

# Cyber-Technology Torts and Insurers' Ambiguous Obligations to Defend Professionals and Business Entities Under Evolving Cyber-Insurance Contracts: Statistical and Legal Inferences from Traditional Insurers' Declaratory Judgments, 1940-2019

WILLY E. RICE\*

## ABSTRACT

*Innovative technologies increased in the 1940s. In the wake, personal injuries and property losses also grew. Insurers responded—selling liability insurance and promising to defend manufacturers and sellers against “personal injury” lawsuits. Today’s widely marketed commercial general liability (CGL) insurance contract originated in the 1940s. Like early-twentieth-century technologies, cyber-technologies are producing injuries and losses. Again, insurers are responding—marketing modified 1940s-vintage CGL contracts and promising to defend merchants and professionals against cyber-technology claims. To assess the veracity of cyber insurers’ promises, the author conducted an empirical study of courts’ declaratory judgments (N=1840)—focusing on courts’ dispositions of duty-to-defend disputes between 1940-2019. Legal and statistical analyses uncovered several statistically significant, newsworthy and surprising findings: 1) Cyber-liability insurers are more likely to breach their promises—refusing to defend businesspersons and professionals against cyber-technology claims; 2) Cyber-risk insurers are more likely to engage in bait-and-switch schemes—promising only an “illusion of coverage”; 3) Courts are substantially more likely to resolve duty-to-defend controversies in favor of insurers; and 4) State and federal courts are more likely to allow questionable extralegal factors—rather settled legal doctrines—to influence the dispositions of cyber-related controversies. In recent years, the American Bar Association as well as most business, trade and professional associations have established an additional licensure requirement: Practitioners must assess and defend against the risks associated with using various office and cyber-related technologies. Certainly, business and professional associations are encouraging their members to purchase and understand*

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\* Professor of Law & Englehardt Research Fellow, St. Mary’s University School of Law-San Antonio. M.A., Ph.D.—University of North Carolina at Chapel Hill; Postdoctoral Fellow—The Johns Hopkins University; J.D.—The University of Texas at Austin; and an American Bar Foundation Scholar. Crossing numerous years, Eugene R. Anderson, Hubert M. Blalock, Jr., David R. Heise, Frank A. Bottini, Jr. and, more recently, Robert Ranalli of Patel, Solis & Cardenas Law Firm shared generously their expertise or insight with the author. Absolutely, their input helped the author to fashion the legal and statistical analyses as well as the research methodology in this Article. The author also thanks several other small-firm practitioners as well as cyber-technology specialists who shared their wisdom at gatherings in Austin, San Jose and San Antonio. All errors or omissions are the author’s alone.

*cyberinsurance. This Article also encourages knowledgeable “cyber” merchants and professionals to avoid several provable and arguably “ultrahazardous” risks: 1) the risk of receiving severe punishment and sanctions for illegally and unethically using cyber technologies, 2) the risk of purchasing cyberinsurance, asking the insurer for a legal defense and receiving a rejection, 3) the risk of having to defend against cybertechnology lawsuits and paying substantial out-of-pocket damages, and 4) the risk of purchasing debatably more expensive cyber-liability insurance—which provides only an illusion of coverage.*

## INTRODUCTION

Demographers and forecasters recently reported several newsworthy developments: approximately thirty million small businesses are located in the United States;<sup>1</sup> professionals comprise approximately sixty percent of that class;<sup>2</sup> and nearly six-hundred thousand solo and small-firm professionals are practicing law.<sup>3</sup> Even more relevant, attorneys as well as other professionals and small businesses are increasingly employing “cyber technologies—mobile, docketing, communications, storage, document-creation, document-transfer, cloud-based, electronic-filing and electronic-discovery technologies—to achieve diverse ends.”<sup>4</sup>

Some legitimate concerns, however, have begun to emerge about the adverse consequences of businesspersons’ and professionals’ using and abusing cyber-technology tools.<sup>5</sup> As an example, more than ninety years ago, the American Bar Association (“ABA”) fashioned the Model Rules of

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1. United States Small Business Association, OFFICE OF ADVOCACY SMALL BUSINESS PROFILE, [https://www.sba.gov/sites/default/files/advocacy/All\\_States.pdf](https://www.sba.gov/sites/default/files/advocacy/All_States.pdf) [<https://perma.cc/TXL5-XX3U>].

2. *Id.*

3. *Law School Solo Practice Incubators and Legal Residency Programs*, HANOVER RESEARCH (July 2012), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_hanover\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_hanover_report.authcheckdam.pdf) [<https://perma.cc/5LSS-NFX4>].

4. See Aaron Street, *Mobile Technology*, 2017 Techreport (Dec. 1, 2017), [https://www.americanbar.org/groups/law\\_practice/publications/techreport/2017/mobile/](https://www.americanbar.org/groups/law_practice/publications/techreport/2017/mobile/) [<https://perma.cc/SG85-YNVD>] (citing the ABA’s 2017 Legal Technology Survey Report and revealing that for many years mobile technology—including laptops, smartphones, and tablets—has been a ubiquitous part of law practice. Lawyers use laptops, smartphones, tablets, and non-work desktop computers more frequently than other mobile technology. The percentages are 44%, 30% 13% and 12%, respectively); Stephen Embry, *Litigation and TAR*, 2017 Techreport (Dec. 1, 2017), [https://www.americanbar.org/groups/law\\_practice/publications/techreport/2017/litigation\\_tar/](https://www.americanbar.org/groups/law_practice/publications/techreport/2017/litigation_tar/) [<https://perma.cc/NJ8P-UG59>] (“[M]ore lawyers are using technology in the courtroom... The top uses for laptops in the courtroom according to the ABA 2017 Legal Technology Survey Report include: 34% to access email, 33% to access key evidence and documents, 29% to do legal research, 27% to access court dockets and documents and 23% to deliver presentations... The frequency of electronic filings with court systems continues to increase and has clearly become the norm... [A]lmost 79% of the respondents say they... file documents electronically with courts.... The number of courts that allow electronic filings and the number of courts that require it have slightly increased over last year... The percentage of those who never receive requests for e-discovery fell slightly from 38% in 2015 to 36% in 2017... The number of firms involved in cases where processing of e-discovery is necessary remains constant at 51% and increases with firm size.”).

5. Cf. *What Law Firms Must Do to Prepare for and Respond to Cyberattacks*, LAW TECHNOLOGY TODAY, <https://www.lawtechnologytoday.org/2019/10/prepare-for-and-respond-to-cyberattacks/> [<https://perma.cc/34DT-EKNK>] (“Under American Bar Association’s Formal Opinion 483, lawyers have an ethical obligation to extend their duty of competence to prepare for a potential... data breach. Specifically, lawyers must understand the technologies used to deliver legal services to their clients, and the ways in which data is transferred and stored. They then must take steps to reasonably safeguard client property and information in their possession. To that end, under the duty of competence, a lawyer has an ethical obligation to understand the risks of any technology used in their practice in the three areas to follow that are each critical to preventing and recovering from data breaches.”).

Professional Conduct.<sup>6</sup> Rule 1.1 reads: “A lawyer shall provide competent representation to a client. Competent representation requires . . . legal knowledge, skill, thoroughness and preparation.”<sup>7</sup> However, since “the practice of law is now inextricably intertwined with technology,”<sup>8</sup> the ABA has amended Rule 1.1 in 2012 and added Comment [8]: “A lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*.”<sup>9</sup>

Most states have adopted the amendment.<sup>10</sup> Arguably, the ABA’s message is extremely clear: solo and small-to-large-firm practitioners must (1) employ law-practice technologies efficiently and ethically, (2) appreciate the seemingly innocuous consequences of using law technology, and (3) understand the serious risks and substantial penalties which are associated with attorneys’ intentionally abusing law technology.<sup>11</sup>

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6. MODEL RULES OF PROF’L CONDUCT: PREFACE (AM. BAR ASS’N 2019), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble/) [<https://perma.cc/L6C4-RQ7T>] (“For more than ninety years, the American Bar Association has provided leadership in legal ethics and professional responsibility through the adoption of professional standards that serve as models of the regulatory law governing the legal profession.”).

7. MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2019), [https://www.americanbar.org/groups/professional\\_responsibility/publications](https://www.americanbar.org/groups/professional_responsibility/publications) [<https://perma.cc/R2WP-9E4H>]; see also Brittany Stringfellow Otey, *Millennials, Technology, and Professional Responsibility: Training a New Generation in Technological Professionalism*, 37 J. LEGAL PROF. 199, 219 (2013) (Legal practice technology includes but is not limited to the following: desktop, laptop and network computers; smartphones; short messaging services (sms); multimedia messaging service (mms); electronic tablets; office and cloud-based computing and printing services; the Internet; website design and maintenance services; social-media services; office production software; billing, invoicing and accounting programs; document automation and assembly programs; document management systems; document sharing systems; and portable document format (PDF) software and files).

8. Cf. Lowell Brown, *Texas Supreme Court Addresses Attorneys’ Tech Competence in Amended Comment to Disciplinary Rule*, TEXAS BAR BLOG (Mar. 1, 2019), <https://blog.texasbar.com/2019/03/articles/texas-supreme-court/texas-suprem...> [<https://perma.cc/6NKE-QY2U>] (“The Computer and Technology Section resolution... said that ‘the practice of law is now inextricably intertwined with technology for the delivery of services, the docketing of legal processes, communications, and the storage and transfer of client information, including sensitive and confidential private information and other protected data... [L]awyers have become increasingly dependent upon mobile applications to perform core legal functions and the electronic creation of and transmission of attorney client work product and storage of all of this information in the cloud and, therefore, they require a fundamental skillset to effectively manage their law practice...’”).

9. *Id.* (“A Texas attorney’s duty to maintain competence in the practice of law includes knowing about relevant technology, according to a new Texas Supreme Court order. The court... amended Paragraph 8 of the comment to Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct, which deals with competent and diligent legal representation. Under the amended comment, maintaining proficiency and competence in the practice of law includes knowing ‘the benefits and risks associated with relevant technology.’”).

10. *Id.* (“The amendment mirrors a change made to the American Bar Association model rule in 2012. The State Bar of Texas Computer and Technology Section and the bar’s Professional Development/Continuing Legal Education Committee passed resolutions in April 2018 supporting the change. At that time, 31 states had adopted language similar to the ABA model rule related to technological competence... [T]he same language is found in the comment to ABA Model Rule 1.1 and is part of the ethics code in many states.”).

11. Cf. *What Law Firms Must Do to Prepare for and Respond to Cyberattacks*, LAW TECHNOLOGY TODAY, <https://www.lawtechnologytoday.org/2019/10/prepare-for-and-respond-to-cyberattacks/> [<https://perma.cc/34DT-EKNK>] (“The American Bar Association’s Formal Opinion 483 [imposes] a long list of obligations [on the legal profession] and acknowledges that cyberthreats... present a major professional responsibility... For those in the legal profession, cyberthreats targeting law firms are a major professional responsibility that all firms must continually address[.]”).

What specific risks raised the ABA's concerns? The precise answer is wanting. However, research reveals that numerous clients, third parties and competitors have allegedly damaged or destroyed,<sup>12</sup> interfered with<sup>13</sup> or misappropriated<sup>14</sup> attorneys' legal technology.<sup>15</sup> In addition, vendors have purposely or inadvertently sold defective technologies, or engaged in deceptive trade practices that injured attorneys and/or their clients.<sup>16</sup> Therefore, to protect their technology-based tangible and intangible property interests, some law firms and attorneys have been forced to file a variety of common-law<sup>17</sup> and statutory<sup>18</sup> actions against offending parties.

Even more significant, state disciplinary boards have raised concerns about lawyers' abusing,<sup>19</sup> deliberately or unintentionally, emerging technologies for unethical purposes: (1) impermissibly accessing "protected" computers and reviewing privileged information,<sup>20</sup> (2) listening to confidential

12. See *Ogletree, Abbott, Clay & Reed Law Firm, L.L.P. v. FindLaw*, No. 14-340, 2014 WL 2611862, at \*4 (D. Minn. June 11, 2014) (Ogletree Law Firm's hiring FindLaw—a subsidiary of West Publishing Corporation and Thomson Reuters Holdings, Inc.—to develop Ogletree's websites and Ogletree's alleging that FindLaw decreased the traffic on the websites and injured Ogletree's business, by ignoring Ogletree's webpage-naming conventions which generated error messages).

13. See *Allen v. IM Solutions, LLC*, 94 F. Supp. 3d 1216, 1218 (E.D. Okla. 2015) (Lawyers and law firms' commencing a putative class action against an operator of legal marketing websites as well as against providers of online marketing services and alleging violations of the Lanham Act, tortious interference with prospective business relationship, and civil conspiracy arising from pop-up advertisements allegedly created by hidden "adware" software on consumers' computers).

14. Cf. *Geragos v. Borer*, No. B208827, 2010 WL 60639, \*2 (Cal. Ct. App. Jan. 11, 2010) (attorneys Geragos, Harris, and Geragos & Geragos's suing several defendants who were allegedly involved in the scheme to videotape Michael Jackson and his lawyers and raising two theories of recovery—the common law misappropriation of name and likeness, and a statutory misappropriation of one's name and likeness under California Civil Code § 3344).

15. See, e.g., *DeGidio v. West Group Corp.*, 191 F. Supp. 2d 904, 905 (N.D. Ohio 2002) (an attorney's alleging that defendants infringed upon his website's domain name and pleading several causes of action—common law unfair competition, dilution and misappropriation of property interest.); *Perk v. Vector Resources Group, Ltd.*, 485 S.E.2d 140, 141 (Va. 1997) (an attorney's alleging that his former law firm and associate attorneys knowingly, willfully, deliberately, and without justification stole and converted personal computer programs, computer databases and computer software).

