CRITICAL ISSUES FOR THE INSURANCE INDUSTRY AND ITS ATTORNEYS— 2025 AND BEYOND[1]

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[1] The panel members would like to recognize Michael Marick, Esq. This paper continues with evolving topics in the industry that was originally started in 2022 with paper and presentation.

I. Introduction

This paper, and the accompanying presentation, address current issues that are important to the insurance industry, those of us who represent the industry in coverage matters, and litigation: (1) AI and the modernization of the claims and litigation process; (2) Litigation strategy including advertising for verdicts, third-party funding, discovery abuses and legislative and tort reform; (3) Mass torts and (4) industry perceptions from both the inside and outside perspectives.

Insurers are facing extraordinary claims and coverage litigation today, and likely for many years to come, for claims arising from: (1) nuclear verdicts; (2) opioids and other mass torts; (3) climate change/natural disasters. Additionally, the last several years have brought to the forefront important issues related to the implementation of AI as related to the claims and litigation process. Evolving issues surrounding advertising for verdicts, third-party funding, discovery and legislative and tort reform continue to be at the forefront of the considerations that insurers are involved in.

Finally, insurers and law firms continue to explore how to best structure and improve their working environments, particularly in light of what we have learned from the Covid pandemic—how to create our best companies and firms in the "new normal" and working to adjust to the transition of the labor market with many experienced individuals ending their working careers while others enter the industry.

II. Significant Issues and Litigation Facing the Insurance Industry

A. Artificial Intelligence

Artificial Intelligence ("AI") is a form of technology which enables computer systems to carry out tasks which typically require human intelligence. *Artificial Intelligence*, NAIC, October 14, 2021, https://content.naic.org/cipr_topics/topic_artificial_intelligence.htm. It can be used to recognize patterns and predict hidden or untraceable data. AI has become a critical part of our everyday lives. Advancements in artificial technology continue to increase and affect multiple industries, including insurance.

1. Pricing

AI algorithms are able to create insurance risk profiles based on information related to individual customer behavior. *See* McKinsey & Company, *Insurance 2030—The impact of AI on the future of insurance,* March 12, 2021, https://www.mckinsey.com/industries/financial-services/our-insights/insurance-2030-the-impact-of-ai-on-the-future-of-insurance. Insurance companies can use these profiles to price their policies more competitively. *Id.* Through the use of AI algorithms, purchasing insurance policies can be completed within minutes. *Id.* AI can also help carriers reduce expensive processes while still creating value.

Machine learning and insurance: the emergence of a pricing revolution, THE ECONOMIST, https://thedigitaltransformation.economist.com/machine-learning-insurance/. In order to simplify the customer experience, insurers can use third-party data to supplement their algorithms. *Id.*

2. Underwriting

Underwriting insurance is heavily dependent on data and analytics. *See* Anthony Xavier, *6 Ways Machine Learning and AI are Transforming the Insurance Industry*, SIMPLESOLVE INC., March 12, 2021, https://www.simplesolve.com/blog/machine-learning-and-ai-in-insurance-industry/. AI algorithms are capable of reviewing customer data and creating risk profiles to better detect the value of the risk more efficiently. *Id.* The use of AI for risk analysis is vast and can include photo analytics used to help validate damages for property and automobile insurers, and "geospatial imagery" used to perform property risk analysis, "deep learning," and "science-driven risk comparison." *Id.*

Prior to the advancement of AI, in many lines of coverage, insurers relied on the information provided by insureds to evaluate and assess the risk. *Id.* With the use of AI, insurers are now able to collect data from a variety of sources, independent of the insured. *Id*. AI can also evaluate "unstructured data" associated with high-risk behaviors in the insured's operations and transpose them as risk predictors. *Using Artificial Intelligence in Risk Management*, RECIPROCITY, September 9, 2021, https://reciprocity.com/blog/using-artificial-intelligence-in-risk-management/.

With the development of AI, the process of underwriting has become more accurate, efficient, and quicker. *See supra* Xavier. Over the past two decades, insurance companies have incorporated "underwriting rules engines" into their risk assessment process. *See* Chloe Cheung, *Will artificial intelligence ever replace human underwriting?* FT ADVISER, January 18, 2022 https://www.ftadviser.com/protection/2022/01/18/will-artificial-intelligence-ever-replace-human-underwriting/?page=1. These engines consist of "pieces of software that use decision trees to automate and replicate the human underwriting process." *Id.*

A common concern around the development of AI is its potential to replace humans in the workplace, including underwriters. *Id.* According to John Downes, Director of Underwriting and Claims at VitalityLife, it is unlikely that underwriters will ever be replaced, although the role is likely to change over time. "Regular ongoing maintenance of any machine learning model will need to be done and an underwriting team together with a data science team would be essential for that, as well as for the ongoing underwriting philosophy development." *Id.* Nicky Bray, Chief Underwriter for Zurich UK Life Business, explains "it's about revolutionizing existing roles, so that more time is invested in customer engagement and complex cases so we can deliver tailored solutions to meet customer needs." *Id.*

3. Claims Management

AI has also helped to improve the claims management process. Processing and managing claims often involve analyzing data and communicating with various individuals, including the claimant, underwriters, and brokers. *See* Xavier, *supra*. AI applications, such as, claims management software can be utilized to "automate routine data checks" and allow adjusters to focus their time on other tasks. *Id.* Furthermore, claims management software can be used to "streamline end-to-end processes, right from data scanning and processing to verifying policy details and identifying gaps or errors." *Id.*

4. Fraud Detection

Insurers use AI to detect fraudulent claim activity. *See* Jim Hulett, *Artificial intelligence in claims fraud: How AI is automating suspicious behavior detection,* VERISK July 15, 2020, https://www.verisk.com/insurance/visualize/artificial-intelligence-in-claims-fraud-how-ai-is-automating-suspicious-behavior-detection/. Developing AI algorithms and predictive models for claims fraud detection requires vast information. *Id.* The more data that is fed into the algorithm results in a greater success in detecting fraud. *Id*. Doing so is not always a seamless process. *Id.* For example, transferring data from a third-party to an internal model requires a great deal of time and resources. *Id.* Nevertheless, having a proven infrastructure built into anti-fraud AI systems is cost-effective and can create better data integration. *Id.*

Insurers have seen an increase in suspicious claim referrals from fraud detection AI. *See* Claims Journal Staff, *Insurers Report Growing Use of Fraud-Detection Technology*, *Artificial Intelligence,* CLAIMS JOURNAL, January 26, 2022, https://www.claimsjournal.com/news/national/2022/01/26/308256.htm. A recent Insurance Fraud Technology Study found that eighty percent of respondents to a survey of insurers reported using predictive modeling to detect fraud, which increased from fifty five percent in 2018. *Id.* The study further found that detection of claims fraud, underwriting, and internal fraud has steadily increased throughout the years. For example, ninety six percent of survey respondents reported using some version of fraud-detection technology. *Id.* However, according to the study, in 2014, less than seventy five percent of respondents reported using this technology. *Id.* In addition, fraud detection technology resulted in more referrals than in past years. *Id.* According to the study, thirty nine percent of respondents said that more than thirty percent of their referrals came from an automated fraud detection system, compared to just twenty percent in 2018. *Id.*

B. Latest In Litigation

1. Social Inflation

Before addressing additional topic areas, social inflation continues to be a significant challenge to insurers and their stakeholders, as it has a direct effect on

claims and the cost of coverage. Social inflation does not have a single definition, but instead generally refers to rising litigation costs and its impact on insurers' claim payouts, loss ratios and, ultimately, how much policyholders pay for coverage.

