial, were representations allegedly made by the insurance agent to the policyholder on how certain claims would be handled.[226] The policyholder was allowed to testify about what the insurance agent told him over the hearsay objections of counsel for the insurer.[227]

The issue for the trial court to decide in *Western Nat'l* was whether the testimony was hearsay. Minnesota adheres to the classic hearsay rule: "Hearsay is not admissible except as provided by these rules or by other

220. *Id.*
221. Morrison v. Swenson, 142 N.W.2d 640, 644 (Minn. 1966) (citing William R. Vance, Handbook on the Law of Insurance 2nd, Sec. 118, pg. 415 (1930)); *see also* Eddy v. Republic Nat'l Life Ins. Co., 290 N.W.2d 174, 176 (Minn. 1980) (agents act on behalf of insurer, brokers act on behalf of prospective policyholder).
222. Minn. Stat. § 60K49, Subd. 1.
223. Graff v. Robert M. Swendra Agency, Inc., 800 N.W.2d 112, 118 n.5 (Minn. 2011) ("This distinction [between agent and broker], however, appears to have been superseded by statute.").
224. Western Nat'l Mut. Ins. Co. v. Prospect Foundry, 2018 WL 1787687, No. A17-0992 (Minn. Ct. App. Apr. 16, 2019).
225. *Id.* at *1.
226. *Id.* at *5.
227. *Id.*

rules prescribed by the Supreme Court or by the Legislature."[228] "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[229]

Minnesota also recognizes the classic exceptions to hearsay, including:

> **Statements which are not hearsay.** A statement is not hearsay if – . . . (2) *Statements by a party-opponent.* The statement is offered against a party and is . . . (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . . .[230]

Expert testimony established that the agent had authority to communicate regarding the relevant policy on behalf of the carrier.[231] A representative from the carrier testified that one of the services the company provides is communication about claims, and all communication between Western and the policyholder flowed through the broker.[232] The agency agreement between the broker and Western gave the broker the authority to provide "all usual and customary services of an insurance agent on all insurance contracts placed by the Agent."[233] The Court found that the statements about the claims were not hearsay because, as statements of Western's authorized agent, they were statements by a party-opponent.[234]

At the heart of the court's decision was Minnesota's agency statute, Minnesota Statute § 60K49, Subd. 1., that states in relevant part: "A person performing acts requiring a producer license under this chapter is at all times the agent of the insurer and not the insured."[235] The "acts" referred to in the statute, are enumerated in Minnesota Statute §60K.32:

> A person shall not sell, solicit, or negotiate insurance in this state for any class or classes of insurance unless the person is licensed for that line of authority under sections 60K.30 or 60K.56. The license itself does not create any authority, actual, apparent, or inherent, in the holder to represent or commit an insurance carrier.[236]

Finally, "negotiate" is specifically defined in the statutes as well. Minnesota Statute §60K.31, Subd. 12, reads:

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228. Minn. R. Evid. 802.
229. *Id.* at 801(c).
230. *Id.* at 801(d)(2)(C&D).
231. *Western Nat'l*, 2018 WL 1787687 at *5.
232. *Id.*
233. *Id.*
234. *Id.* at *6.
235. Minn. Stat. § 60K49, subd. 1.
236. *Id.* § 60K.32

> "Negotiate" means the act of conferring directly with or offering advice directly to a purchaser or prospective purchaser of a particular contract of insurance concerning any of the substantive benefits, terms, or conditions of the contract if the person engaged in that act either sells insurance or obtains insurance from insurer for purchasers.[237]

Because there was no dispute in the case that the broker sold and obtained insurance, and there was no dispute that the communication relating to claims was advice about the particular Western policies issued to Prospect concerning substantive benefits, the court held that the broker was the agent for Western for purposes of those communications.

In *Graff v. Robert M. Swendra Agency, Inc.*, the Minnesota Supreme Court recognized the agency statute, and mentioned that the distinction between a broker and agent for certain communications has been eliminated by it.[238] In that case, the parties did not dispute that the insurer "was vicariously liable for the negligent acts of the [broker] under a principal-agent relationship."[239]

Courts interpreting Minnesota's agency statute have held that representations made by an insurance broker are representations of the insurer, regardless of the relationship between the broker and the prospective policyholder. Therefore, it is important that both policyholders and insurers alike carefully monitor and document these communications because they can have a substantive effect on the interpretation and application of the underlying policies.