16. Cf. *Innovative Office Systems, Inc. v. Johnson*, 906 S.W.2d 940, 947 (Tex. Ct. App.—Tyler 1995) (concluding that the evidence was "legally and factually sufficient to support the court's findings that Johnson leased a malfunctioning copier from Innovative and Innovative's actions were false, misleading, or deceptive").

17. See *Salzer v. Southern Poverty Law Center, Inc.*, 701 F. Supp. 2d 912, 913-914 (W.D. Ky. 2009) (attorney's suing SPLC for allegedly posting defamatory comments about the attorney on SPLC's website); *Kelly Law Firm, P.C. v. An Attorney for You*, 679 F. Supp. 2d 755, 757-758 (S.D. Tex. 2009) (several solo and small-firm attorneys' commencing fraud, breach of contract, unjust enrichment and deceptive trade practices actions against internet-marketing companies—An Attorney for You, Calliope Media, L.P., and Calliope Media, Inc.—for allegedly providing unsatisfactory marketing outcomes).

18. See *David Nutt & Associates, P.C. v. First Continental Leasing Corporation*, 599 So. 2d 576, 578-579 (Miss. 1992) (lawyer's leasing a computer system for his law offices from the lessor and ultimately suing the lessor for allegedly leasing a defective computer and for breaching the implied warranties of merchantability and fitness under Miss. Code Ann. § 75-2-314 and § 75-2-315); *Ferron v. Search Cactus, L.L.C.*, No. 2:06-cv-327, 2007 WL 1792331, at \*1 (S.D. Ohio. June 19, 2007) (attorney's suing a Michigan-based limited liability company—under Ohio Consumer Sales Practices Act, Ohio Rev. Code § 1345.02(A)—for allegedly sending a multitude of unspecified free products and prize notifications to the attorney's various e-mail accounts).

19. See Cheryl B. Preston, *Lawyers' Abuse of Technology*, 103 CORNELL L. REV. 879, 888-91 (2018) (reporting and discussing a variety of technology abuses and accompanying disciplinary sanctions).

20. See, e.g., *In the Matter of Julia Ellis Brown*, 628 S.E.2d 885, 886-887 (S.C. 2006) (attorney's receiving a two-year suspension from the practice of law for accessing an employer's computer system without permission and "bringing the courts or the legal profession into disrepute").

and “protected” voicemail messages without permission,<sup>21</sup> (3) using “protected” passwords without permission to access online fee-based databases,<sup>22</sup> and (4) using internet chat rooms, short messaging services (“SMS”), multimedia messaging service (“MMS”), video-conferencing technologies, social media, websites, and e-mails to share highly “offensive” communications, materials and images.<sup>23</sup>

To help illustrate the severity of some attorneys’ unethical and cyber-technology violations, consider the noteworthy rise and unfortunate demise of two extremely bright associate attorneys in *Lawyer Disciplinary Board v. Michael P. Markins*.<sup>24</sup> In law school, Michael “was an outstanding student—graduating near the top of his class.”<sup>25</sup> He was admitted to the West Virginia State Bar in October 2001.<sup>26</sup> At that time, questions “regarding his moral or ethical character” had not materialized.<sup>27</sup> In fact, as a highly respected associate attorney and legal-community member, he was on track to become a partner at Huddleston Bolen, LLP (hereinafter “Bolen”).<sup>28</sup> However, in the course of events, Michael began engaging in highly unethical and even criminal activities—accessing protected computers and reading confidential email without permission.<sup>29</sup>

Early in his professional life, Michael met and married Andrea.<sup>30</sup> She was a bright and highly respected associate attorney at the law firm of Offutt, Fisher and Nord (hereinafter “Nord”).<sup>31</sup> Approximately five months after Andrea joined Nord, Michael began accusing her of spending too much time away from home—attending Nord’s late-evening social functions.<sup>32</sup> Refusing to accept Andrea’s explanations, Michael began accessing protected computers in Andrea’s workplace and monitoring various e-mail accounts.<sup>33</sup> On numerous occasions, Michael used his Bolen-IP account<sup>34</sup>, his residential-IP

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21. See, e.g., *In re Schwartz*, 599 S.E.2d 184, 184-185 (Ga. 2004) (lawyer’s receiving an 18-months suspension from the practice of law accessing, listening to, and randomly deleting voice mail messages on a law firm’s voice mail messaging system—after the law firm had discharged him).

22. See, e.g., *In re the Reciprocal Discipline of Everett Walton*, 287 P.3d 1098, 1106 (Or. 2012) (an attorney receiving a public reprimand for using a Westlaw password for Internet research of Office of Special Prosecutor without authorization).

23. See, e.g., *Attorney Grievance Commission of Maryland v. Robert John Greenleaf*, 91 A.3d 1066, 1067-1068, 1078 (Md. 2014) (disciplinary board’s disbarment of a “sexual predator” attorney who used the internet to solicit sexual acts from a law enforcement officer who was posing as a fourteen-year-old or fifteen-year-old girl).

24. 663 S.E.2d 614 (W.Va. 2008).

25. *Id.* at 615 n.1.

26. *Id.* at 615.

27. Brief of Michael P. Markins, *Lawyer Disciplinary Bd. v. Markins*, 663 S.E.2d 614 (W.Va. 2008) (No. 33256), 2008 WL 952949, at \*1 [hereinafter Appellate Brief of Michael P. Markins].

28. *Id.*

29. *Id.* at \*2-3.

30. Brief of the Lawyer Disciplinary Bd., *Lawyer Disciplinary Bd. v. Markins*, 663 S.E.2d 614 (W.Va. 2008) (No. 33256), 2008 WL 952950, at \*3.

31. *Id.*

32. *Id.* at \*8.

33. *Id.* at \*9.

34. A businessperson or residential consumer may access the worldwide web by purchasing services from an Internet Service Provider (ISP)—who gives the consumer a unique IP address. Or an individual may access the web by using her employer’s internet service or the wireless service in hotels or in public spaces. Quite simply, Michael accessed the Internet from his place of employment, from his home and

account<sup>35</sup> as well as IP accounts at hotels<sup>36</sup> to access and read “about 150 e-mails.”<sup>37</sup> During one unauthorized access, the “highly suspicious” Michael read Nord’s confidential files—partnership documents, daily-receipt reports, and client-billing summaries.<sup>38</sup>

Ultimately, Nord discovered that Michael used a personal computer to access his wife’s email account.<sup>39</sup> A Nord partner met with Andrea, and disclosed Michael’s unauthorized incursions.<sup>40</sup> Although expressing “shock and surprise,” she verified that her husband was not the intruder, and denied having any knowledge of Michael’s conduct.<sup>41</sup> In the course of events, Nord terminated Andrea for lying.<sup>42</sup> Bolen fired Michael for repetitively accessing Nord’s e-mail accounts—a crime under West Virginia Criminal Code.<sup>43</sup> To punish Michael and deter other attorneys from engaging in similar cyber-crimes and unethical behaviors, the Supreme Court of West Virginia suspended Michael’s law license for two years.<sup>44</sup>

To be sure, there are greater cyber-technology risks and adverse consequences that lawyers, as well as other professionals and businesspersons, must appreciate and avoid.<sup>45</sup> Clients and non-clients have sued solo practitioners, professionals and small businesses — alleging that the practitioners

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from various hotels. *See generally* Fink v. Time Warner Cable, 837 F. Supp. 2d 279, 280 (S.D.N.Y. 2011) (outlining the facts and theories of recovery against subsidiary ISPs in California and New York who allegedly “throttled” consumers’ internet service and forced the consumers to access the web elsewhere).

35. *Id.*

36. *Id.*

37. Brief of the Lawyer Disciplinary Bd., *supra* note 30, at \*3-4 (“[Michael’s] unauthorized activity was discovered after one of [Nord’s] lawyers... began to suspect that [Andrea’s] e-mail account had been accessed... [T]he firm’s computer consultant... was contacted to determine whether anyone was accessing the firm’s e-mail accounts [Data from the computer system revealed that the Nord’s] account was accessed one or more times from the Huddleston IP address on 165 of the 243 calendar days... ”); *see also* Steve Korris, *Lawyer Who Read Wife’s E-Mails Suspended for Two Years*, WEST VIRGINIA RECORD (May 29, 2008), <https://wvrecord.com/stories/510594214-lawyer-who-read-wife-s-e-mails-suspended-for-two-years> [<https://perma.cc/N2D9-DZHU>].

38. Brief of the Lawyer Disciplinary Bd., *supra* note 30, at \*3.

39. *Id.* at 8.

40. *Id.* at 7.

41. *Id.*

42. *Id.*

43. W. Va. Code § 61-3C-12.

44. *Lawyer Disciplinary Bd.*, 663 S.E.2d, at 622.

45. *See generally* Jeffrey A. Franklin, *Cyber Insurance For Law Firms*, 33 No. 3 GPSOLO 58, 59 (2016) (outlining numerous risks and adverse consequences associated with using cyber technologies — liability for security breaches; costs associated with a privacy breach; costs associated with restoring, updating, replacing electronically stored business assets; business interruption expenses; cost associated with libel, slander, copyright infringement, product disparagement, or reputational damage to others when the allegations involve a business website or social media; and expenses related to cyber extortion or cyberterrorism).

intentionally or negligently infringed upon,<sup>46</sup> invaded<sup>47</sup> and misappropriated<sup>48</sup> property interests in various technologies. Other aggrieved persons have sued attorneys for allegedly breaching hardware,<sup>49</sup> software<sup>50</sup> and end-users license agreements.<sup>51</sup> Still, other third parties have filed common-law<sup>52</sup> and statutory cyber-tort lawsuits<sup>53</sup> against solo professionals and small businesses.

Therefore, several questions beg for answers: Do *traditional* professional-liability, businessowners-liability, and general-liability insurers have a contractual duty to defend small businesses, attorneys and other professionals against cyber-technology claims? Or will small businessowners and professionals be forced to purchase substantially more expensive<sup>54</sup> cyberinsurance in order to cover third-party claims?

46. Cf. *Riley v. Dozier Internet Law, PC*, 371 Fed. Appx. 399, 400-401 (4th Cir. 2010) (“[Law firm] sued Riley for trademark infringement, alleging that Riley’s website infringed on the name ‘Dozier Internet Law, P.C.,’ a registered trademark... In response, Riley brought [an] action against both Dozier personally and DIL. In his complaint, Riley sought a declaratory judgment that his website neither defamed Dozier nor infringed on DIL’s trademark.”).

47. See *Hartford Casualty Insurance v. Swapp Law, PLLC*, No. 2:17-cv-01130, 2018 WL 6602212, at \*1 (D. Utah. Dec. 17, 2018) (insurer’s responding after its insured law firm had been sued in a class action under the Driver’s Privacy Protection Act for the invasion of privacy, property damage, and personal and advertising injury).

48. See *Dauphinais v. Cunningham*, No. 3:08-cv-1449, 2009 WL 4545293, at \*5 (D. Conn. Nov. 30, 2009) (a client’s suing his attorney for damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. and under Connecticut Corrupt Organization and Racketeering Activities Act, Conn. Gen.Stat. § 53-393 et seq.—asserting that the attorney conspired with third parties to misappropriate or steal the client’s computer software).

49. See *Certified Comput. Sols., Inc. v. Rieth & Antonelli Co.*, 841 N.E.2d 866, 868 (Ohio Mun. Ct. 2005) (software consulting firm’s suing law firm for damages after the consultant detected and removed computer bugs and viruses, installed Microsoft Windows software on several computers, installed RAM boards for additional memory capacity, recovered lost TimeSlips data and replaced memory modules).

50. See *LanQuest Corp. v. McManus & Darden LLP*, 796 F. Supp. 2d 98, 99-100 (D.D.C. 2011) (consulting firm’s filing a breach of oral contract action against a law firm and seeking \$90,541.40 in damages for computer network engineering, integration, and consulting services).

51. See *Out of the Box Developers, LLC v. LogicBit Corp.*, No. 10 CVS 8327, 2012 WL 5356282, at \*4 (N.C. Super. Ct. Oct. 30, 2012) (software developer’s alleging that Doan Law Firm breached three provisions of an end-user licensing agreement by “(1) refusing to allow OTB to remove the BKexpress customizations from Doan Law’s computer system when the licensing agreement expired; (2) transferring the .bak File to LogicBit... without OTB’s prior written consent; and (3) reverse engineering BKexpress to customize HoudiniEsq for the purpose of competing with OTB.”).

52. See, e.g., *Seidl v. Greentree Mortg. Co.*, 30 F. Supp. 2d 1292, 1298-1299 (D. Colo. 1998) (a mortgage company suing an internet-domain-name owner as well as the owner’s attorney for generating spam and raising several theories of recovery—defamation or libel per se on the Internet; false light invasion of privacy, and, interference with prospective contractual relations); *Dalley v. Dykema Gossett, PLLC*, 788 N.W.2d 679, 685 (Mich. Ct. App. 2010) (computer consultant’s filing a lawsuit against an insurer, a law firm and an attorney who represented the insurer in a federal suit and alleging that the lawyer-agent committed several torts when attempting to secure copies of files on the consultant’s computer— invasion of privacy in the form of intrusion on seclusion, trespass, intentional or reckless infliction of emotional distress, abuse of process, and tortious interference with business relationships).