Among the chief causes of social inflation are: (1) tort reform rollbacks; (2) class actions; (3) litigation funding; (4) "nuclear" verdicts; and (5) corporate policyholders' coverage positions.

Among the measures insurers can take to combat social inflation are: (1) legislative initiatives/lobbying; (2) education of the judiciary; (3) improvements in risk evaluation/underwriting; (4) taking select cases to trial; and (5) aggressively challenging corporate policyholders' overreaching (including in relation to their defense/"Cumis" counsel fees).

2. Litigation Funding

Increasingly in recent years, consumer or commercial litigation is financially supported by investors who front a portion or all of the costs of litigation in return for a percentage of the settlement or verdict, which is known as litigation funding. Litigation funding results in increased claims, higher defense and indemnity costs, has proven costly to defendants in litigation and their insurers, and is controversial.

In late 2021, Swiss Reinsurance Company released a report urging the United States government to restrict third-party litigation funding practices. The report noted, that in 2020, an estimated $8.5 billion was invested in litigation in the United States. Swiss Re's report explains that the majority of third-party litigation funding targeted commercial litigation and mass torts.

Whether through rules of standing (such as those requiring that suits be brought by the real party in interest), the breadth of civil discovery, or the general judicial and social preference for disclosure and transparency, there are compelling reasons to require the disclosure of litigation funding arrangements. Unfortunately, defendants' attempts to obtain litigation funding agreements have been unsuccessful in most cases. For example, a California court denied a defendant's motion to compel disclosure of funding agreements and concluded that materials exchanged pursuant to a non-disclosure agreement were protected by the work product doctrine. *Impact Engine Inc. v. Google LLC*, 19-cv-01301-CAB-DEB, Dkt. 129 (S.D. Cal. Oct. 20, 2020) (under the terms of the NDA, confidentiality was the "clear expectation of both parties" and was "not waived because it was shared with another person or entity"). Another court did not even reach the work product question, after concluding that the defendant failed to even meet its burden of showing that the documents were relevant to the claims in the litigation. *United Access Technologies LLC v. AT&T Corp.*, 2020 WL 3128269, *1-2 (D.Del. June 12, 2020). However, a court in the Southern District of New York found funding agreements relevant and discoverable where the evidence could negate the

defendant's counterclaim. *E. Profit Corp. Ltd. v. Strategic Vision US, LLC*, 2020 WL 7490107 at *7-8 (S.D.N.Y. Dec. 18, 2020).

As of late 2025, approximately half of all states have enacted legislation to respond to third-party litigation funding and alleged abuses associated with it. In the United States, the "One Big Beautiful Bill Act" initially included a proposal to increase taxes on profits from litigation funding from the 15 percent capital gains rate to a new rate of 31.8 percent. The provision was removed from the reconciliation bill, however.

In October 2024, the U.S. Judicial Conference authorized a subcommittee to examine potential amendments to the Federal Rules of Civil Procedure to address the disclosure of third-party funding agreements.

Other states have passed or proposed legislation that would require disclosure of third-party litigation funding, starting with Wisconsin, which in 2017 approved a law requiring disclosure of any agreements in which a party other than the attorney "is permitted to charge a contingent fee" or receive "proceeds" from a civil action in discovery. The bill, A.B. 773, narrowly passed the state's Senate and took effect in July 2018.

3. Advertising for Verdicts

In a recent article for the U.S. Chamber of Commerce Institute for Legal Reform, an article was included titled "Plaintiffs' Firms Manufacture Lawsuits and Seek to Control Media -- And Their Proud of It." See, Plaintiffs' Firms Manufacture Lawsuits and Seek to Control Media – and They're Proud of It - ILR (June 10, 2025). Among the information included in the article were statements made by a leading Plaintiffs' mass tort lawyer noting "the idea that you're going to go try a case and that's all you have to do is ridiculous. If you don't control the narrative outside the courtroom, you've already lost inside the courtroom." As he put it, "the litigation doesn't wag the media tail—the media tail wags the litigation." The attorney further is ascribed as stating that representatives of his firm engage in a "relentless pursuit of government cooperation in [opioids and PFAS litigation efforts]." "[Counsel] figured out how to get control from governmental agencies… and he's not afraid to have doors slammed on his face."

The import of the information included in the article is chilling. A leading mass tort lawyer noting that concerns outside the courtroom and evidence were taking precedent over the actual merits of the case. In response, companies have attempted to issue corrective advertising, If a company has been found to be deceptive, the Federal Trade Commission (FTC) can compel it to run advertisements that correct its previous misstatements. This is intended to eliminate the lingering effects of misleading claims. Defamation lawsuits are another potential avenue to pursue, albeit timely, costly and with potential risk. Additionally, companies need to be examined social media and be ready to respond quickly if false and/or misleading information is posted.

III. Mass Torts

A. The Opioid Federal Court MDL and State Court Cases

In 2017, sixty-four federal court lawsuits that had been brought in nine districts across the country were sent to coordinated multi-district litigation in the Northern District of Ohio before Judge Dan Polster (the "MDL"). *See In Re: National Prescription Opiate Litigation*, MDL-2804, Dkt. No. 1, at Schedule A. In addition, over 350 parallel actions have since been filed in state and local courts. In several states, including New York, these cases also were consolidated in coordinated state proceedings.

At one time, there were more than 3,000 pending state and federal court lawsuits against opioid manufacturers[2], distributors, and pharmacies brought by state, county, and municipal governments and government agencies, Indian Nations, legal guardians for babies born with Neonatal Abstinence Syndrome ("NAS"), third-party payors, and others. The lawsuits generally assert claims against the defendants for their roles in fueling the opioid crisis, under theories of liability including: (1) public nuisance, (2) false representation, (3) unjust enrichment, (4) civil conspiracy (5) common law parens patriae, (6) negligence, (7) gross negligence, and (8) consumer protection act claims. The core allegations against the manufacturers are that they acted improperly in the marketing and sale of prescription opioid medications. Against the wholesale distributors, the plaintiffs assert the defendants failed to meet their obligations under the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801 *et seq*., to prevent diversion of prescription opioid medications into the illicit market. Against the retail pharmacies, the plaintiffs allege the defendants (1) as distributors of opioids to their own stores, supplied too many pills pursuant to pharmacy orders; and (2) as retail pharmacies, dispensed too many pills by filling physicians' prescriptions, also in violation of their obligations under the CSA.