VI. E-SCOOTERS ARE EVERYWHERE NOW, BUT INSURANCE COVERAGE FOR RIDERS IS NOWHERE

Damian J. Arguello

In 2018, many major U.S. cities saw electric scooters become ubiquitous.[240] Lime reportedly had 26 million rides in 2018.[241] E-scooters rented out by companies like Lime, Bird, Razor, Lyft, and Spin are part of the growing on-demand economy that includes ride-sharing companies like Uber and Lyft. These services enable users to access transportation and other services on-demand without having to own the equipment.

237. *Id.* § 60K.31, subd. 12

238. Graff v. Robert M. Swendra Agency, Inc., 800 N.W.2d 112, 118 n.5 (Minn. 2011) ("This distinction [between agent and broker], however, appears to have been superseded by statute.").

239. *Id.*

240. *See* Sasha Lekach, *E-Scooters Get a Lot of Hate, But They're Sticking Around*, Mashable, Dec. 20, 2018, https://mashable.com/article/escooter-lime-bird-end-of-2018/#rsCSkqmMEPq1.

241. *Id.*

But are users covered by insurance if they hurt someone or damage property while operating an e-scooter? Probably not. As this industry continues to grow, the importance of clarifying the scope and availability of insurance coverage also grows.

E-scooter rental companies generally are required by the municipalities in which they operate to carry insurance. For example, in Denver, e-scooter rental companies are required to carry a minimum liability insurance limit of $1 million to cover property damage and $2 million to cover personal injuries and name "The City & County of Denver, its Officers, Officials and Employees, and The Colorado Department of Transportation with it's [sic] Officers, Officials and Employees" as additional insureds.[242]

However, although e-scooter rental companies are typically required to extend that coverage to the city, they are not typically required to extend that coverage to the user. One notable exception is San Francisco, which requires e-scooter rental companies to carry "[a]dequate insurance . . . for each Powered Scooter ridden, parked, or left standing or unattended on any sidewalk, Street, or public right-of-way under the jurisdiction of the SFMTA or Public Works, and for each user using the Powered Scooter during the period of use."[243]

In fact, under the typical e-scooter rental contract the user electronically signs when they subscribe to the scooter rental service, not only is the e-scooter rental company not agreeing to protect the user under its insurance or in any other way, the user assumes all the risk and actually agrees to defend and indemnify the rental company if an accident occurs. For example, Lime's user agreement states that "Lime will carry all necessary insurance associated with the Vehicles as required by applicable law."[244] However, the user agrees to be "solely responsible and liable" for any "consequences, claims, demands, causes of action, losses, liabilities, damages, injuries, fees, costs and expenses, penalties, attorneys' fees, judgments, suits and/or disbursements of any kind, or nature whatsoever, whether foreseeable or unforeseeable, and whether known or unknown, as a result of using any of the services."[245]

242. *See* Denver Dockless Mobility Pilot Permit Program Overview, June 2018, https://www.denvergov.org/content/dam/denvergov/Portals/705/documents/permits/Dockless-Mobility-Pilot-Permit-Program-Overview_June2018.pdf (citing City & County of Denver Public Works Dep't Transit Amenity Program Rules & Regulations § II.A.B.(a)).

243. S.F. Municipal Transportation Agency Board of Directors Resolution No. 180501-073, § 916(d)(6)(B) (May 1, 2018), https://www.sfmta.com/sites/default/files/reports-and-documents/2018/05/5-1-18_item_11_pilot_scooter_share_program_permit_resolution.docx_.pdf.

244. Lime User Agreement, § 1.4.4 (Dec. 7, 2018), *available at* https://www.li.me/user-agreement.

245. *Id.*, § 1.8.