53. See *Habush v. Cannon*, 828 N.W.2d 876 (Wis. Ct. App. 2013) (a law firm’s filing a statutory invasion of privacy action against a competing law firm for allegedly using the former law firm’s website names for advertising and trade purposes); *Seidl v. Greentree Mortg. Co.*, 30 F. Supp. 2d 1292, 1298-1299 (D. Colo. 1998) (mortgage company’s suing the attorney under Title IX of the Crime Control Act of 1970 and the Racketeering Influenced Corrupt Organizations Act or RICO, 18 U.S.C. § 1962 and alleging that the attorney and her client conspired to extort money from innocent advertisers who use the Internet); *Avila v. Rubin*, 84 F.3d 222, 225-226 (7th Cir. 1996) (student loan debtor’s filing a class action against an attorney and a debt collection agency for allegedly violating the Fair Debt Collection Practices Act by mass producing electronic debt-collection letters which contained a facsimile of the attorney’s signature and created false and misleading communications from the attorney).

54. See *infra* notes 651-667 and accompanying discussion.

Additionally, assuming that professionals and businessowners will purchase cyber-insurance, will state and federal courts be more likely to force cyber-liability insurers to defend those insureds against *all types* of cyber-technology torts? Or, will courts impose very different duty-to-defend obligations on cyber-risk insurers?

In light of small merchants' and professionals' increasing exposure to various cyberspace risks, cyber-technology claims and cyber-insurance litigation, this Article addresses and attempts to answer the questions presented above. Part I of the Article provides a short overview of traditional and stand-alone insurance agreements: first-party property,<sup>55</sup> third-party liability,<sup>56</sup> and business owners' "hybrid" insurance contracts.<sup>57</sup> Within the first-party category, one finds standard commercial-property, business-interruption, and vehicle-automobile<sup>58</sup> insurance coverage. The second category comprises the widely advertised and ubiquitous comprehensive general liability (CGL) insurance contract—which was introduced in the 1940s.<sup>59</sup> Errors and omissions, professional-malpractice, directors' and officers', and employment-practices liability insurance contracts also provide coverage for third-party claims.<sup>60</sup> Lastly, businessowners' property-insurance contracts are essentially "hybrid" agreements—covering both first- and third-party claims.<sup>61</sup>

As discussed above, businesses and professionals are increasingly using cyber-technology tools—smartphones, tablets, laptops, desktop computers, websites, as well as social-media and virtual-office technologies—to advertise and generate revenue.<sup>62</sup> Even more noteworthy, these technologies are employed in brick-and-mortar offices, residential offices, airport terminals, and nearly anywhere a sports utility vehicle, truck or automobile can access

55. See *infra* notes 85-101 and accompanying discussion.

56. See *infra* notes 123-137 and accompanying discussion.

57. See *infra* notes 139-168 and accompanying discussion.

58. Car Insurance and Theft: Does Car Insurance Cover Theft and Vandalism?, Nationwide Insurance (Mar. 25, 2019), <https://www.nationwide.com/does-car-insurance-cover-theft.jsp> [<https://perma.cc/A8DN-TM6M>] (“[D]oes car insurance cover stolen items? Unfortunately, it does not. Comprehensive auto insurance will only cover the components and features that are permanent, pre-installed parts of the car. It will not cover your... personal belongings... such as an iPod or [a] wallet. However, these items would likely be covered by a homeowners’ or renters’ insurance policy. If your car were stolen with personal items inside, you would need to file two different claims — one [under] your auto insurance and one [under] your homeowners’ insurance.”).

59. See Daniel Streim, Policyholders Beware — Cyber Coverage May Provide A False Sense of Security, Orrick Blog (June 4, 2015), <https://blogs.orrick.com/trustanchor/2015/06/04/policyholders-beware-cyber-coverage-may-provide-a-false-sense-of-security/> [<https://perma.cc/UH64-YK9R>] (“[W]e are in the early stages of the evolution of coverage for data security breaches— a risk that barely existed a decade ago... If history is a guide, policyholders should expect... [a more developed market for] standardized cyber policies..., much the way the market for standardized commercial general liability policies developed beginning in the 1940s.”).

60. See *generally* Part III and accompanying notes.

61. See What Is Business Owner's Policy (BOP) Insurance? The Hartford Insurance Co. (Mar. 25, 2019), <https://www.thehartford.com/business-owners-policy> [<https://perma.cc/C6AB-YHMH>] (“A... BOP combines business property and business liability insurance into one [convenient] policy. BOP insurance helps cover your business from claims resulting from [a] fire, theft or another covered disaster” and from claims involving “bodily injury, property damage [and] personal and advertising injury” that could arise from your business operations. “Businesses can tailor [a]... BOP to help meet their unique needs by adding optional coverages like: data breach, business income for off-premises utility services and other specialized coverages” to their BOP) (emphasis added).

62. See *supra* note 4 and accompanying text.

cellular towers, or Wi-fi hotspots.<sup>63</sup> Thus, promising to cover specific cyber-technology risks, insurers have begun to market aggressively cyberinsurance contracts. Part II reviews standard, specialty, standalone as well as “hybrid” cyberinsurance agreements.

Under traditional professional-malpractice and commercial-general-liability insurance contracts, insurers promise to defend insureds against third-party lawsuits.<sup>64</sup> PART III briefly discusses settled declaratory-judgment rules,<sup>65</sup> explains how courts declare rights and obligations under insurance contracts, and outlines the scope of insurers’ legal-defense obligations under traditional-liability insurance contracts.

In contrast, PART IV analyzes the salient factors which trigger insurers’ duty to defend under cyberinsurance contracts<sup>66</sup>—after third parties file cyber-technology and tort-based claims against insureds. PART V discusses conflicting judicial declarations<sup>67</sup> regarding whether insurers must defend insureds against third-party lawsuits when insureds’ cyber technologies allegedly cause injuries and third-parties to file negligence, defamation, false advertising, invasion of privacy and deceptive trade practices claims against the insureds.

Finally, PART VI presents the findings of an empirical study<sup>68</sup>—which assesses the independent and concurrent influences of litigants’ theories of recovery, demographic characteristics, third-party claims, and other predictors on the dispositions of duty-to-defend disputes in declaratory-judgment trials. The study also uncovers the types of conflicting judicial rulings that insureds receive after asking both traditional underwriters and cyber-liability insurers to provide a legal defense.<sup>69</sup>

The Article discusses the statistically significant findings which emerged from the empirical judicial study. Positive and negative inferences<sup>70</sup> are presented. In the end, professional and business entities are encouraged to understand and avoid two sets of equally dangerous risks: the perils associated with the illegal and unethical use of cyber technologies, and the risks of purchasing expensive and complex cyberinsurance contracts, that only provide an illusion of coverage.<sup>71</sup>

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63. Cf. Jeremy Laukkonen, *How to Get Wi-Fi in Your Car*, Lifewire (Sept. 12, 2019), <https://www.lifewire.com/get-wifi-in-your-car-4047954> [<https://perma.cc/L7YX-N6JV>] (“[T]he internet is everywhere... Advances in cellular technology have made it far easier, and more cost effective, to use the Internet on the road... [And] there are more ways to get Wi-Fi in your car than ever before.”).

64. See *infra* Part III and accompanying discussion.

65. See *infra* Part III and accompanying discussion.

66. See *infra* Part IV and accompanying discussion.

67. See *infra* Part V and accompanying discussion.

68. See *infra* note 624 and accompanying discussion.

69. See *infra* Part VI and accompanying discussion.

70. See *infra* Part VI and accompanying discussion.

71. See *infra* notes 357-367 and accompanying discussion.

## I. A BRIEF OVERVIEW OF TRADITIONAL FIRST-PARTY AND THIRD-PARTY INSURANCE CONTRACTS

It is important to appreciate the distinction between first-party insurance *contracts*<sup>72</sup> and first-party insurance *coverage*,<sup>73</sup> as well as the difference between third-party insurance *contracts*<sup>74</sup> and third-party insurance *coverage*.<sup>75</sup> Quite simply, many first-party insurance *contracts* contain third-party *coverage* clauses.<sup>76</sup> For example, standard first-party homeowners' insurance contracts contain liability-insurance coverage which requires insurers to pay proceeds and/or defend against third-party claims.<sup>77</sup> Also, in most states, insurers must offer and motorists must purchase automobile insurance for the benefit of third-party victims.<sup>78</sup> Still, those same automobile-vehicle insurance contracts also provide first-party coverage for the insured motorists.<sup>79</sup>

Definitely, some first-party insurance contracts—life, disability, health, fire, theft and casualty insurance contracts—provide first-party coverage only for “named insureds.”<sup>80</sup> And other insurance contracts—comprehensive general liability, directors' and officers' liability, and professional liability

72. See, e.g., *Linn v. N. Idaho Dist. Med. Serv. Bureau Inc.*, 638 P.2d 876, 878 (1981) (noting that the insurer's argument had no application in a first party insurance contract where the insured paid the insurer to assume the risk).

73. See, e.g., *Compton v. Allstate Property & Cas. Ins. Co.*, 278 F.R.D. 193, 196 (S.D. Ind. 2011) (reaffirming that in a first-party insurance coverage dispute, an insurer may not withhold on work product grounds material that it prepared as part of the normal course of the insurance business).

74. See, e.g., *Navigators Specialty Ins. Co. v. Christensen Inc.*, 140 F. Supp. 3d 1097, 1102 (W.D. Wash. 2015) (declaring that the state's insurance statute confers a right of action to first-party claimants whether under a first-party or third-party insurance contract).

75. See *Mut. of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.*, 169 P.3d 1, 7 n.8 (Wash. 2007) (quoting Thomas W. Harris, *Washington Insurance Law* § 1.2 (2d ed.2006) (“Third-party coverage indemnifies] an insured for covered claims which others [third-party claimants] file against him.”... By contrast, first-party coverage ‘pay[s] specified benefits directly to the insured when a ‘determinable contingency’ occurs,’ ‘allow[ing] an insured to make her own personal claim for payment against her insurer.”)).

76. Compare *Hankins v. Maryland Cas. Company/Zurich American Ins. Co.*, 101 So. 3d 645, 654 (Miss. 2012) (distinguishing a third-party liability claim under a comprehensive general liability insurance contract and a first-party claim under a homeowners' policy), with *Lara v. State Farm Fire & Cas. Co.*, 121 Fed. Appx. 796, 797 (10th Cir. 2005) (“State Farm handles damage claims [that are] covered under homeowners' policies—such as wind, hail, water, fire, theft, vandalism and *third-party liability*.”) (emphasis added).

77. *Id.*

78. Cf. *Cox v. Cont'l Cas. Co.*, No. C13-2288, 2014 WL 2011238, at \*5 (W.D. Wash. May 16, 2014); *Burress v. Sanders*, 31 S.W.3d 259, 263-64 (Tenn. Ct. App. 2000) (quoting The Tennessee Motor Vehicle Financial Responsibility Act, 21 Tenn.L.Rev. 341, 342 (1950)) (“Like a majority of states, Tennessee has adopted financial responsibility statutes requiring motorists involved in serious accidents to prove their ability to pay up to a specified amount of damages or face the loss of their driving privileges. These statutes are intended to provide a more effective means of enforcing payment of automobile-caused damage claim...”).

79. See *Latterell v. Progressive Northern Ins. Co.*, 801 N.W.2d 917, 921-22 (Minn. 2011) (quoting *Bobich v. Oja*, 258 Minn. 287, 294 (1960); then quoting *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 252 (Minn.1998)) (“Parties to insurance contracts... absent legal prohibition or restriction... are free to contract as they see fit...” [Generally] automobile insurance [contracts] falls into one of two categories: first-party coverage or third-party coverage. First-party coverage pays benefits to the insured, often regardless of the vehicle the insured was occupying at the time of a motor vehicle accident... [F]irst-party benefits ‘protect persons [rather than] vehicles, and therefore the benefits of first-party coverage follow the insured person.”).

80. See *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 886 (1995) (listing true first-party insurance contracts which only cover insureds' losses or damages).

insurance policies—provide coverage only against third-party claims.<sup>81</sup> Generally, if an insurer has a duty to cover an insured’s property damage, the insurance contract provides first-party coverage.<sup>82</sup> On the other hand, liability insurance contracts promise to settle third-party claims, pay judgments, or defend insureds against third-party contract- and tort-based lawsuits.<sup>83</sup> Certainly, it should be emphasized: most insurance agreements are “hybrid” contracts—providing both first- and third-party coverage.<sup>84</sup>

#### A. COVERAGE UNDER TRADITIONAL FIRST-PARTY, PROPERTY INSURANCE CONTRACTS

Traditional property insurance evolved from marine insurance.<sup>85</sup> Generally, property insurance contracts provide first-party coverage—requiring underwriters to cover insureds’ damaged, destroyed or loss property.<sup>86</sup> It is important, however, to emphasize: the definition of coverage under traditional property insurance contracts confuses most consumers and jurists.<sup>87</sup> “Coverage” has a unique meaning—requiring litigants to focus on *covered* and *excluded perils* rather than on the *covered property* when trying to determine whether a “*covered loss*” occurred.

81. See *Olds-Olympic, Inc. v. Commercial Union Ins. Co.*, 918 P.2d 923, 930 (Wash 1996) (“An owned property exclusion prevents a comprehensive general liability insurance policy from providing first-party benefits to the insured.”); *American Const. Benefits Group, LLC v. Zurich American Ins. Co.*, No. 3:12-CV-2726-D, 2013 WL 1797942, at \*2 (N.D. Tex. Apr. 29, 2013) (“The amended complaint alleges only that [ACBG president] committed wrongful acts that resulted in a loss to ACBG. But... ACBG is attempting to transform its directors’ and officers’ liability [insurance contract] into a first-party policy to provide coverage for its own loss.”); *Rockhill Insurance Company v. CFI-Global Fisheries Management*, 322 F. Supp. 3d 1110, 1124 (D. Colo. 2018) (reaffirming that professional liability insurance contracts cover an insured’s errors and omissions when providing professional services to third-party clients, patients or customers); see also *Abram v. United Services Auto. Ass’n*, 916 N.E.2d 1175, 1187-88 (Ill. Ct. App. 2009) (finding that the insurance contract “provides no first party insurance coverage (including but not limited to, any uninsured motorist coverage, underinsured motorist coverage, personal injury protection or any medical payments coverage)”).