The defendants asserted numerous defenses to these claims, including that (1) state nuisance law does not apply to the legal sale of a legal product; (2) the FDA and the DEA approved the manufacture and sale of prescription opioids, and the DEA set annual quotas prescribing the amount that could be manufactured; (3) physicians prescribed opioid medications consistent with the evolving standard of care for the treatment of pain; (4) applicable statutes of limitation have run; (5) the opioid epidemic is not a "public nuisance" under state law; and (6) the

[2] On September 15, 2019, Purdue Pharma and its affiliated companies filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York. Purdue quickly obtained an injunction staying all actions against the Purdue entities as well as against their owners, directors, officers, and employees – particularly, members of the Sackler Family. The injunction was extended 18 times to allow Purdue and its creditors to negotiate a settlement as part of Purdue's Bankruptcy Plan. Mallinkrodt, another manufacturer, also filed for bankruptcy protection.

plaintiffs cannot prove the defendants caused the opioid epidemic or substantially contributed to a public nuisance.

1. MDL And State Court Trial Track Bellwether Cases

Judge Polster, and state courts presiding over coordinated lawsuits, established bellwether litigation track cases. Judge Polster issued a case management order meant to "facilitate, to the maximum extent possible, coordination [of discovery] with parallel state court cases." (MDL Dkt. No. 876, at ¶ I(b)). Over 450 depositions were taken under the MDL umbrella and over 160 million pages of documents were produced. (MDL Dkt. No. 2676, at 5).

Judge Polster first established Track One, consisting of lawsuits brought by Cuyahoga and Summit Counties, Ohio. The manufacturer and distributor defendants settled the litigation on the eve of trial in October 2019. Walgreens, the only pharmacy defendant that had not previously been severed from Track One, did not settle. Instead of proceeding to trial against Walgreens only, Judge Polster established Track One B and scheduled trial of the Cuyahoga and Summit County cases against the pharmacy defendants for October 2020. Track One B was to proceed in two phases. Phase I would try the plaintiffs' public nuisance claims against the pharmacies for their conduct as distributors and dispensers of prescription opioids. If the jury found liability, Judge Polster would schedule a bench trial to impose an appropriate remedy.

The pharmacies successfully challenged the Sixth Circuit Judge Polster's inclusion of claims against them as distributors after the deadline to amend the pleadings, and those claims were stricken from the case. Rather than proceed to trial against the pharmacies only for conduct as dispensers of prescription opioids, Judge Polster established Track Three[3], consisting of lawsuits filed by Lake and Trumbull Counties, Ohio. Judge Polster allowed the plaintiffs to amend their complaints to include claims against the pharmacies for their conduct as distributors, severed all non-pharmacy defendants, and proceeded to a jury trial on liability for the plaintiffs' public nuisance claims against the pharmacies only.

2. Completed Trials

State of Oklahoma ex rel. Hunter v. Johnson & Johnson, et al. Case No. CJ-2017-816, District Court of Cleveland County, OK.

Following a bench trial, Judge Thad Balkman issued a judgment on the State's public nuisance claims against Johnson & Johnson ("J&J"), finding J&J liable under Oklahoma's public nuisance statute for conducting "false, misleading, and dangerous marketing

[3] Judge Polster previously established Track Two, consisting of lawsuits brought by the City of Huntington and Cabell County, West Virginia, and remanded that bellwether to the Southern District of West Virginia.

campaigns" about prescription opioids. Judgment After Non-Jury Trial, p. 25, Aug. 26, 2019. The court awarded the State $465 million, representing the cost of abating the nuisance for one year.

On November 9, 2021, the Oklahoma Supreme Court reversed the trial court judgment, holding that Oklahoma's public nuisance statute does not apply to the manufacturing, marketing, and selling of products. *State ex rel. Hunter v. Johnson & Johnson,* 499 P.2d 719 (Okla. Nov. 9, 2021). The Oklahoma decision was the first state supreme court, and the first appellate court of any kind, to hold that a manufacturer's conduct does not constitute a public nuisance.

The People of the State of California, acting by and through Santa Clara County Counsel and Orange County District Attorney, et al. v. Purdue Pharma L.P., et al. Case No. 30-2014-00725287-CU-BT-CXC, Superior Court, Orange County, CA.

The People of the State of California brought an action against several opioid manufacturers[4] for public nuisance (California Civil Code Sections 3479 and 3480), false advertising (Business and Professions Code Sections 17500 *et seq*), and unfair competition (Business and Professions Code Sections 17200 *et seq*). As in other opioid-related lawsuits, the plaintiff alleged that the manufacturers started and exacerbated the opioid crisis with an aggressive and misleading marketing campaign.

On November 1, 2021, Judge Peter Wilson issued a Tentative Decision following a bench trial against opioid manufacturers concluding that the State of California "failed to prove an actionable public nuisance for which the [manufacturers] … are legally liable." He entered the Statement of Decision and Judgment on December 14, 2021.

Having found that the FDA, the DEA, and the California Legislature previously determined that the social utility of medically appropriate opioid prescriptions outweighs the gravity of the harm inflicted by them, the court held that any downstream consequences flowing from medically appropriate prescriptions are not unreasonable and cannot constitute an actionable public nuisance. Judge Wilson further held that the plaintiff had no evidence to demonstrate or suggest that the increased prescriptions were not medically appropriate, and no evidence that attempted to quantify how medically inappropriate prescriptions caused or contributed to the

[4] Johnson & Johnson and Janssen Pharmaceuticals; Endo Pharmaceuticals Inc., and Endo Health Solutions Inc.; Teva Pharmaceuticals USA, Inc., Cephalon, Inc., Watson Laboratories, Inc., Actavis, LLC, and Actavis Pharma, Inc.; and Allergan plc, and Allergan Finance LLC.

opioid crisis. Adding that the plaintiff described the opioid crisis as multifaceted, with contributing actors, including manufacturers, distributors, pharmacies, doctors, the illegal drug trade, the FDA, the DEA, and the State of California, Judge Wilson stressed that while the plaintiff is not required to prove the exact contribution of each defendant, it nevertheless must prove that the contribution of each defendant was more than negligible or theoretical.

Judge Wilson also rejected the plaintiff's causation arguments. First, he rejected the claim that causation can be established by aggregate proof, i.e., that the substantial increase in opioid prescriptions must necessarily have been caused by the defendants' conduct. *Id*. at 17. Second, he found that the plaintiff failed to establish the defendants' marketing and promotion caused the diversion of opioids to the criminal market. *Id*. at 20.

The City of Huntington and Cabell County Commission v. AmerisourceBergen Drug Corporation, et. al. Case No. 17-CV-01362, United States *District* Court for the Southern District of West Virginia – Track Two.

From May 3, 2021 through July 12, 2021, Judge David Faber conducted a bench trial on liability for the plaintiffs' nuisance claims against distributors AmerisourceBergen Drug Corporation, Cardinal Health, and McKesson. The Court ruled in favor of the distributors. An appeal was taken to the 4th Circuit Court of Appeals, which subsequently certified a question to the West Virginia Supreme Court of Appeals concerning whether:

> Under West Virginia's common law, can conditions caused by the distribution of a controlled substance constitute a public nuisance and, if so, what are the elements of such a public nuisance claim?