Further, the Lime agreement requires the user to assume the risk: "You expressly agree and acknowledge that you fully understand the risks associated with your use of the services, products, and/or related equipment, and that you assume such risk."[246]

Finally, the Lime agreement requires the use "to defend, indemnify, and hold harmless" Lime and associated persons "from and against" "all consequences, claims, demands, causes of action, losses, liabilities, damages, injuries, fees, costs and expenses, penalties, attorneys' fees, judgments, suits settlements, and/or disbursements of any kind, or nature whatsoever, whether foreseeable or unforeseeable, and whether known or unknown, that directly or indirectly arise from or are related to" the use of Lime's services and equipment.[247]

So, the user typically does not get insurance coverage from the e-scooter rental company. What about the user's own automobile liability insurance? The user probably does not get coverage there, either. Most personal auto liability insurance policies exclude coverage for vehicles with fewer than four wheels. For example, the Personal Auto Policy form propounded by the Insurance Services Office ("ISO") and which serves as a model for many personal auto insurers' proprietary forms states, "[w]e do not provide Liability Coverage for the ownership, maintenance or use of [] [a]ny vehicle which [] [h]as fewer than four wheels; . . . ."[248] Moreover, many millennials who use e-scooters do not even own a car and thus probably do not have a personal auto insurance policy to begin with.

If the user has homeowners or apartment rental insurance, that too is unlikely to provide coverage. For example, although there may be some room for argument about whether e-scooters are designed for recreational use off public roads, the liability section of the ISO Homeowners Insurance Policy form excludes coverage for any "motor vehicle liability."[249] "Motor vehicle" is defined in relevant part as "a self-propelled land or amphibious vehicle."[250] Again, however, many millennials who use e-scooters may not even have any kind of homeowners or renters insurance.

What about personal umbrella liability policies? Many of those policies will be "follow form," meaning they will adopt the exclusions of the underlying personal auto or homeowners policies. Even if the personal umbrella policy does not follow form or does not exclude coverage for vehicles with fewer than four wheels, the existence and scope of this coverage varies

246. *Id.*, § 7.4.
247. *Id.*, § 8.1.
248. ISO Personal Auto Policy form PP 00 01 01 05 Exclusion B.1.a.
249. ISO HomeownersSpecial Form, HO 00 03 10 00, Exclusion A.
250. *Id.*, Definition B.7.a.

by insurer. Furthermore, many people of all ages do not carry personal umbrella policies at all.

It is possible that an e-scooter user could be acting within the course and scope of employment at the time of an accident to travel to a meeting, deliver documents, etc. Is there coverage for the user under the employer's commercial insurance? That is a more complex question.

Assume, for example, that the user's employer carries a commercial auto policy based upon an ISO Business Auto Coverage Form with liability coverage applying to "any auto." The employer might have coverage, but the employee likely is not covered because the policy limits insured status to "anyone else [other than the named insured] while using with your permission a covered 'auto' you own, hire or borrow."[251] This coverage form defines "auto" as "[a] land motor vehicle . . . designed for travel on public roads; or any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. However, 'auto' does not include 'mobile equipment.'"[252] In turn, "mobile equipment" includes "vehicles designed for use principally off public roads."[253]

Thus, depending on whether the applicable state or municipality requires e-scooters to be insured, they may or may not be an "auto" covered under the commercial auto policy. Moreover, since the employee, not the named insured employer (the "you" in the above-referenced sentence), presumably hired or borrowed the e-scooter, the employer's coverage may not extend to the employee who actually rented the e-scooter.

If the employee does not have liability coverage under the employer's commercial auto policy, does the employee have coverage under the employer's general liability coverage? Again, probably not. The ISO CGL form excludes coverage for bodily injury or property damage "arising out of the ownership, maintenance, use or entrustment to others of any . . . 'auto' . . . owned or operated by or rented or loaned to any insured."[254] The ISO CGL form contains the same or a very similar definition of "auto" as the ISO Business Auto Coverage Form.[255]

Further complicating the analysis under either personal or commercial coverage is the use of proprietary coverage forms by many insurers. Additionally, as suggested above, the applicable financial responsibility or motor vehicle insurance law also is a factor in determining coverage. Finally, one

251. ISO Business Auto Coverage Form CA 00 01 03 10 § II.A.1.b.
252. *Id.*, § V.B.
253. *Id.*, § V.K.1.
254. ISO Commercial General Liability Coverage Form CG 00 01 04 13, § I.2.g.
255. *Id.*, § V.2.

has to consider the various endorsements issued on personal and commercial insurance policies.

The bottom line is that, currently, there is a good chance that an e-scooter renter does not have any liability insurance coverage if the user hurts someone or damages someone's property. As of this writing, the author has been unable to locate any reported decisions addressing the issue but, as lawsuits against e-scooter users are filed, related coverage actions reaching the appellate or federal district courts are bound to follow.