82. See *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 705 n.2 (1989).

83. See PART I.B and accompanying notes.

84. See *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 710 (1989) (“First- and third-party coverage is... typically provided in a single policy, and... once the insured shows that an event falls within the scope of basic coverage... the burden is on the insurer to prove a claim is specifically excluded.”); see also *Tri-etch, Inc. v. Cincinnati Ins Co.*, 909 N.E.2d 997, 1003 (Ind. 2009) (discussing errors and omission insurance contracts, observing that often an insured rather than a third party may assert an errors or omission claim, and stressing that “errors and omissions coverage is not limited to first-party claims”).

85. Philip L. Bruner and Patrick J. O’Connor, Jr., 4PT2 BRUNER & O’CONNOR CONSTRUCTION LAW § 11:418 (2018) (“Property insurance is not a new concept. Some historians peg the beginnings of this coverage to early 14th-century Italy. ‘Bottomry’ was a form of insurance... [that insured] the bottoms [or hulls] of merchant ships carrying... valuable cargo. Beginning in the late seventeenth century... a specialized marine insurance market began to coalesce in Edward Lloyd’s coffee house in London... [and] a Society of Lloyd’s was formed... [T]he underwriters... literally wrote their names under insurance contracts and were... known as Lloyd’s Names... From its origins [of covering fire losses], property insurance has developed to cover... numerous types of risks. The industry has developed policies to protect crops from hail damage as well as [to protect] boilers and other machinery from catastrophic breakdowns.”).

86. See *Gap, Inc. v. Fireman’s Fund Ins. Co.*, 782 N.Y.S.2d 242, 244 (N.Y. App. Div. 2004) (noting that property insurance is first-party insurance).

87. See *Garvey*, 770 P.2d at 704-05 (stressing that “some of the confusion... regarding insurance coverage under the ‘all-risk’ section of a homeowner’s insurance policy —when [a] loss to an insured’s property [has occurred]— can be attributed to two causes, one... which is a no excluded peril, and the other an excluded peril.”).

Basically, property insurers sell two types of traditional insurance contracts.<sup>88</sup> Consumers may purchase “named-peril,” “covered-peril,” or “specific-risk” insurance contracts to protect and preserve tangible and intangible property interests.<sup>89</sup> “Named perils” contracts provide coverage and pay proceeds only if a specific, covered or named peril causes a property loss.<sup>90</sup> In contrast, all-risks insurance contracts cover insureds’ property against all known, unknown and unanticipated risks or perils.<sup>91</sup> Stated slightly differently, all-risks insurance covers “risks which are not usually contemplated.”<sup>92</sup>

Even more relevant, many insured residential- and commercial-property owners fail to fully appreciate another important principle: before courts compel insurers to reimburse property-loss expenses, both “sophisticated” and “unsophisticated” insureds must prove causation.<sup>93</sup> Without a doubt, there are multiple theories of causation—conventional proximate cause,<sup>94</sup> concurrent causation,<sup>95</sup> cause in fact,<sup>96</sup> producing cause,<sup>97</sup> efficient proximate cause,<sup>98</sup> foreseeability causation,<sup>99</sup> and the doctrine of efficient producing cause.<sup>100</sup> Thus, the question arises: which burden of causation must insureds satisfy before courts order insurers to repair or replace damaged tangible or

88. See, e.g., *Vision One, LLC v. Phila. Indem. Ins. Co.*, 174 Wash. 2d 501, 512-13 (2012) (observing that property insurance policies generally fall into two categories—named-peril and all-risk contracts).

89. See, e.g., *id.*; *Poulton v. State Farm Fire and Cas. Cos.*, 675 N.W.2d 665, 670 (Neb. 2004) (observing that a property insurance contract insures against “specific perils” or “named perils”).

90. See, e.g., *Poulton*, 675 N.W.2d at 670 (reaffirming that under a specific perils policy, an insured’s personal property is covered if one of the listed perils in the contract damaged the property).

91. *Id.*

92. *Id.*

93. *Garvey*, 770 P.2d at 710 (“Coverage... is commonly provided by reference to causation—e.g., ‘loss caused by’ certain enumerated perils. The term ‘perils’ in traditional property insurance parlance refers to fortuitous, active, physical forces such as lightning, wind, and explosion, which bring about the loss. Thus, the ‘cause’ of loss in the context of a property insurance contract is totally different from that in a liability policy.”).

94. See, e.g., *Frontline Processing Corp. v. Am. Econ. Ins. Co.*, 149 P.3d 906, 909-11 (Mont. 2006); *Scirex Corp. v. Fed. Ins. Co.*, 313 F.3d 841, 850 (3d Cir. 2002); *FDIC v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 205 F.3d 66, 76 (2d Cir. 2000); *Jefferson Bank v. Progressive Cas. Ins. Co.*, 965 F.2d 1274, 1281-82 (3d Cir. 1992); *Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc.*, 854 A.2d 378, 385-87 (N.J. 2004).

95. See *Colella v. State Farm Fire & Cas. Co.*, 407 Fed. Appx. 616, 622 (3d Cir. 2011) (“[W]hen there are two or more causes of loss, the policyholder’s claim is covered as long as the immediate or proximate cause of loss is covered by the policy.”). Some property insurers, however, use anti-concurrent causation clauses in order to exclude coverage when an excluded peril causes any portion of a loss. See, e.g., *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 425 (5th Cir. 2007) (“[T]his prefatory language denies coverage whenever an excluded peril and a covered peril combine to damage a dwelling or personal property.”).

96. *Id.*

97. See *UDR Texas Properties, L.P. v. Petrie*, 517 S.W.3d 98, 107 (Tex. 2017) (“To recover... under a products liability theory requires proof of producing causation”) (Willett, J., concurring).

98. See *Safeco Ins. Co. of America v. Hirschmann*, 773 P.2d 413, 416 (Wash. 1989) (noting that “efficient proximate cause” is an insurance-law doctrine which establishes coverage under a property insurance contract if an *initial* covered peril is the efficient proximate cause of a loss regardless of subsequent events’ influences).

99. See *UDR Texas Properties, L.P. v. Petrie*, 517 S.W.3d 98, 107 (Tex. 2017) (“Proximate cause and producing cause share the common element of causation in fact, with proximate cause including the additional element of foreseeability.”).

100. See *Leadership Real Estate v. Harper*, 271 N.J. Super. 152, 171 (1993) (discussing and explaining the doctrine of efficient producing cause).

intangible property? A majority of states have adopted the efficient proximate cause theory.<sup>101</sup>

As an illustration, consider the insured's digital-property-loss and insurance-coverage dispute in *Providence Washington Ins. Co. v. Volpe and Koenig, P.C.*<sup>102</sup> Volpe and Koenig, P.C. is a boutique law firm—comprising intellectual-property attorneys, technology specialists, patent agents and technical advisors.<sup>103</sup> During the summer of 2003, Volpe's computer system “crashed,” preventing the attorneys from accessing stored files and other data.<sup>104</sup> Immediately, Volpe contacted DJS Technologies Solutions (DJS), who sent a technician to diagnose the problem. The agent discovered: 1) The central air-conditioner's “cooling failure” *caused* an “extremely hot temperature” in the server room<sup>105</sup>; 2) the “extremely hot temperature” *caused* the server to “overheat”; and 3) the overheated computer *caused* the loss of data.<sup>106</sup> Volpe paid approximately \$135,000 after DJS replaced the computer and restored files.<sup>107</sup>

When the computer malfunctioned and compromised the stored data, Providence Washington Insurance Company insured Volpe law firm's tangible and intangible property under a commercial property insurance contract.<sup>108</sup> A computer endorsement, however, was attached to the contract. The endorsement excluded coverage for any damage *caused* by:

Dampness or dryness of atmosphere, or *changes in or extremes of temperature*, unless such conditions result from physical damage *caused by a covered cause of loss* to an *air conditioning unit or system*, including equipment and parts, which is part of, or used with the electronic data processing equipment.<sup>109</sup>

Nearly eleven months after the “computer crash” and repairs, Volpe sent a notice of loss to Providence, and disclosed the \$135,000 out-of-pocket expenditures.<sup>110</sup> The insurer admitted that the “crashed” computer was a “*covered property*” under the endorsement.<sup>111</sup> Still, Providence refused to reimburse the out-of-pocket expenditures, and raised two affirmative defenses: 1) Volpe failed to file a timely notice of loss; and 2) a “*covered cause of loss*” did not cause the *damaged* property.<sup>112</sup>

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101. See Michael C. Phillips & Lisa L. Coplen, *Concurrent Causation versus Efficient Proximate Cause in First-Party Property Insurance Coverage Analysis*, 36-WTR BRIEF 32, 34-35 (Winter 2007) (identifying thirty-four states' embracing the efficient proximate cause standard and identifying eight states' adopting and applying the concurrent causation theory). See also *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 162 (Tex. 1971) (embracing the concurrent causation doctrine and stressing: An insured may recover proceeds under a property insurance contract if the insured proves that a “covered risk” rather than an “excluded risk” is the dominant efficient cause of the loss).

102. 396 F. Supp. 2d 542 (E.D. Pa. 2005).

103. *About, VOLPE AND KOENIG, P.C.*, <http://vklaw.com/about/> [https://perma.cc/K9JW-MRGM] (last visited Apr. 16, 2019).

104. *Volpe*, 396 F. Supp. 2d at 543.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* (Exclusion B.2.k.(7)(a) of the Computer Endorsement) (emphasis added).

110. *Id.*

111. *Id.*

112. *Id.*

Again, barring a few situations, the exclusion did not require Providence to pay any insurance proceeds if “*changes in or extremes of temperature*” caused the law firm’s property loss. But, Volpe argued: the phrase was confusing, as it could mean a change in atmospheric, indoor or outdoor temperatures.<sup>113</sup> Arguably, the law firm’s interpretation was more reasonable. Why? Volpe’s intellectual property attorneys and technology specialists are highly sophisticated: they have an impressive history of fashioning and reading complex words and phrases.<sup>114</sup> Yet, Providence rejected Volpe’s argument, filed a declaratory-judgment action, and asked the federal district court to declare whether or not a reimbursement was mandatory.<sup>115</sup>

The district court found decisively: 1) a cooling failure in the server room *caused* a change in temperature,<sup>116</sup> and, 2) the cooling failure *caused* the computer damage and loss data.<sup>117</sup> Applying the plain meaning rule,<sup>118</sup> the district court declared that the phrase “*changes in or extremes of temperature*” clearly includes indoor temperature which was “*unaffected by outdoor temperature*.”<sup>119</sup> In the end, the federal court also declared that Volpe’s property loss was *not covered* under the commercial property insurance contract.<sup>120</sup> Understandably, unsophisticated, as well as sophisticated consumers, may reasonably expect traditional commercial and residential property insurance contracts to cover *any or all* property losses. However, *Volpe* and many other decisions<sup>121</sup> reveal: the definition of coverage under property-insurance contracts is complicated. Insureds must always be prepared to prove that a specifically “named peril,” “covered peril,” or “peril insured against” caused the damaged or loss property.<sup>122</sup>

113. *Id.*

114. VOLPE AND KOENIG, P.C., *supra* note 103 (“Founded in 1987, [o]ur team of IP attorneys and professional staff possess advanced technical degrees and experience working within a wide range of industries—including computer technology, electrical components and life sciences... [O]ur attorneys... know the patent process inside and out. Our goal is to... offer proactive intellectual property guidance [to protect] valuable IP portfolios...”).

115. *Volpe*, 396 F. Supp. 2d at 543.

116. *Id.* at 544.

117. *Id.*

118. *See generally* Part V and accompanying notes.

119. *Volpe*, 396 F. Supp. 2d at 544-45.

120. *Id.*

121. *See* Willy E. Rice, *The Court of Appeals for the Fifth Circuit 2004-2005 Disposition of Insurance Decisions: A Survey and Statistical Review*, 38 TEX. TECH. L. REV. 821, 856-857 n.285-289 (2005) (citing numerous cases and parenthetical statements).

122. *See* TAG 380, LLC v. ComMet 380, Inc., 890 N.E.2d 195, 199 (N.Y. 2008) (“Commercial property insurance is generally offered [under] an all-risk policy or a named-perils policy... [The latter] covers... enumerated risks [and] an ‘all-risk’ agreement generally covers all risks of physical loss.”); *State Farm Fire & Cas. Co. v. Von Der Lieth*, 54 Cal. 3d 1123, 1131-32 (1991) (reaffirming that under the efficient proximate cause doctrine a loss is covered, if a combination of covered and excluded risks cause a loss and, the covered risk was the efficient proximate cause of the loss. Conversely, “the loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate, or predominate cause of the loss.”); *Fed. Life Ins. Co. v. Raley*, 109 S.W.2d 972, 974 (Tex. 1937) (reaffirming that the term “proximate cause” has the same meaning as that applied in negligence cases, except proving that the “peril insured against” causes the property loss and the loss property was foreseeable or anticipated is not required.”); *Ingersoll Milling Machine Co. v. M/V Bodena*, 829 F.2d 293, 307 (2d Cir. 1987) (stressing that insurers sell generally all-risk or named-perils commercial property insurance contracts and all-risks contract cover property losses which are caused by any fortuitous peril).