City of Huntington v. AmerisourceBergen Drug Corp., 96 F.4th 642, 644 (4th Cir. 2024). The West Virginia Supreme Court of Appeals declined to answer the certified question, while leaving open the possibility of additional consideration of future certified questions on this issue pending further factual development. See, *City of Huntington v. AmerisourceBergen Drug Corp.,* 915 S.E.2d 828 (W. Va. 2025).

In Re: National Prescription Opiate Litigation, MDL-2804 – Track Three.

Judge Dan Polster conducted a jury trial in the Track Three bellwether case brought by Lake and Trumbull Counties, Ohio against CVS, Giant Eagle, Walgreens, and Walmart for actions undertaken as distributors and dispensers of prescription opioids. Giant Eagle settled on October 28, 2021, and the case proceeded as a jury trial on liability for the plaintiffs' public nuisance claims against CVS, Walgreens, and Walmart.

At the close of their case-in-chief, the plaintiffs abandoned their claims against the pharmacies for conduct as distributors. On November 23, 2021, the jury rendered a verdict for the plaintiffs, finding that the plaintiffs proved by the greater weight of the evidence that oversupply of legal prescription opioids, and diversion of those opioids into the illicit market outside of appropriate medical channels, is a public nuisance, and that the defendants engaged in intentional and/or illegal conduct which was a substantial factor in producing the public nuisance.

Following entry of the verdict, Judge Polster scheduled the bench trial on abatement to begin on May 9, 2022. The defendants filed a Motion for Certification of Orders for Interlocutory Relief and post-trial motions for entry of judgment or for a new trial, which are based largely on arguments Judge Polster previously rejected. Judge Polster denied the defendants' Motion for Certification of Orders for Interlocutory Relief on January 31, 2022 and, in separate Opinions, denied the defendants' post-trial motions on March 7, 2022. Certified questions were later certified to the Ohio Supreme Court regarding whether the claims for public nuisance were abrogated by the Ohio Product Liability Act. The Ohio Supreme Court found that the claims were abrogated, which resulted in the 6th Circuit Court of Appeals reversing the district's court's judgment on the public law nuisance claims. *Trumbull Cnty. v. Walgreens Boots All., Inc*. (*In re Nat'l Prescription Opiate Litig*. 2025 U.S. App. LEXIS 2316 (6th Cir. 2025).

3. Settlements

Plaintiffs have reached and are continuing to negotiate settlements with manufacturers, distributors, and pharmacies. We highlight the most significant completed and pending settlements below.

- Purdue Pharma

  On September 1, 2021, U.S. Bankruptcy Judge Robert Drain approved Purdue's reorganization plan, which included a $4.5 billion settlement contribution in exchange for releases against Purdue and the Sackler Family. On December 16, 2021, District

Court Judge Colleen McMahon overturned the settlement and plan of reorganization on the ground that Judge Drain did not have the authority to release the Sacklers, who are not debtors, from future opioid litigation and liability. Although Purdue appealed Judge McMahon's decision to the Second Circuit, Judge Drain ordered the parties back to mediation to explore settlement in light of Judge McMahon's ruling. On March 3, 2022, Purdue filed a motion seeking Judge Drain's approval of a settlement term sheet that secures additional settlement payments that would bring the total to $5.5 to $6 billion. Judge Drain approved the term sheet on March 10. However, the matter was subsequently appealed resulting in the landmark *Harrington v. Purdue Pharma, L.P*. ruling that rejected the ability to obtain a release of claims and potential claims against the Sackler family, both for consenting and non-consenting creditors as they were non-debtors to the Purdue Pharma Chapter 11 bankruptcy proceedings.

- Big Three Distributors and J&J Global Settlement

  On July 21, 2021, J&J and the Big Three Distributors (AmerisourceBergen, Cardinal, and McKesson), made a $26 billion offer to resolve their liabilities in over 3,000 cases. J&J offered $5 billion, with the distributors sharing the remaining $21[5] billion in proportion to their market share. The terms of a final settlement agreement were announced on February 25, 2022.

  There are three phases for this settlement to become effective. First, each state eligible to participate was to decide whether to participate in the settlement, with the defendants then having time to decide whether there is sufficient participation to proceed. That hurdle has been met. Second, the states' subdivisions were to decide whether to participate, with the defendants again having time to decide if there was enough "critical mass" to go forward. On February 7, 2022, the states advised the defendants that there is more than enough participation by subdivisions to go forward. The defendants had until February 25, 2022 to make a final decision and on that date, it was announced that 46 of 49 states[6] eligible to participate in the distributor's settlement[7] and approximately 90% of eligible local governments signed on to the settlement, which will result in $19.5 billion being distributed to the state and local governments. Third, the settlement would become effective 60 days

[5] West Virginia previously settled with the Big Three Distributors in an unrelated settlement. A portion of the distributors' settlement funds ($491 million) is treated as a credit toward potential settlements with West Virginia subdivisions and with Tribes.

[6] Alabama, Oklahoma, and Washington remain holdouts.

[7] 45 of 49 eligible states agreed to participate in the J&J settlement.

later. During that time, the states are to seek entry of a consent judgment to implement releases and injunctive relief.

Under the terms of the settlement, AmerisourceBergen will pay $6.1 billion, Cardinal will pay $6 billion, and McKesson will pay $7.4 billion over 18 years. J&J will pay $5 billion broken into annual payments over nine years. The settlement funds will go to state and local governments and pay for healthcare and drug treatment programs, among other programs aimed at mitigating the opioid crisis. No funds will be paid to a settling state until the consent judgment has been entered in that state.

Of the funds going directly to participating states and subdivisions, at least 85% must be used for abatement of the opioid epidemic, with the bulk of the proceeds restricted to funding future abatement efforts by state and local governments. Less than 10% of the settlement funds will be set aside to pay private lawyers who have been prosecuting cases on behalf of state and local governments.

- Indian Nations

  On February 1, 2022, the Big Three Distributors agreed to pay tribal governments almost $440 million (in addition to a *prior $75 million* settlement between those distributors and the Cherokee Nation), and J&J agreed to pay $150 million. The settlement only becomes effective once 95% of litigating tribes and 14 of the 17 non-litigating tribes agree to participate in its framework. All 574 federally recognized Native American tribes are eligible to participate, regardless of whether or not they have sued the participating defendants.

- Miscellaneous

  Other settlements have been reached, including the following examples:

  - Pharmacy defendants settled the New York state and county cases for a combined $26 million. Other distributor defendants settled for more than $1 billion.

  - Purdue settled with the State of Oklahoma for $270 million before it filed for bankruptcy. Teva settled with Oklahoma for $85 million.

4. Coverage Litigation

The standard CGL policy Insuring Agreement typically provides that the insurer will "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." "Bodily injury" is often defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." Whether the underlying opioid lawsuits brought by governmental entities allege damages "for" or "because of" bodily injury has been the major focus of insurance coverage disputes to date.

Several federal district courts have held that the underlying lawsuits do not seek damages "for" or "because of" bodily injury, and therefore, the insurer had no duty to defend. *See e.g., Cincinnati Ins. Co. v. Richie Enterprises LLC*, No. 1:12-CV-00186-JHM, 2014 WL 838768, at *5 (W.D. Ky. Mar. 4, 2014), order clarified, No. 1:12-CV-00186-JHM, 2014 WL 3513211 (W.D. Ky. July 16, 2014) (applying Kentucky law) (holding that in the absence of medical monitoring claim, the state is solely seeking damages for the money it has been required to spend because of the prescription drug abuse epidemic in West Virginia); *Travelers Prop. Cas. Co. of Am. v. Anda, Inc.*, 90 F. Supp. 3d 1308, 1314 (S.D. Fla. 2015), aff'd, 658 F. App'x 955 (11th Cir. 2016) (applying Florida law) (holding that underlying opioid lawsuits filed by state governments did not seek damages "for bodily injury" because plaintiffs did not purport to assert claims on behalf of individual citizens for the physical harm sustained personally by those citizens); *Motorists Mut. Ins. Co. v. Quest Pharms., Inc*., No. 5:19-CV-00187-TBR, 2021 WL 1794754, at *6 (W.D. Ky. May 5, 2021) (applying Kentucky law) (holding that underlying opioid lawsuits filed by state governments were not "because of" or "for" bodily injury because plaintiffs were not seeking damages based on any bodily injury suffered themselves and did not need to provide proof that its citizens or patients experienced any bodily injury).

The Seventh Circuit, applying Illinois law, reached the opposite decision and found that an underlying lawsuit brought by the State of West Virginia sought damages "because of" bodily injury. *Cincinnati Ins. Co. v. H.D. Smith, L.L.C*., 829 F.3d 771 (7th Cir. 2016).

In *Acuity v. Masters Pharm., Inc*., the Court of Appeals for the First Appellate District of Ohio found that a CGL insurer had a duty to defend its insured, a pharmaceutical distributor, against various lawsuits brought by governmental entities for costs incurred in combating the opioid epidemic. 2020-Ohio-3440, ¶ 5, appeal allowed, 2020-Ohio-5634, ¶ 5, 160 Ohio St. 3d 1495, 159 N.E.3d 277. The court reasoned that there was, arguably, a causal connection between the insured's alleged conduct, the bodily injuries suffered by individuals who became addicted to opioids, overdosed, or died, and the damages suffered by the governmental entities, including money spent on services like emergency, medical care, and substance-abuse treatment. *Id.* at ¶ 28. The insurer appealed. The Supreme Court of Ohio accepted the appeal and heard oral argument on September 8, 2021. This was the first opioid liability coverage dispute argued to a state supreme court.

In *Cincinnati Insurance Company v. Discount Drug Mart, Inc.*, the Ohio Eighth District Court of Appeals found that a CGL insurer had a duty to defend its insured, a drugstore, in underlying opioid lawsuits brought by counties alleging claims for public nuisance and civil conspiracy. 2021-Ohio-4604, ¶ 60. Although the court observed that the counties were "expressly seeking economic damages," the court found that at least part of those claimed damages were for services that the counties "arguably" were required to provide "because of bodily injury." *Id*. at ¶ 53. Furthermore, although the counties alleged that the drugstore intentionally marketed and distributed opioids, the counties did not allege that it intended to cause bodily injury to the counties' citizens or to increase the cost of public services. *Id*. at ¶ 58. Accordingly, the court found that the alleged public nuisance was potentially "accidentally suffered" and therefore "caused by an occurrence" sufficient to trigger a duty to defend. *Id.*

Most recently, in *ACE Am. Ins. Co. v. Rite Aid Corp.*, 2022 WL 90652, (Del. Jan. 10, 2022), the Delaware Supreme Court found that a CGL insurer did not have a duty to defend its insured, a national drugstore company, against various lawsuits brought by governmental entities to recover for opioid epidemic related economic damages. No. 339, 2020. In finding no duty to defend, the Delaware Supreme Court explained that only three classes of plaintiffs are within the scope of the insured's personal injury coverage—the person injured, those recovering on behalf of the person injured, and people or organizations that directly cared for or treated the person injured. *Id.* To recover under the CGL policy as a person or organization that directly cared for or treated the injured person, the Delaware Supreme Court explained that the plaintiff must prove the costs of caring for the individual's personal injury. *Id.* Here, the governmental entities sought to recover their own economic damages and specifically disclaimed recovery for personal injury or specific treatment damages. *Id.* Thus, the Delaware Supreme Court held that the insurers did not have a duty to defend Rite Aid under the insurance policy in issue. *Id.* This was the first state supreme court to render a decision on an opioid coverage issue.

Insurers also have contested whether the underlying opioid lawsuits allege an "occurrence." Under the standard CGL policy, an "occurrence" is typically defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Insurers have argued that the conduct causing the underlying loss is not "accidental" and, therefore, does not qualify as an "occurrence." *See e.g., Liberty Mut. Fire Ins. Co. v. JM Smith Corp*., 602 F. App'x 115, 121 (4th Cir. 2015) (applying South Carolina law) (holding that insurer had a duty to defend underlying opioid lawsuit that potentially alleged an occurrence because pharmaceutical distributor was not accused of providing prescription drugs with knowledge that it was "enabling an abuser."); *The Travelers Prop. Cas. Co. of Am. v. Actavis, Inc.,* 16 Cal. App. 5th 1026, 1041, 225 Cal. Rptr. 3d 5, 18 (2017) (applying California law) (holding that underlying opioid claims against insured drug manufacturer alleging intentional and negligent misrepresentations did not constitute an "accident" within meaning of the manufacturer's CGL policies because the consequences of manufacturer's

promotion of opioid use produced nothing unexpected, independent, or unforeseen).

Finally, insurers have argued that, even if damages are triggered "because of bodily injury," coverage would still be excluded under a standard CGL products-completed exclusion, to the extent included in the insurance policy. *See e.g., Travelers Prop. Cas. Co. of Am. v. Anda, Inc.*, 658 F. App'x 955, 959 (11th Cir. 2016) (applying Florida law) (holding that all the underlying opioid related claims, if covered at all, are encompassed within the products exclusion, which renders coverage inapplicable).

B. Climate Change/Natural Disasters

Climate change is a particularly significant issue for our planet, and for the insurance industry. Financial Services Company, Allianz, conducted a survey of 2,650 risk managers, which resulted in 17 percent having identified climate change as a top three concern. Notably, natural catastrophes were number three on the list with 25 percent of respondents identifying it as a top business risk. In a survey conducted by consulting firm, Deloitte, nearly half of executives stated that their companies had purchased insurance coverage against extreme weather events, and that the top climate concern is the operational impact of climate-related disasters.

Recent reports estimate that the cost of natural disasters in the United States have climbed to new highs each year, with estimates claiming the insured damage to be between $120 billion-$145 billion (2021). The National Oceanic and Atmospheric Administration (NOAA) reported twenty weather and climate related disasters in 2021. These events run the gamut – drought, floods, storms, cyclones, tornadoes, wildfires, and winter storms.