B. COVERAGE UNDER TRADITIONAL THIRD-PARTY LIABILITY INSURANCE CONTRACTS

As disclosed previously, liability insurance contracts cover insureds' allegedly negligent, accidental or inadvertent acts that proximately cause third-party personal injuries and property damage.<sup>123</sup> Under a typical liability insurance contract, an underwriter accepts multiple contractual obligations or assumes an extremely broad spectrum of risks.<sup>124</sup> To illustrate, consider the third-party insurance contract and legal dispute in *Stowers Furniture Company v. American Indemnity Company*<sup>125</sup>—the ninety-year-old, frequently cited Texas case. In *Stowers*, the insurance contract contained duty-to-defend and duty-to-pay provisions which read in pertinent part:

[T]he company agrees . . . [t]o defend . . . on behalf of the Assured any suits *even if groundless*. . . . [We agree] to pay. . . *all costs* taxed against the Assured in *any legal proceeding*. . . , *all interest* accruing after entry of [a] judgment. . . , the expense [for]. . . immediate medical or surgical relief . . . [and] *all* [expenses for]. . . the investigation of. . . an accident, [an] adjustment of *any* claim, or the defense of *any* suit. . . .<sup>126</sup>

Ninety years after *Stowers*, insurers continue to insert extremely similar contractual promises into liability insurance contracts. Consider two very recent disputes in *Mt. Hawley Insurance Company v. Roebuck*<sup>127</sup> and in *Fireman's Fund Insurance Co. v. Hyster-Yale Group, Inc.*<sup>128</sup> In *Mt. Hawley*, the insured purchased a commercial general liability insurance contract.<sup>129</sup> The coverage provision read in pertinent part:

INSURING AGREEMENT: We *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.<sup>130</sup>

In *Fireman's Fund*, the insured also purchased and renewed a series of comprehensive general liability policies.<sup>131</sup> In relevant part, the Fireman's Fund policies stated:

COVERAGE BODILY INJURY LIABILITY EXCEPT AUTOMOBILES: [The Company promises] *to pay on behalf of the insured all sums* which the insured shall become *legally obligated* to pay as damages because of bodily injury, sickness, or disease, including death at any time resulting therefrom, sustained by *any person* and caused by accident. . . .<sup>132</sup>

There is one final observation. In *Stowers*, the insurer selected the name “American Indemnity Company.”<sup>133</sup> Yet, the insurer sold a liability

123. See *Architex Ass'n, Inc. v. Scottsdale Ins. Co.*, 27 So.3d 1148, 1156 (Miss. 2010).

124. See *Warrilow v. Norrell*, 791 S.W.2d 515, 527–28 (Tex. Ct. App.—Corpus Christi 1989).

125. *Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929) (holding approved) (As of April 21, 2019, a large number of state and federal courts as well as commentators and practitioners across the country had cited the case—along with the *Stowers* Doctrine that it created—on 1,247 occasions).

126. *Stowers*, 15 S.W.2d at 546 (emphasis added).

127. 383 F. Supp. 3d 1351 (S.D. Fla. 2019).

128. 127 N.E.3d 385 (Ohio Ct. App. 2018).

129. *Mt. Hawley*, 383 F. Supp. 3d at 1354.

130. *Id.*

131. *Fireman's Fund*, 127 N.E.3d at 387.

132. *Id.*

133. *Stowers*, 15 S.W.2d at 544.

insurance which contained both liability and indemnity coverage provisions. Thus, the duty-to-indemnify clause read in pertinent part:

[The Company agrees] to *indemnify* the Assured . . . [against a loss after liability has been] imposed by law upon the Assured for damages on account of bodily injuries. . . accidentally suffered or alleged to have been suffered. . . by *any person* or persons except employees of the Assured.<sup>134</sup>

Put simply, indemnity insurers sell an assortment of traditional insurance contracts “excess employers’ indemnity,” “professional indemnity,” “hospital indemnity,” “workers’ compensation indemnity,” and “industrial indemnity” insurance contracts.<sup>135</sup> Among medium-to-large corporations, directors-and-officers (D&O) insurance contracts are arguably the most familiar and widely marketed indemnity agreements.<sup>136</sup> Still, it is important to underscore another point: although traditional liability and indemnity policies are third-party insurance contracts, there are significant legal differences between the two forms of insurance.

Generally, business and professional entities purchase traditional liability insurance to help pay the costs of defending against third-party claims.<sup>137</sup> In contrast, indemnity insurers have a contractual obligation to reimburse insureds’ out-of-pocket expenditures after insureds cover personal losses, pay or settle third-party claims, or defend themselves against third-party lawsuits.<sup>138</sup> Under traditional indemnity insurance contracts, insurers normally do not have a contractual obligation to defend insureds against third-party lawsuits.

## II. EVOLVING “SPECIALTY” AND “HYBRID” CYBER-LIABILITY INSURANCE CONTRACTS

Surprisingly, a cursory search of the Internet (or www) generated a long list of definitively and professedly actionable torts that contained the “cyber”

134. *Id.* at 546.

135. This information came from the Internet after using Google search engine and typing in the phrase “indemnity insurance” on April 22, 2019.

136. *Cf. The Who, What & Why of Directors & Officers Insurance*, THE HARTFORD BUSINESS OWNER’S PLAYBOOK, <https://www.thehartford.com/management-liability-insurance/d-o-liability-insurance/explained> [<https://perma.cc/V9DW-GKDU>] (“D&O liability insurance protects the personal assets of corporate directors and officers... [if] they are personally sued... for actual or alleged wrongful acts in managing a company. The insurance... usually protects the company as well [and] covers legal fees, settlements and other costs. D&O insurance is the financial backing for a standard indemnification provision... Directors and officers are sued for... breach of fiduciary duty resulting in financial losses or bankruptcy, misrepresentation of company assets, misuse of company funds, fraud, failure to comply with workplace laws, *theft of intellectual property* and *poaching of competitor’s customers* and lack of corporate governance. Illegal acts or illegal profits are generally not covered under D&O insurance.”) (emphasis added).

137. Again, multi-peril, commercial general liability, professional liability, business owners’ liability, automobile and homeowners’ insurance contracts are familiar examples of liability insurance contracts. *See also* Leslie Scism, *AIG Considers Making Deals, Cutting Buybacks*, WALL ST. J., Jun 29, 2017, at B10 (“American International Group sells property and a wide range of liability insurance to businesses globally, and is well known for its coverage of multinationals. It also... is a leading insurer of cars, homes and other property of the wealthy.”).

138. *See, e.g., Select Insurance With Great Care*, SAN DIEGO UNION TRIB., Oct. 2, 2005, at 8 (“A fee-for-service plan, indemnity insurance became less popular as managed care dominated the industry. Indemnity insurance costs more but allows an unlimited choice of primary-care doctors, specialists and hospitals. The plan will pay a medical provider *directly or reimburse the patient* after the bill is paid and a claim is filed.”) (emphasis added).

prefix: cyber-aggression, cyber-attacks, cyber-bullying, cyber-crimes, cyber-criticisms, cyber-complaints, cyber-deception, cyber-emergencies, cyber-espionage, cyber-exploitation, cyber-fraud, cyber-harassment, cyber-harms, cyber-incidents, cyber-libel, cyber-losses, cyber-medical-event, cyber-obscenity, cyber-offenses, cyber-piracy, cyber-porn, cyber-racism, cyber-security, cyber-squatting, cyber-stalking, cyber-surgery-claim, cyber-targeting, cyber-terrorism, cyber-threats, cyber-torts and cyber-warfare.<sup>139</sup> Yet, there are no universal definitions of these cyber-related terms.<sup>140</sup>

Nonetheless, promising to assume professionals' and businesses' "cyber risks," traditional property and liability insurers have begun to market and sell standalone and specialty contracts<sup>141</sup> under various labels containing the term "cyber": cyber-insurance,<sup>142</sup> cyber-risk insurance,<sup>143</sup> cyber-security insurance,<sup>144</sup> cyber-liability insurance<sup>145</sup> and cyber-loss insurance.<sup>146</sup> Typically, evolving cyberinsurance contracts cover first- and third-party claims which arise from insureds' allegedly damaging, abusing or using without permission all types of communication devices, electronic equipment, and information sharing technologies.<sup>147</sup> Also, under some cyber-risk insurance contracts, the

139. Cf. Krishnendra Joshi, *Torts in the Cyber World*, PLEADERS INTELLIGENT LEGAL SOLUTIONS (May 2, 2019), <https://blog.ipleaders.in/cyber-torts/> [<https://perma.cc/4HCH-MCHL>] (reporting that cyber torts are committed in various ways and that the term includes cyber stalking, cyber harassing, cyber defamation and cyber-vandalism.); Vangie Beal, *Cyber*, WEBOPEDIA, <https://www.webopedia.com/TERM/C/cyber.html> [<https://perma.cc/R8VE-YN4B>] (last visited Nov. 25, 2019) (stressing that the "cyber" prefix has been used to fashion a growing number of new terms, torts and crimes—i.e., cybersecurity, cyberslacking, cyberlibel, cyberspace, cyberbullying, cybersquatting, cybersuicide, cyber crime and cyber kill).

140. Cf. Eric Bolin, *Applying The Law of Proportionality To Cyber Conflict: Suggestions For Practitioners*, 50 VAND. J. TRANSNAT'L L. 217, 222-23 (2017) ("The terminology that surrounds cyber warfare remains in a nascent state... [W]hat is a cyber attack?... Two definitions of cyber attack seem to be more fully accepted than others."); Oona A. Hathaway, Rebecca Crotoft, Philip Levitz, Haley Nix, Aileen Nowlan, William Perdue & Julia Spiegel, *The Law of Cyber-Attack*, 100 CALIF. L. REV. 817, 818 (2012) ("New international efforts to regulate cyber-attacks must... [agree] on the definition[s] of cyber-attack, cyber-crime, and cyber-warfare.").

141. See Joseph S. Harrington, *The Need Is Now Standard. Can The Product Become So?*, ROUGH NOTES (Oct. 26, 2017) <http://roughnotes.com/can-cyber-insurance-standardized/> [<https://perma.cc/9CKX-9YM8>] ("[The Insurance Services Office reported] that cyber insurance is increasingly being purchased through standalone cyber policies, as opposed to endorsements on other types of policies.").

142. See *Palantir Technologies Inc. v. Abramowitz*, No. 16-cv-5857, 2017 WL 926467, at \*1 (N.D. Cal. Mar. 9, 2017) (clarifying the misappropriation of proprietary trade secret and business information claims surrounding cyber insurance technology and related cybersecurity technology).

143. See James Willhite, *On Alert Against Cybercrime—More CFOs Weigh Insurance Against Data Breaches, Despite Limits on Coverage*, WALL ST. J., Aug. 13, 2013, at B6 ("Ciena... [makes] sure its technologies are protected from hackers, cutthroat competitors and other potential cybercriminals... As a result, [the company] is considering cyber-risk insurance. In the past few years, cyber-risk coverage has become one of the fastest-growing businesses for insurers. Insurance broker Marsh Inc. says the number of its clients buying cyber-risk policies jumped by a third last year.").

144. See *P.F. Chang's China Bistro, Inc. v. Fed. Ins. Co.*, No. CV-15-01322, 2016 WL 3055111, at \*9 (D. Ariz. May 31, 2016) (noting that Chubb markets cyber security insurance contracts to cover direct loss, legal liability, and consequential loss resulting from cyber security breaches.).

145. See *Travelers Prop. Cas. Co. of America v. Fed. Recovery Servs., Inc.*, 103 F. Supp. 3d 1297, 1298 (D. Utah 2015) (describing the coverage provision under a cyber-liability insurance contract).

146. See David L. Vicevich, *The Case for a Federal Cyber Insurance Program*, 97 NEB. L. REV. 555, 583 (2018) (discussing cyber-loss insurance).

147. See Gregory D. Podolak, *Cyber Risk Coverage Litigation Heats Up as Exposure and the Insurance Market Evolve*, AM. BAR ASS'N (June 13, 2014), <https://www.americanbar.org/groups/litigation/committees/insurance-coverage/articles/2014/marchapril2014-cyber-risk-litigation/> [<https://perma.cc/46AU-LRGU>].

definition of a “covered” technology is broad, encompassing a large assortment of cellular technologies, cyber-digital hardware, and communication software, as well as applications for creating, accessing, publishing, storing and sharing digital documents.<sup>148</sup>

A. “HYBRID” CYBER-INSURANCE CONTRACTS—FIRST- AND THIRD-PARTY COVERAGE

Unlike traditional first- and third-party insurance contracts, cyber-insurance contracts are not standardized.<sup>149</sup> Many of the words and phrases in coverage, exclusion, conditions and definitions clauses have been negotiated.<sup>150</sup> Therefore, the non-standardized language is more likely to change the scope of coverage for various cyber events, cyber-losses or cyber-claims.<sup>151</sup> Nevertheless, like traditional businessowners’ insurance contracts, cyber-insurance contracts are fundamentally “hybrid” contracts—providing both first-party-property and third-party-liability coverages.<sup>152</sup>

In a nutshell, first-party cyber-insurance covers the following losses after a cyber-event or cyber-attack: 1) insureds’ intangible property damage and restoration costs,<sup>153</sup> 2) business-interruption costs,<sup>154</sup> 3) property losses and expenses arising from distributed denial of service (DDOS) attacks,<sup>155</sup> 4) theft of property,<sup>156</sup> and cyber-related extortion.<sup>157</sup> To illustrate, consider the three

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148. See, e.g., WILLY E. RICE, LEGAL PRACTICE TECHNOLOGY AND LAW—CASES AND MATERIALS 5 (1st ed. 2017) (stressing that legal disputes—like insureds-insurers duty-to-defend disagreements—involve “solo and small-firm practitioners’ purchasing, using, designing, sharing, invading, misappropriating, and/or abusing legal-practice or law-office technologies: desktop, laptop, and network computers; smartphones; short messaging services (sms); multimedia messaging service (mms); electronic tablets; office and cloud-based computing and printing services; the Internet; website design and maintenance services; social-media services; office production software; billing, invoicing, and accounting programs; document automation and assembly programs; document management systems; document sharing systems; and portable document format (PDF) software and files.”).