Insurers have responded by increasing deductibles and placing sublimits on policies. Some insurers have also responded by crafting percentage-based deductibles for storms and sublimits for flood losses.

As the insurance industry grapples with the increased risk of climate change events, it likely will face increasing scrutiny from state and federal regulators. States could pressure financial institutions, including insurers, to reduce their investments in greenhouse gas producing industries. This may also present an opportunity for insurance companies to garner good public relations by embracing green initiatives.

While climate change events will result in increased premiums and deductibles, it is also leading some policyholders to lose access to coverage altogether. California's insurer of last resort, the California FAIR Plan Association, wrote 241,000 policies in 2020, an increase of some 50,000 policies from 2019. This increase is almost exclusively related to those residing on property which have seen a marked increase in risk from wildfires. The California Insurance Commissioner stated the vast majority of nonrenewals stemmed from S.B. 824,

which prohibited the cancelation of residential policies for one year for homeowners living in the perimeter or adjacent to a declared wildfire state of emergency.

Insurers can be the agent for change, helping society adjust to the challenges it faces from climate change. In October 2021, Axis Capital publicized that it would be phasing out insurance and investments in the thermal coal business. The Hartford has announced that it will be investing $2.5 billion in companies and technologies supporting the transition to renewable energy as well as divesting from tar-sands and coal holdings. In California, insurers are increasingly offering discounts to policyholders who fortify and improve their property's wildfire defenses, including utilizing more native and fire-resistant landscaping or home hardening through the use of fire-resistant construction materials. In areas prone to high winds/tornados, insurers can encourage retrofitting buildings to increase their structural integrity. In areas prone to increased flooding, insurers can encourage more mitigation techniques and structures while utilizing the vast amount of data and resources to create better forward-looking modeling to further identify areas at increased risk as the climate changes.

While the majority of the focus related to climate change is on the property and casualty side, other sectors also have been affected. Since 1995, crop insurance payouts have dramatically increased as droughts and excess precipitation have become more common. In 1995, U.S. farmers received approximately $325 million for drought related damage and $685 million for excess precipitation. By 2020, those figures increased to $1.65 billion and $2.6 billion, respectively.

We also are likely to see increased litigation against companies whose operations generated greenhouse gas emissions which scientists have linked to climate change. *See City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021) (dismissed for failure to state a claim); see also, *Connecticut v. Exxon Mobil Corp*., 83 F.4th 122 (2nd Cir. 2023) (remand to state court following attempted removal). Policyholders will seek coverage defense costs and even indemnity for those claims.

The battles will be waged over whether the claims arise from an occurrence (an accident), as well as the application of the various forms of the pollution exclusion, including whether greenhouse gases are a "pollutant."

C. PFAS

Per- and polyfluoroalkyl substances, commonly known as PFAS, represent a class of man-made chemicals, which are highly resistant to degradation. This means that they persist in the environment over a long period of time and will not break down from natural biological processes. Simply put, the chemical will stay in the soil and groundwater for a long time. 3M obtained the patent to manufacture PFAS in the 1940s and began widespread commercial production in the 1950s. It used the chemicals in the production of a wide variety of consumer, commercial,

and industrial products, including stain repellents such as Scotchgard, fire retardants (more commonly referred to as AFFF), stain removers, paints, paper treatments, and many other commercial products. 3M, and to a lesser extent DuPont, sold PFAS chemicals to manufacturers all over the world.

3M announced a phase out with the US Environmental Protection Agency in 2000. In recent years, PFAS related litigation has significantly increased across the country. Today, there are thousands of pending cases arising from alleged PFAS contamination. In addition to a marked increase in private litigation alleging either bodily injury or property damage, both state attorney generals and environmental protection agencies have taken notice of the widespread nature of PFAS and have filed natural resource defense actions seeking damages for the presence of PFAS in the environment.

One of the initial natural resource defense actions was brought in 2010 by the Minnesota Attorney General along with the Commissioner of Pollution Control against 3M alleging the widespread contamination of the Minnesota environment from 3M's manufacture of PFAS and its disposal of PFAS related byproducts into the environment. The State of Minnesota cited to studies showing: (1) high exposure to PFAS is acutely toxic to animals; (2) long term exposure showed an increased risk in tumors to the liver, pancreas, and testes; and (3) studies showing adverse effects on the immune system and offspring of mice. The State alleged 3M's PFAS contamination emanated from its manufacturing facility and dumpsites where 3M had deposited its PFAS manufacturing waste.

In 2018, the State of Minnesota moved to file a third amended complaint seeking punitive damages against 3M, and shortly thereafter, 3M reached an $850 million settlement with the State of Minnesota.

Since the 2018 settlement with 3M, there has been a significant increase in PFAS-related litigation. The defendants include 3M and DuPont, as well as manufacturers which incorporated PFAS chemicals into products they sold.

A significant portion of PFAS litigation involves aqueous film forming foam, better known as AFFF or firefighting foam. Beginning in the 1960s, 3M sold AFFF to the United States military to combat chemical and other fires for which traditional water usage would be ineffective. Since then, 3M sold AFFF throughout the United States (and Europe) to countless airports and firefighting groups. After utilizing AFFF, firefighters often allowed the foam to migrate into traditional water runoff and into the water table. With its extremely high persistence, the accumulation of decades of AFFF has resulted in high PFAS concentrations in nearby water supplies.

Today, the manufacturers of AFFF face over 3,000 pending lawsuits in a multi-district litigation pending in the Federal District Court of South Carolina. The AFFF MDL claims can be broken down into two main sub-categories: (1) those individuals alleging either property damage or bodily injury due to the presence of

PFAS for the uncontrolled usage of AFFF nearby and (2) claims from water suppliers seeking reimbursement for the costs of implementing processes to remove PFAS from their water supplies.

Various PFAS litigation is pending in Michigan. Not only does Michigan have over three dozen airport and military installations which likely utilized AFFF in their firefighting efforts, Michigan historically has been home to manufacturers which utilized PFAS to create end products. Paper manufacturers in Parchment, Michigan utilized PFAS chemicals in the production of various paper products. In April 2021, 3M and Georgia-Pacific announced a $11.9 million settlement to resolve that class action. Wolverine Worldwide, a leather manufacturer, utilized PFAS in the treatment of its leather products, including Hush Puppy shoes. It now faces hundreds of claims related to the presence of PFAS in surrounding soil and water.

Other manufacturers throughout the country face litigation related to their use of PFAS. In Georgia, carpet manufacturers near Rome, Georgia have been sued for their discharge of PFAS into the Tennessee River and the surrounding area. In upstate New York, manufacturers of stain- and water- resistant fabrics face claims related to the discharge of PFAS into the surrounding areas. Similar claims exist in New Jersey, Delaware, and California. In Ohio, an individual has filed a putative class action on behalf of all those with PFAS in their blood. Notably, this case does not seek medical damages, but rather an establishment of a science panel whose findings would be binding on the defendants.

In October 2021, the United States Environmental Protection Agency issued its "PFAS Strategic Roadmap". The Department of Defense, Department of Agriculture, and Food and Drug Administration also have announced an intention to investigate PFAS-related issues. States, including New York, California, New Jersey, and Ohio, have all adopted or proposed limits for PFAS in drinking water.

Policyholders have tendered PFAS claims to their CGL insurers, which typically have responded by asserting their pollution exclusions. In *Tonoga v. New Hampshire Ins. Co.*, 201 A.D.3d 1091, 159 N.Y.S.3d 252 (2022), the court applied both a "sudden and accidental" pollution exclusion and an "absolute" pollution exclusion to find an insurer had no duty to defend a manufacturer facing claims alleging its release of PFAS into the environment from its manufacturing process. First, the court concluded that whether a substance is a "pollutant" under the definition of the policy is "necessarily situational" and PFAS met that definition. The Court further found that the allegation of decades of releases was the "opposite of suddenness", and the sudden and accidental exception to the exclusion thus did not apply.

Insurers also may argue that the insured knew or should have known that the release of PFAS into the wider environment would result in damage. In lawsuits against PFAS manufacturers such as 3M and DuPont, many plaintiffs have alleged

the companies were well aware of the dangers posed by the chemicals and still knowingly allowed them to be discharged into the environment.

D. Sexual Abuse

High profile, well publicized, and costly sexual abuse cases unfortunately have become too common. Claims and lawsuits arising from the misconduct of perpetrators and the organizations with which they were affiliated include: the Catholic Church and archdioceses across the country; the Boy Scouts of America; Larry Nassar/USA Gymnastics/Michigan State University; Bill Cosby; Harvey Weinstein; and regrettably, many more. The cost to resolve these claims, at extraordinary expense to the insurance industry, has totaled well into the billions of dollars, to date, and losses will continue to mount. This is particularly so because legislation has been enacted in various states to abrogate, revise, and extend statutes of limitation to allow previously untimely claims. *See, e.g., New York Child Victims Act,* S.B. 2440, 242d Leg., Reg. Sess. (N.Y. 2019). That many targets of staggering sexual abuse lawsuits have filed for bankruptcy protection further complicates the resolution of the claims and the attendant coverage issues.

Various coverage issues arise in sexual abuse cases, including trigger (which policy or policies even potentially apply). "'[Trigger of coverage] refers to the legal test used to determine which policy should be looked at to ascertain if that policy has coverage obligations regarding the claims asserted against the policyholder . . . the trigger concept is not designed to determine coverage; rather, it acts as a gatekeeper, matching particular claims with particular periods of time and hence particular insurance policies.'" Barron L. Weinstein, *Sexual Misconduct Claims A Policyholder's Perspective of Key Coverage Issues*, Brief, Winter 2009, at 48, 52 (citing James M. Fischer, *Insurance Coverage for Mass Exposure Tort Claims: The Debate over the Appropriate Trigger Rule*, 45 DRAKE L. REV. 625, 631 (1997)).

Courts have applied various theories to determine when coverage is triggered, which initially arose in contexts other than sexual abuse claims (most prominently, environmental tort and contamination claims). *See W. World Ins. Co. v. Lula Belle Stewart Ctr., Inc.*, 473 F. Supp. 2d 776, 784 (E.D. Mich. 2007) (explaining courts have discussed four possible theories for determining what event or events trigger coverage under standard CGL policies, including "exposure," "injury in fact," "manifestation," and "continuous" trigger theories). The date of actual abuse is usually the trigger under a standard commercial general liability policy, which could include successive years of CGL policies if a victim was abused in more than one policy period. *See Bishop of Charleston v. Century Indem. Co.*, 225 F. Supp. 3d 554, 565-66 (D.S.C. 2016) (holding where abuse was ongoing over a number of years, coverage is triggered under successive years so long as abuse occurred during the policy period). However, other courts have applied a date of first abuse trigger, which limits coverage only to the policy in effect for that particular victim's first date of abuse, even if the victim was abused in subsequent

policy periods. *See Pa. St. Univ. v. Pa. Mfrs.' Ass'n Ins. Co.*, No. 03195, 2016 Phila. Ct. Com. Pl. LEXIS 158, at *27-28 (C.P. Philadelphia May 4, 2016).

Another significant issue that impacts insurers' overall exposure is the number of occurrences implicated by the perpetrator's acts of abuse as to different plaintiffs at different locations on dates spanning a number of years of the carriers' coverage. Courts' analyses of the number of occurrences in the policy limits context have varied greatly and in some instances are transparently result-oriented—depending on when self-insured retentions/deductibles or limits of liability are at issue. Even among courts that have found "multiple" occurrences in the sexual abuse context, their analyses and approaches have differed. In most of the following cases, the courts interpreted standard commercial general liability policy language requiring that the insurer pay damages because of "bodily injury" caused by an "occurrence." "Occurrence" is typically defined as "an accident, including continued or repeated exposure to substantially the same general harmful conditions."

Some courts have held that each act of abuse constitutes a separate occurrence. *See, e.g., Lee v. Interstate Fire & Cas. Co.*, 86 F.3d 101, 104-05 (7th Cir. 1996) (applying Illinois law) ($100,000 per occurrence SIR; the court held that, where the alleged tort is negligent supervision, each act of sexual abuse was a separate occurrence); *Roman Catholic Diocese of Joliet, Inc. v. Interstate Fire Ins. Co.*, 292 Ill. App. 3d 447-456 (1st Dist. 1997) ($75,000 per occurrence SIR; court found that the repeated exposure of the minor to the negligently supervised priest is what constitutes each separate occurrence).

Other courts have focused on the number of occurrences based on the number of victims, holding that each victim's abuse constitutes an "occurrence." *See, e.g., H.E. Butt Grocery Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 150 F.3d 526, 531 (5th Cir. 1998) (Texas law) ($1 million per occurrence SIR; court held that the abuse of two children on two separate occasions by the policyholder's employee constituted two occurrences); *May v. Maryland Cas. Corp*., 792 F. Supp. 63, 65 (E.D. Mo. 1992) (involving two policy periods with different insurers, court held that each claimant was a separate occurrence); *Pa. State Univ. v. Pa. Manufacturers' Ass'n Ins. Co.*, No. 03195, 2016 Phila. Ct. Com. Pl. LEXIS 158, *28 (May 4, 2016) (where policies were not subject to SIRs or deductibles, court found that negligence resulting in continuing sexual abuse by football coach was a single occurrence for each victim); *Beaufort County School Dist. v. United Nat. Ins. Co*., 392 S.C. 506, 517 (Ct. App. 2011), *cert. dismissed*, (Dec. 20, 2011) ($150,000 per occurrence SIR; court held sexual abuse by one perpetrator to seven victims constituted seven occurrences); *S.F. v. West American Ins. Co.*, 250 Va. 461, 465 (1995) (court held that the alleged molestation of each claimant was a separate occurrence). In other cases, courts have found that each policy period in which the victim suffered abuse constitutes an occurrence. *See, e.g., Society of Roman Catholic Church of Diocese of Lafayette & Lake Charles, Inc. v. Interstate Fire & Cas. Co.*, 26 F.3d 1359, 1365-66 (5th Cir. 1994) (applying Louisiana law) (court

held that the molestation of each child constituted a separate occurrence in each policy period); *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa*., 21 N.Y.3d 139, 149 (2013) ($250,000 per occurrence SIR per policy period; court concluded that the priest's sexual abuse of the same child over six years constituted an occurrence per policy period); *Interstate Fire & Cas. Co. v. Archdiocese of Portland in Oregon*, 35 F.3d 1325, 1330-31 (9th Cir. 1994) (applying Oregon law) (court held that each victim's exposure to a negligently supervised priest in each of four different contract periods constituted separate occurrence per contract period).