149. DYLAN C. BLACK ET AL., RISK AND INSURANCE MANAGEMENT SOCIETY, A GUIDE TO CYBER INSURANCE 2 (2018) (“As more small- and mid-market organizations purchase cyber insurance, use of ISO forms will likely grow, but variation in available policy wording will persist.”).

150. See *id.*

151. *Id.*

152. *Id.* (“Cyber policies often provide multiple coverage[s]... Insurers divide [those] differently and sometimes include sublimits for specific coverage types”).

153. *Id.* at 3 (“Coverage for destruction or restoration of data following a cyber event is a core component of almost all cyber insurance policies”).

154. *Id.* at 3 (“Many insurers offer business interruption coverage [which] could include coverage for cyber-related business interruption”).

155. *Id.* at 4 (“[S]ome insurers offer separate coverage for losses due to DDOS events.”). See also, Joy Reo, *Cyber Insurance and DDoS Attack Protection*, CORERO BLOG (July 21, 2017), <https://www.corero.com/blog/cyber-insurance-and-ddos-attack-protection/> [<https://perma.cc/3CY2-W8Q5>] (“American International Group... surveyed cyber security and risk experts to [determine]... the likelihood and impact of a systemic cyber-attack—an attack on more than one target, focused on a particular industry or sector of the economy. Not surprisingly, distributed denial of service or DDOS attacks ranked highest among their concerns.”).

156. BLACK ET AL., *supra* note 149, at 5 (“Theft coverage under cyber policies can be quite robust... Many insurers provide coverage for a wide range of property and assets... Potentially covered property can include data, intellectual property... money or securities, finished goods or works in progress and computing resources.”).

157. BLACK ET AL., *supra* note 149, at 5 (“Extortion coverage is commonly offered as a standard component of most cyber policies... [But], most insurers require that the extortion to be cyber-related [before coverage is triggered].”).

“independent agreements” in Travelers Indemnity Company’s uniquely constructed and unconventional first-party cyber-insurance contract:

BREACH RESPONSE INSURING AGREEMENTS — The insurer will reimburse or pay. . . *notification costs* resulting from an actual or suspected privacy breach; . . . *computer and legal expert costs* resulting from an actual or suspected 1) privacy breach, 2) security breach, or 3) cyber extortion threat. . . ; *restoration costs*, directly caused by a *security breach*; . . . [and] *public relations costs*, resulting from an actual or suspected: 1) privacy breach, 2) security breach, or 3) media act....

CYBER CRIME INSURING AGREEMENTS—The insurer will pay the *insured entity* for its direct loss of money, securities, or *other property*, directly caused by computer fraud that is discovered during the policy period. . . [And] the Insurer will pay the *insured entity* for its direct loss of money or securities, directly caused by social engineering fraud [or] by telecom fraud that is discovered during the policy period.

BUSINESS LOSS INSURING AGREEMENTS—The insurer will pay the insured for its business interruption loss that is directly caused by any of the following: . . . 1) A security breach that results in a *total or partial interruption of a computer system*, 2) a system failure. . . [and], 3) The voluntary shut-down of a computer system by the Insured, . . . to minimize the loss caused by a security breach or privacy breach[.]<sup>158</sup>

Debatably, specialized-first-party cyber-insurance has two negative attributes: 1) It is remarkably more expensive than traditional first-party property insurance coverage<sup>159</sup>; and, 2) It is less superior than similar coverage under standard first-party, property insurance contracts. Quite simply, fewer “perils insured against,” “covered perils” or “covered causes of loss” are listed in evolving cyber-risk insurance contracts.<sup>160</sup> To support the latter assertion, consider the findings of a preeminent risk assessment and management organization:

[Cyber-risk property insurance does] not cover *direct, physical damage* arising out of a cyber event. [Most cyber insurers] expressly exclude property damage from coverage. Where property damage is *covered*, it is often limited to *intangible property*—such as lost data or information. . . [A cyber insurer will] replace, recreate, restore or repair the insured’s computer systems, but provides *no coverage for damage to other property*. . . Unless the policy directly provides *coverage for property damage*, the physical impact of a

158. THE TRAVELERS INDEMNITY CO., FORM CYB-16001 ED. 01-19-CYBERRISK INSURANCE POLICY 1-2 (2019), <https://www.travelers.com/iw-documents/apps-forms/cyberrisk/cyb-16001.pdf> [<https://perma.cc/43J5-LS8J>].

159. See Liz Skinner, *Is Cyber Insurance Worth the Cost?*, INV. NEWS (Jan. 15, 2017), <https://www.investmentnews.com/article/20170115/FREE/170119958/is-cyber-insurance-worth-the-cost> [<https://perma.cc/RML8-URGW>] (“Just as the coverage varies, the cost of cyber insurance premiums is set based on different factors such as the number of records a firm wants to cover, the number of client accounts it has or the number of investment professionals at the firm. The price also is affected by where client records are stored and how much coverage is purchased. Firms typically spend between \$5,000 and \$50,000 a year for policies that provide \$1 million to \$10 million in coverage.”) (emphasis added).

160. See, e.g., Sharon D. Nelson & John W. Simek, *Cyber Insurance: Necessary, Expensive, and Confusing As Hell*, 91-OCT WIS. LAW. 14, 15 (2018) (“Most lawyers have professional liability insurance, which will undoubtedly provide some cyber insurance coverage given that lawyers [generate and store legal-services data]. However, more than 50 percent of the cost of a data breach may come from digital forensics and the data breach..., which are not covered... Other costs that likely are not covered include public relations coverage, data breach law compliance and notification costs, and regulatory investigations costs, including fines and penalties.”) (emphasis added).

cyber event may be uncovered.<sup>161</sup>

On the other hand, “hybrid” cyber-insurance contracts provide significantly broader coverage for *third-party* claims—those arising from professionals and business entities’ allegedly tortious conduct.<sup>162</sup> For instance, Great American E & S Insurance Company crafted a cyber-liability insurance contract and it reads in relevant part:

LIABILITY COVERAGE—The insurer shall pay on behalf of an insured all loss incurred as a result of any claim for *multimedia wrongful act, network wrongful act* or *privacy wrongfully act*. . . .<sup>163</sup>

MULTIMEDIA WRONGFUL ACT—[This term means] any actual or alleged: 1) libel, slander, trade libel, product disparagement or any defamation or harm to the character of reputation of *any person or entity*, 2) invasion or infringement of the right of privacy or publicity, including the *torts* of intrusion upon seclusion, publication of private facts, false light or misappropriation of name or likeness, 3) outrage or infliction of emotional distress, 4) dilution or infringement of title, slogan, trademark, trade name, trade dress, service mark or service name, 5) copyright infringement, plagiarism, or misappropriation of information, ideas or other similar *property rights*, or 6) piracy or unfair competition, but only if . . . resulting from any multimedia activity.<sup>164</sup> . . .

NETWORK SECURITY WRONGFUL ACT—[This phrase means] an actual or alleged act, error or omission by or on behalf of the insured in the performance of the Company’s business that causes or fails to prevent: 1) *unauthorized access* to or *unauthorized use* of the covered network, 2) the transmission of *any malicious* code from the covered network to *a third party’s computer systems*, 3) business interruption, and/or 4) a network disruption.<sup>165</sup> . . .

PRIVACY WRONGFUL ACT—[This term means] any actual or alleged: 1) negligent act, error or omission by or on behalf of the insured in the performance of the Company’s business that actually or allegedly causes or fails to prevent unauthorized access to, unauthorized use of . . . [or] the loss of *any laptop, smartphone or other portable device* that contains *protected information* . . . [or], 2) violation of any federal, state, local or foreign law or regulation regarding the maintenance, protection, use or disclosure of *protected information*. . . .<sup>166</sup>

Most definitely, some specialty insurers also sell cyber-liability insurance which cover claims arising from insureds’ breach of electronic security and privacy systems,<sup>167</sup> or from insureds’ failure to prevent unauthorized accesses to protected computers.<sup>168</sup>

161. BLACK ET AL., *supra* note 149, at 2 (emphasis added).

162. BLACK ET AL., *supra* note 149, at 6 (“Liability coverage is the cornerstone of cyber insurance. . . . [C]laims that are made against the insured during the policy period or an extended reporting period are covered under the policy, even if the underlying events occurred before the policy period. . .”).

163. GREAT AM. E & S INS. CO., GREAT AMERICAN INS. GROUP, CYBER RISK INSURANCE POLICY – FORM D62100 2 (2017), <http://www.abais.com/Data/Sites/1/media/specimen/sbg/gaiccyberpolicy.pdf> [<https://perma.cc/PG4U-FFBQ>] (emphasis added).

164. *Id.* at 7 (emphasis added); *see also* Franklin, *supra* note 45 (reporting that some third-party cyber provisions cover the cost “associated with libel, slander, copyright infringement, product disparagement or reputational damage, when [the underlying third-party] allegations involve a business website, social media, or print media.”).

165. GREAT AM. E & S INS. CO., *supra* note 163, at 7-8 (emphasis added).

166. GREAT AM. E & S INS. CO., *supra* note 163, at 8 (emphasis added).

167. Franklin, *supra* note 45.

168. Franklin, *supra* note 45.

B. DUTY-TO-DEFEND COVERAGE UNDER CYBER-LIABILITY INSURANCE CONTRACTS

Like traditional CGL, professional and other liability-insurance underwriters, today's cyber-liability insurers promise to defend insureds against third-party cyber-technology lawsuits. To review the promises, the author randomly retrieved several "embryonic"<sup>169</sup> cyber-liability insurance contracts from various websites and compared relevant terms. And a surprising finding emerged: the duty-to- defend provisions in cyber-liability insurance agreements are *strikingly similar* to duty-to- defend clauses in traditional-liability insurance contracts.

To illustrate, consider the traditional insuring agreements in *Mt. Hawley* and in *Fireman's Fund*. In *Mt. Hawley*, joint venturers purchased a commercial general liability insurance contract and the duty-to- defend clause read in pertinent part:

Insuring Agreement: . . . We will have the *right and duty to defend* the insured against any "suit" seeking . . . damages. However, we will have no *duty to defend* the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.<sup>170</sup>

And, in *Fireman's Fund*, a business entity purchased and renewed several comprehensive general liability policies. And the duty-to- defend provisions read in relevant part:

DEFENSE SETTLEMENT SUPPLEMENTARY PAYMENTS: . . . [T]he company shall. . . *defend any suit against the insured* alleging such injury, sickness, disease or destruction in seeking damages on account thereof, *even if such suit is groundless, false or fraudulent*; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient.<sup>171</sup>

Now, consider the duty-to- defend language in two randomly selected cyber-liability insurance contracts. In the first insuring contract, a specialty insurer assumed the insured's technology risks.<sup>172</sup> The contract read in relevant part:

Defense: We have the *right and duty to defend any covered claim* brought against you, *even if such claim is groundless, false or fraudulent*. You shall not . . . incur any claims expenses, certain *data breach team expenses, cyber extortion costs, or digital property replacement* without our prior written consent. We have the *right to appoint counsel* and [provide a] defense . . . as we deem necessary. . . . You *will select [a] defense counsel from our list of approved law firms*, and we

169. See Bethany Thomas, *The Role of Cyber Insurance (And Why It's Important)*, PROTEAN RISK (Mar. 6, 2018), <https://www.proteanrisk.com/insights/2018/the-role-of-cyber-insurance/> [<https://perma.cc/AZ6Q-R2UZ>] (explaining why cyberinsurance is different and stressing: "Predictions that global cyber insurance premiums will more than double... has caused an explosion of choice for buyers... [W]ithin the Lloyd's insurance market there are now 77 cyber risk insurers. Despite the first cyber insurance policies[] appearing in the late 90s, the product is still in the embryonic stage of development and evolving all the time.").

170. *Mt. Hawley*, 383 F. Supp. 3d at 1354.

171. See *Fireman's Fund*, 782 N.Y.S.2d at 244 (noting that property insurance is first-party insurance).

172. *About Us*, VICTOR O. SCHINNERER & CO. INC., <https://www.schinnerer.com/about-us/> [<https://perma.cc/D5QW-UZSB>] ("[We are] one of the largest and most experienced underwriting managers of specialty insurance programs in the world... Our vision is to be recognized as an elite specialty insurance provider/distributor... [We offer] a unique combination of global reach and specialized expertise with core capabilities in underwriting, technology, distribution and capital.").

reserve the right to associate in the defense.<sup>173</sup>

International specialty underwriters also sell cyber-liability insurance agreements. And the duty-to-defend provisions in those contracts *almost mirror* the three clauses appearing above. Consider the insurance-defense language that an underwriter at Lloyd's of London—Hiscox London Market<sup>174</sup>—inserted in its cyber-risk policy:

DEFENSE AND SETTLEMENT OF CLAIMS: The underwriters will have the *right and duty to defend any covered claim . . . , even if such claim or regulatory proceeding is groundless, false, or fraudulent. . . .* The underwriters will have the *right to appoint defense counsel. . . .* The underwriters' *duty to defend will terminate* [after] the applicable limit of liability [has been exhausted].<sup>175</sup>

Once more, duty-to-defend provisions in traditional and cyber-risk insurance contracts are nearly identical. Moreover, traditional insurers and their insureds have a one-hundred-year history of litigating duty-to-defend controversies.<sup>176</sup> Thus, in light of these realities, two questions beg for simple answers: 1) why would or should otherwise savvy and rational professional and business entities purchase decidedly more expensive third-party, cyber-liability insurance?; and, 2) would it not be wiser, and, arguably, less expensive for business entities to purchase traditional-liability insurance coverage, along with an endorsement that covers cyber-related, third-party claims? In PART IV of this Article, state and federal courts' conflicting dispositions of traditional and cyber-specific duty-to-defend controversies are discussed. At that point, we will return to and address these questions.