In contrast, other courts have held that sexual molestation claims arise out of a single occurrence, particularly where one perpetrator or a single course of negligent supervision is involved. *See, e.g., TIG Ins. Co. v. Smart School*, 401 F. Supp. 2d 1334, 1346 (S.D. Fla. 2005) (where policy provided limits of $1 million per occurrence and $3 million aggregate, court held that all acts of sexual abuse by one perpetrator against two victims constituted a single occurrence); *Diocese of Winona v. Interstate Fire & Cas. Co*., 841 F. Supp. 894, 898-99 (D. Minn. 1992) (court held claims arise out of negligent supervision constituting only one occurrence per contract period); *Guideone Spec. Mut. Ins. Co. v. Doe #1*, No. 07-0866-CV-W-ODS, 2008 U.S. Dist. LEXIS 119141 (W.D. Mo. 2008) (slip op.) (court held all acts of sexual misconduct were committed by one person and, thus, were one occurrence); *TIG Ins. Co. v. Merryland Childcare and Development Center, Inc.*, No. 04-2666 B, 2007 U.S. Dist. LEXIS 8190 (W.D. Tenn. 2007) (court held that multiple acts of sexual abuse constituted one occurrence); *Washoe County v. Transcontinental Ins. Co*., 110 Nev. 798, 801 (1994) (court held that the County's negligence in the licensing process and in its duties to investigate and monitor the day-care center constituted a single occurrence); *TIG Ins. Co. v. San Antonio YMCA*, 172 S.W.3d 652, 660-61 (Tex. App. San Antonio 2005) (court held that all acts of sexual abuse by one camp counselor involving six children and taking place over a summer constituted a single occurrence); *Preferred Risk Mut. Ins. Co. v. Watson*, 937 S.W.2d 148, 150 (Tex. App. Fort Worth 1997), writ denied, (July 31, 1997) (court found that the single occurrence at issue was all acts of sexual molestation allegedly committed by one person); *State Farm Fire & Cas. Co. v. Elizabeth N*., 9 Cal. App. 4th 1232, 1234; 1238 (1st Dist. 1992) (court found babysitter's liability for "multiple instances of negligent care and supervision, which allowed several children to be repeatedly molested" was one occurrence).

Several common exclusions are raised as coverage defenses to sexual abuse claims. Liability insurance policies often exclude coverage for injuries that the insured "expected or intended." Where an insured is sued for its agent's alleged sexual misconduct, insurance carriers commonly argue, that the insured had prior notice of the sexual misconduct, failed to take corrective actions, and thus the insured expected or intended the plaintiff's injuries. *See Empire Indem. Ins. Co. v. Chicago Province of Soc. of Jesus*, 2013 IL App (1st) 112346, ¶ 41 (holding allegations of the insured's prior knowledge of its agent's numerous incidents of sexual abuse of minors, which occurred before the alleged abuse of the plaintiffs,

were sufficient to preclude coverage under expected or intended exclusion); *Diocese of Winona v. Interstate Fire & Cas. Co.*, 89 F.3d 1386, 1391 (8th Cir. 1996) (applying Minnesota law) (holding expected or intended injury exclusion precluded coverage where the insured should have known that its agent's abuse of the plaintiff was substantially probable as a result of the continuing exposure caused by the insured's willful indifference).

Intentional acts exclusions also are often asserted by insurance carriers, particularly in cases involving the sexual abuse of a minor by the insured. In that context, a "special rule" has been developed, i.e., the inferred intent rule, under which a majority of courts "infer or imply an intent on the part of the insured to cause the resulting injury, as a result of the nature of the insured's conduct." § 49:115. Intentional acts, 17 Williston on Contracts § 49:115 (4th ed.). Under this rule, courts presume the insured intended to cause the harm or injury the plaintiff sustains, and the conduct is therefore presumptively within the intentional acts exclusion. *See Goldsmith v. Physicians Ins. Co. of Ohio*, 890 S.W.2d 644, 647 (Ky. Ct. App. 1994) (holding the insured's intent to harm the minor was inferred so as to exclude coverage for the intentional act).

Finally, liability insurance policies often contain some form of sexual misconduct exclusion, which have been enforced by the courts. For instance, "abuse and molestation" exclusions, which most commonly provide that a policy does not apply to bodily injury arising out of the actual or threatened abuse or molestation of one in the care, custody, or control of the insured, have been upheld by the courts. *See Sarah G. v. Maine Bonding & Cas. Co.*, 2005 ME 13, ¶ 13, 866 A.2d 835, 839 (holding that sexual exploitation of minor children was abuse within the meaning of abuse or molestation exclusion); *Cmty. Action for Greater Middlesex Cty., Inc. v. Am. All. Ins. Co.*, 254 Conn. 387, 402, 757 A.2d 1074, 1083 (2000) (holding the boys' alleged acts of grabbing and folding a young girl were sexual abuse and molestation within the meaning of the exclusion).

IV. Creating Our Best Companies and Firms

Due to coronavirus pandemic, millions of individuals across the nation voluntarily left their jobs and started to reevaluate what they want out of their careers. The influx of resignations has led to what is now commonly known as the "Big Quit" or the "Great Resignation." *See* Bill Whitaker, *The Great Resignation: Why more Americans are quitting their jobs than ever before,* CBS NEWS, January 9, 2022, https://www.cbsnews.com/news/great-resignation-60-minutes-2022-01-10/. In light of this economic trend, employers have been forced to rethink their approach to talent management and procurement. Given the competitive job market, insurers and law firms alike should be open-minded to new approaches to attracting talent to set them apart from the competition.

This exodus of long time employees with the combined new influx of younger workers, with different goals, aspirations and ideas of what they want from their careers. This has necessarily required insurers and law firms to adapt, which

still undertaking high quality work in light of the trends and issues, discussed earlier. While this topic could likely have been the subject of the entire paper, efforts continue to foster a new generation of insurance and lawyer leaders that will be necessary likely requires examining things from a different perspective then what has historically driven potential employees.

A corollary of these issues is the perception of the insurance industry, both inside it and outside it. Whereas insurance started as a means to mitigate risk, news stories and trial attorney advertising have painted the industry as a something of a villain driven by greed. Whether through messaging or other means, it is incumbent that the industry focus on the good the industry does for its policyholders and society.