### III. INSURANCE CONTRACTS, LEGAL CONTROVERSIES AND THE APPLICABILITY OF CONTRACT INTERPRETATION DOCTRINES IN DECLARATORY JUDGMENT TRIALS

Historically, insurers have defined “key” phrases in first- and third-party insurance contracts.<sup>177</sup> Similarly, cyber-liability insurers have begun to sell

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173. VICTOR O. SCHINNERER & CO., FORM PF-46359—PROGRAM CYBER LIABILITY INSURANCE POLICY 3 (2015), [https://www.victorinsuranceus.com/404/?aspxerrorpath=/Content/Industries/Cyber/Documents/Schinnerer\\_Cyber\\_Protection\\_Policy\\_Form.aspx](https://www.victorinsuranceus.com/404/?aspxerrorpath=/Content/Industries/Cyber/Documents/Schinnerer_Cyber_Protection_Policy_Form.aspx) [<https://perma.cc/9BAJ-KSLW>] (emphasis added).

174. *See About Hiscox London Market*, HISCOX LONDON MARKET <https://www.hiscoxlondonmarket.com/about-hiscox-london-market> [<https://perma.cc/WLV8-E4S8>] (“We are one of the oldest, biggest and most successful Lloyd’s syndicates. [We are] known for our leadership in the market and our underwriting blend of expertise and capacity, whatever the size and complexity of the risk.”).

175. HISCOX LONDON MARKET, CYBER THREAT PROTECT POLICY 4 (2018), [https://www.titlepac.com/sites/titlepac/uploads/documents/print\\_forms/Hiscox\\_Cyber\\_Policy\\_2.2018\\_-\\_Specimen.pdf](https://www.titlepac.com/sites/titlepac/uploads/documents/print_forms/Hiscox_Cyber_Policy_2.2018_-_Specimen.pdf) [<https://perma.cc/U6HK-9V5P>] (emphasis added).

176. *See, e.g.*, *Buffalo Steel Co. v. Aetna Life Ins. Co.*, 136 N.Y.S. 977, 986 (N.Y. 1912) (concluding the insurer and insured had a mutual understanding that the insurer would defend the insured against an underlying action while fully reserving the insurer’s rights under the insurance contract); *Coast Lumber Co. v. Aetna Life Ins. Co.*, 125 P. 185, 186 (Idaho 1912) (declaring rights under an insurance contract respecting the insurer’s obligation to provide a legal defense of the insured); *Indemnity Co. of America v. Bolas*, 135 So. 174, 176 (Ala. 1931) (resolving a duty to defend controversy); *New Amsterdam Cas. Co. v. Cumberland Tel. & Tel. Co.*, 152 F. 961, 964 (6th Cir. 1907) (interpreting a liability insurance contract and declaring the insurer’s defense obligations and reserved rights).

177. *Cf.* *Miller v. Ho Kun Yun*, 400 S.W.3d 779, 787 (Mo. Ct. App. 2013) (embracing the view that the definitions of key terms in insurance policies place a limitation on coverage); *Snow-Koledoye v. Horace Mann Ins. Co.*, No. M2000-02954-COA-R3-CV, 2002 WL 225893, at \*5 (Tenn. Ct. App. Feb. 14, 2002) (declaring that the language in the insurance contract was not vague or ambiguous, because

specialty insurance contracts which also contain definitions of “controlling” terms.<sup>178</sup> Some examples are the ever-evolving and varying definitions of “multimedia wrongful act,” “network security wrongful act,” and “piracy wrongful act.”<sup>179</sup> Still, notwithstanding cyber-liability insurers’ efforts to define “key” words and phrases, disputes have begun to erupt between arguably increasingly technology-savvy insureds and their insurers regarding the precise meaning of certain cyber-specific terms.<sup>180</sup> For instance, disagreements are erupting over the meaning of “an insurer’s *duty to defend* an insured against a *groundless claim*.”<sup>181</sup> Usually, those words and phrases are not defined in traditional- or cyber-liability insurance contracts.<sup>182</sup>

However, recognizing that “duty to defend” conflicts are inevitable,<sup>183</sup> insurers typically reserve their contractual right to file declaratory judgment actions.<sup>184</sup> But fairly often, underwriters exercise that right—encouraging courts to declare that the insurers’ definition of “controlling language” is correct or sound.<sup>185</sup> This part of the Article presents a short review of declaratory

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the definitions for certain key terms were outlined in the insuring agreement); *Polston v. Aetna Life Ins. Co.*, 932 S.W.2d 786, 788 (Mo. Ct. App. 1996) (reaffirming the general rule that definitions in insurance contract govern the meaning of terms in the contract policy, “especially when the policy definitions differ from the ordinary definitions of those terms”).

178. See *Watson v. Agway Ins. Co.*, 291 N.J. Super. 417, 423 (App. Div. 1996); *Lane v. Allstate Ins. Co.*, 472 So. 2d 823, 824 (Fla. Dist. Ct. App. 1985) (“If the controlling language of an insurance policy supports two interpretations, one favorable to the insurer and the other favorable to the insured, courts are obligated to adopt the interpretation supporting coverage.”).

179. See *supra* notes 136-42 and accompanying text.

180. See *infra* notes 237-92 and accompanying text.

181. See *supra* notes 126, 171-75 as well as *infra* notes 293, 304 and accompanying text.

182. See *supra* notes 101, 144-48 and accompanying text.

183. To estimate how frequently insurers and insureds commence declaratory judgment actions in federal and state courts and litigate “reservation of rights” disputes, the author executed a narrow query—(*reserve!* *reservation* /3 *right!*) /p *declare declaration* “*declaratory judgment*”—in Westlaw’s “All State & Federal” database on April 29, 2019. The query generated more than 10,000 *reported* cases. Arguably, the number of *reported* disputes strongly suggest: Every first- and third-party insurance contract is significantly more likely to contain ambiguous rather than clearly defined words and phrases.

184. See, e.g., *American Economy Insurance Company v. Aspen Way Enterprises, Inc.*, No. CV 14-09-BLG-SPW, 2015 WL 7871337, at \*1 (D. Mont. Dec. 4, 2016) (reporting that the insurer decided to defend the insured against the underlying action under a reservation of rights, reserved the right to file a declaratory judgment action, and sent a reservation of rights letter to the insured); *Nautilus Ins. Co. v. The In Crowd, Inc.*, No. 3:04-0083, 2005 WL 2671252, at \*3 (M.D. Tenn. Oct. 19, 2005) (reporting that the insured notified the insurer of an impending underlying lawsuit, the insurer conducted an investigation under a full reservation of rights, the insurer gave notice and reserved the right to commence a declaratory judgment action to determine the parties’ rights and obligations under the insurance contract, the insurer sent a letter—agreeing to provide a defense under an express reservation of rights, the insured retained legal counsel for the insured and, again agreed to provide a defense—expressly reserving its right to bring a declaratory judgment action to declare contractual rights and obligations).

185. To estimate how frequently insurers and insureds commence declaratory judgment actions in federal and state courts and litigate “reservation of rights” disputes, the author executed a narrow query—(*reserve!* *reservation* /3 *right!*) /p *declare declaration* “*declaratory judgment*”—in Westlaw’s “All State & Federal” database on April 29, 2019. The query generated more than 10,000 *reported* cases. Arguably, the number of *reported* disputes strongly suggest: Every first- and third-party insurance contract is significantly more likely to contain ambiguous rather than clearly defined words and phrases. See, e.g., *American Economy Insurance Company v. Aspen Way Enterprises, Inc.*, No. CV 14-09-BLG-SPW, 2015 WL 7871337, at \*1 (D. Mont. Dec. 4, 2016) (reporting that the insurer decided to defend the insured against the underlying action under a reservation of rights, reserved the right to file a declaratory judgment action, and sent a reservation of rights letter to the insured); *Nautilus Ins. Co. v. The In Crowd, Inc.*, No. 3:04-0083, 2005 WL 2671252, at \*3 (M.D. Tenn. Oct. 19, 2005) (reporting that the insured notified the insurer of an impending underlying lawsuit, the insurer conducted an investigation under a full reservation of rights, the insurer gave notice and reserved the right to commence a declaratory judgment action to determine the parties’ rights and obligations under the insurance contract, the insurer sent a letter—agreeing to

judgment statutes, along with a discussion of legal doctrines that state and federal courts employ to declare rights and obligations under traditional- and cyber-liability insurance contracts.

#### A. THE UNIFORM DECLARATORY JUDGMENTS ACT OF 1922

Forty states have adopted the Uniform Declaratory Judgments Act of 1922 (“UDJ”).<sup>186</sup> In pertinent part, the UDJ reads: “Courts of record within . . . respective jurisdictions . . . have power to declare rights, status and other legal relation. . . . The declaration may be . . . affirmative or negative. . . [and will] have the force and effect of a final judgment[.]”<sup>187</sup> Furthermore, the UDJ must be “liberally construed and administered”<sup>188</sup> to achieve its purpose — settling a controversy and “providing relief from uncertainty and insecurity [regarding] rights, status and other legal relations.”<sup>189</sup>

Significantly, the UDJ’s standing-to-sue language is fairly broad and inclusive: “A person interested under a . . . written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a . . . contract . . . may [ask a court to answer] any question of construction or validity arising under the . . . contract or . . . obtain a declaration of rights, status or other legal relations[.]”<sup>190</sup> Even more importantly, the UDJ allows courts to declare contractual rights, obligations and relationships before an actual breach, violation or disturbance occurs—which is “a speedy and inexpensive method” for deciding or settling controversial disputes.<sup>191</sup>

To repeat, courts must liberally construe the UDJ,<sup>192</sup> and, a declaratory-judgment action may be used “to resolve a wide variety of legal disputes.”<sup>193</sup> Nevertheless, the UDJ has limits.<sup>194</sup> Among other restrictions, the statute prevents courts from creating or exercising jurisdiction illegally, arbitrarily or fraudulently.<sup>195</sup> The act bars courts from considering abstract questions of

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provide a defense under an express reservation of rights, the insured retained legal counsel for the insured and, again agreed to provide a defense—expressly reserving its right to bring a declaratory judgment action to declare contractual rights and obligations).

186. See *Current Acts: Declaratory Judgments Act*, NAT’L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, <https://www.uniformlaws.org/committees/community-home?CommunityKey=a95a0b86-e7c1-42b8-8814-73ccb08843a4> [https://perma.cc/49AF-4F4A] (last visited Apr. 30, 2019).

187. S.C. Code Ann. § 15-53-20 (2019).

188. Tex. Civ. Prac. & Rem. Code Ann. § 37.002(b) (West 2019); Wyo. Stat. Ann. § 1-37-114 (2019).

189. Ind. Code Ann. § 34-14-1-12 (LexisNexis 2019).

190. Wash. Rev. Code Ann. § 7.24.020 (LexisNexis 2019).

191. *Sunset Cay, LLC v. City of Folly Beach*, 593 S.E.2d 462, 466-467 (S.C. 2004).

192. See *Chesapeake & Potomac Telephone Co. of Maryland v. Pincoffs*, 328 A.2d 78, 83 (Md. Ct. Spec. App. 1974).

193. *Garcia v. Am. Home Mortg. Servicing, Inc.*, No. 01-13-00359, 2014 WL 3408701, at \*3 (Tex. Ct. App.—Houston July 10, 2014).

194. *Sunset Cay*, 593 S.E.2d at 466.

195. See *William F. West Ranch, LLC v. Tyrrell*, 206 P.3d 722, 726-727 (Wyo. 2009) (“The Declaratory Judgments Act does not . . . extend the jurisdiction of the courts . . . [I]n order for a court to have jurisdiction over a declaratory judgment action, the ‘right’ to be declared must fall within the scope of the act and the plaintiff must be an ‘interested’ person.”).

law or giving advisory opinions—which do not settle legal disputes.<sup>196</sup> Moreover, declaratory relief will be denied unless a petitioner overcomes several procedural and substantive barriers: (1) proving that the dispute is a justiciable controversy,<sup>197</sup> (2) proving that the litigants have adverse interests,<sup>198</sup> (3) proving that the petitioner has a legally protected interest in the controversy,<sup>199</sup> and (4) proving that the disputed issue is ripe for adjudication.<sup>200</sup>

Debatably, courts' primary responsibility is to determine whether a declaration will resolve a justiciable controversy more effectively and/or efficiently than another judicial remedy.<sup>201</sup> Thus, trial judges have wide-ranging discretion when deciding whether or not to grant declaratory relief—after interpreting cyber-liability or any liability insurance contract.<sup>202</sup> And, to underscore the latter assertion, court of appeals are effectively precluded from altering trial judges' declaratory judgments unless the decrees are arbitrary.<sup>203</sup>

#### B. THE FEDERAL DECLARATORY JUDGMENTS ACT

The Federal Declaratory Judgments Act (FDJA) was enacted in 1934. In relevant part, the FDJA reads:

In a case of actual controversy within its jurisdiction. . . any court of the United States. . . may declare the rights and other legal relations of any interested party. . . . [The] declaration shall have the force and effect of a final judgment or decree, and [it] shall be reviewable. . . .”<sup>204</sup>

What is “a case of actual controversy”? The Supreme Court has ruled: Declaratory judgment disputes must mirror the types of “cases” and “controversies” which are justiciable under Article III of the United States Constitution.<sup>205</sup> More specifically, a justiciable controversy must have certain attributes: 1) the conflicting parties must have adverse legal interests, 2) the parties' dispute must be definite, 3) the disagreement must be a “real and substantial” controversy, and 4) the dispute must demand immediate relief which conclusively resolves the controversy.<sup>206</sup>

196. See, e.g., *Lamb v. Perry*, 225 A.2d 521, 523 (R.I. 1967) (reiterating that the UDJ precludes court's considering abstract questions or fashioning advisory opinions).

197. See *Diversified Indus. Dev. Corp. v. Ripley*, 514 P.2d 137, 137-139 (Wash. 1973). See also *Sunset Cay*, 593 S.E.2d at 466 (“A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character.”); *Cranston v. Thomson*, 530 P.2d 726, 729 (Wyo. 1975) (“The difference between an abstract question [that is nonjusticiable] and a controversy contemplated by the Uniform Declaratory Judgments Act is one of degree.”).

198. *Diversified Indus.*, 514 P.2d at 139.

199. *Id.*

200. *Id.*

201. *Preferred Prof'l Ins. Co. v. West*, 23 N.E.3d 716, 724 (Ind. Ct. App. 2014).

202. Cf. *Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997) (reaffirming that a trial court abuses its discretion if the court's judgment is arbitrary or unreasonable, or if the court decided a controversy without referencing guiding legal rules or principles).

203. See, e.g., *Del Valle Indep. Sch. Dist. v. Lopez*, 863 S.W.2d 507, 513 (Tex. Ct. App.—Austin 1993) (defining an “abuse of discretion” as evidence of a trial court allowing legal error to injure or prejudice a litigant's interests).

204. 28 U.S.C. § 2201(a) (2018).

205. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937).

206. *Id.* at 240-41.

Focusing on the phrase “within its jurisdiction,” it should be stressed: a litigant who asks for declaratory relief has the burden to prove subject matter jurisdiction by a preponderance of the evidence.<sup>207</sup> However, federal district courts do not have a statutory or constitutional obligation to exercise subject matter jurisdiction and adjudicate a declaratory judgment action.<sup>208</sup> A federal court’s decision to exercise jurisdiction is totally discretionary.<sup>209</sup> And, assuming that a district court decides to review a pleading, the court has additional and unbridled discretion to deny or grant completely or partially a request for declaratory relief.<sup>210</sup>

There are, however, limitations. For example, depending on the type of controversy, a district court’s efforts to comply with the Erie doctrine<sup>211</sup> might be thwarted—forcing the court to “Erie guess,”<sup>212</sup> apply the “laws of federal panels or circuits,” and/or apply the laws of another state.<sup>213</sup> In *Herrmann Holdings Ltd. v. Lucent Technologies Inc.*,<sup>214</sup> the Fifth Circuit gave a synopsis of a federal judicial practice, which could present a problem for businesses and professionals who litigate duty-to-defend disputes under evolving cyber-insurance contracts. The appellate court stated:

[Exercising diversity of citizenship jurisdiction], we have a duty to apply Texas law. The Texas Supreme Court has not . . . ruled on the enforceability of [these] clauses in breach-of-contract actions. Accordingly, . . . we are required to make an Erie guess [to determine] what the Texas Supreme Court would most likely decide. . . . In making an Erie guess, we defer to intermediate state appellate court decisions “unless convinced by other persuasive data that the highest court of the state would decide otherwise.” We may also refer to rules in other states that Texas courts might [consider].”<sup>215</sup>

207. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *GAF Bldg. Materials Corp. v. Elk Corp.*, 90 F.3d 479, 483 (Fed. Cir. 1996) (reaffirming that a petitioner must establish that the court has proper jurisdiction when filing a declaratory judgment action).

208. See *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494 (1942) (stressing that the district court had no obligation to exercise its jurisdiction although it had jurisdiction under the Federal Declaratory Judgments Act).

209. See *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995) (reaffirming that the Declaratory Judgment Act is as “an enabling act”—giving discretionary power to federal district courts, rather than creating an absolute statutory right for litigants (citing *Pub. Serv. Comm’n of Utah v. Wycoff Co.*, 344 U.S. 237, 241 (1952))).

210. *Id.*

211. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77-78 (1938) (requiring federal courts to apply state supreme courts’ rulings, laws or declarations when determining questions of state law).

212. See Willy E. Rice, *The Court of Appeals for the Fifth Circuit 2003-2004 Insurance Decisions: A Survey and An Empirical Analysis*, 37 TEX. TECH L. REV. 871, 921, 963, 1029 (2005) (critiquing the Erie doctrine, “Erie guessing” and the questionable application of federal “laws of the panels and circuit” to decide insurance-contract disputes in federal declaratory judgment trials).

213. See Willy E. Rice, *The Court of Appeals for the Fifth Circuit 2004-2005 Disposition of Insurance Decisions: A Survey and Statistical Review*, 38 TEX. TECH L. REV. 821, 872 n.425, 908 nn.729-30 (2006) (highlighting the questionable application of Erie-guessed laws of the circuit and panels to decide a specific insurance-law controversy).

214. 302 F.3d 552, 558 (5th Cir. 2002).

215. *Id.* (emphasis added) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79-80 (1938)); *Barfield v. Madison County, Miss.*, 212 F.3d 269, 271-72 (5th Cir. 2000); *United Parcel Service, Inc. v. Weben Indus., Inc.*, 794 F.2d 1005, 1008 (5th Cir. 1986); *First Nat’l Bank of Durant v. Trans Terra Corp.*, 142 F.3d 802, 809 (5th Cir. 1998); and *Hill v. London, Stetelman, & Kirkwood, Inc.*, 906 F.2d 204, 207 (5th Cir. 1990)).

Briefly put, although district courts have broad discretionary power under the FDJA, a keen appreciation of federalism requires district courts to determine 1) whether deciding the controversy would promote or undermine state courts' comity interests—applying state laws, adjudicating claims and rendering final judgments, (2) whether state or federal courts would resolve a dispute more efficiently, (3) whether overlapping questions of fact or law are present—triggering unnecessarily both state and federal courts' adjudicating the dispute, and (4) whether a plaintiff's litigating a claim in federal court is merely forum shopping or procedural fencing.<sup>216</sup> Undeniably, federal appellate courts have sufficient power to review district courts' declaratory judgments—looking for lower courts' abuse of discretion or failure to deliver practical and judicious decisions.<sup>217</sup>

### C. INSURANCE CONTRACTS AND CONFLICTING DOCTRINES OF INTERPRETATION

A prominent member of the American Law Institute (“ALI”) underscored a provable historical truth: “Liability insurance is an [interaction] between tort and contract law.”<sup>218</sup> In fact, a close scrutiny of this Article’s title provides support for the ALI jurist’s observation. Furthermore, when interpreting liability insurance contracts, state and federal courts may apply “basic contract-doctrines of interpretation,” “insurance-specific doctrines of interpretation,” or a combination of various legal and equitable doctrines.<sup>219</sup> Still, viewed from insurers’ perspectives, a major problem exists: traditional- and cyber-liability insurers sell the same contract in several states, while doctrines of contract interpretation can “vary from jurisdiction to jurisdiction.”<sup>220</sup>

Thus, in declaratory judgment trials, liability insurers have a long history of encouraging courts to apply “insurance specific,” as well as common-law doctrines when interpreting contractual rights and obligations.<sup>221</sup>

216. *Nautilus Ins. Co. v. Winchester Homes, Inc.*, 15 F.3d 371, 377 (4th Cir. 1994). *See also* *Lewis v. Johnson*, 359 F.3d 646, 653 (3d Cir. 2004) (reiterating the importance of recognizing and protecting state-comity interests).

217. *See Willton v. Seven Falls, Co.*, 515 U.S. 277, 288 (1995).

218. Greg Tourial, *American Law Institute Adopts Liability Insurance Law Restatement*, CONGRESSIONAL QUARTERLY ROLL CALL, 2018 WL 2328044, at \*1 (May 23, 2018) (comment of Professor Tom Baker of the University of Pennsylvania Law School).

219. *Id.* (“The [ALI] has been working on [a] liability insurance Restatement since 2010. The draft... cover[s] a range of liability insurance law topics... [One chapter] addresses the special application of... basic contract-law doctrines of interpretation... in an insurance-law context... [Another chapter] addresses insurance-law doctrines relating to duties of insurers and insureds in the management of potentially insured liability actions[.]”).

220. *Id.* *See also* WILLY E. RICE, *CONTRACT LAW—PRACTICE, INTERPRETATION, AND ENFORCEMENT* 74-86, 105-10, 121-33 (Jamie Giganti et al. eds., 1st ed. 2014) (disclosing the numerous and competing legal doctrines that state and federal courts employ to create, interpret and enforce contracts under the common law.).

221. Tourial, *supra* note 218 (“[Prominent jurists adopted new] guidelines for liability insurance case law after [facing] strong opposition from the insurance industry... The American Law Institute approved the Restatement of the Law for Liability Insurance in 2018... [Opponents argued that ALI’s proposals are] too sweeping and could... undermined insurance contracts... The American Insurance Association accused the ALI of using the liability insurance Restatement as ‘a reform document’ rather than as a summation of [current] insurance liability laws.”).

Depending on the jurisdiction, courts might employ one or a combination of the following principles: adhesion doctrine, ambiguity doctrine, reasonable expectation doctrine, plain meaning rule, and traditional rules of contract construction and interpretation.<sup>222</sup>

Typically, the formation of an adhesion contract occurs when 1) a powerful or more sophisticated party fashions a one-sided and/or standardized agreement, and 2) a less powerful party may only accept or reject the contract.<sup>223</sup> Simply put, standard insurance contracts are contracts of adhesion—requiring “special rules of interpretation.”<sup>224</sup> Consequently, to promote the purposes of insurance, the adhesion doctrine requires courts to construe liberally the terms of, say, a standard cyber-insurance contract in favor of the insured.<sup>225</sup>

Second, for the most part, courts interpret insurance contracts like any other business contract.<sup>226</sup> But, when interpreting a standardized liability insurance contract, courts apply a slightly variant rule, if arguably ambiguous terms are present.<sup>227</sup> In theory, courts must interpret ambiguous insurance terms in favor of insureds.<sup>228</sup> Similarly, theoretically, and under the doctrine of reasonable expectation, words and phrases in a cyber- or traditional liability insurance contract must be construed to satisfy the reasonable expectations of insureds.<sup>229</sup>

On the other hand, absent ambiguous language, standardized liability insurance contracts must be construed according to their “plain and ordinary meaning.”<sup>230</sup> Furthermore, under traditional common-law rules of contract construction and interpretation, cyber-liability and all liability insurance contracts must be construed to satisfy the parties’ intent and mutual understanding at the time when the contract was formed and executed.<sup>231</sup>

These are not bright-line or ironclad doctrines. For example, in *Forbeau v. Aetna Life Insurance*,<sup>232</sup> the Texas Supreme Court declared, as a matter of law, that “every conflicting interpretation of an insurance contracts is not an ambiguity.”<sup>233</sup> However, in *Ritchie v. Allied Property & Casualty Insurance Company*,<sup>234</sup> the Missouri Supreme Court embraced contrary views: 1) courts

222. See Rice, *supra* note 213, at 855 nn.278-80 (discussing the five doctrines that courts apply to interpret and construe insurance contracts).

223. See *Rodgers v. Tecumseh Bank*, 756 P.2d 1223, 1226 (Okla. 1988).

224. *Fed. Home Loan Mortg. Corp. v. Scottsdale Ins. Co.*, 316 F.3d 431, 444 (3d Cir. 2003).

225. *Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Smaistrala*, 436 P.3d 249, 253 (Utah Ct. App. 2018).

226. *Employers Insurance of Wausau v. Tektronix, Inc.*, 156 P.3d 105, 116 (Or. Ct. App. 2007).

227. *Id.* at 116 n.9.

228. See *Farmers Ins. Co. v. Munson*, 930 P.2d 878, 882 (Or. Ct. App. 1996).

229. See *Hugenberg v. W. Am. Ins. Co./Ohio Cas. Grp.*, 249 S.W.3d 174, 185-86 (Ky. Ct. App. 2006).

230. See, e.g., *Masters v. Celina Mut. Ins. Co.*, 224 A.2d 774, 776 (Pa. Super. Ct. 1966) (reaffirming that provisions in an insurance contract must “be read together and construed according to the plain meaning of the words—to avoid ambiguity and to ensure that each provisions’ purpose is achieved”).

231. See, e.g., *Everest Indemnity Ins. Co. v. Valley Forge, Inc.*, 140 F. Supp. 3d 421, 426 (E.D. Pa. 2015).

232. *Forbeau v. Aetna Life Ins.*, 876 S.W.2d 132 (Tex. 1994).

233. *Id.* at 134.

234. 307 S.W.3d 132, 135 (Mo. 2009) (en banc).

must resolve ambiguities in favor of insureds; and, 2) contractual words and phrases are ambiguous, if they lend themselves to more than one reasonable interpretation.<sup>235</sup> Arguably, state supreme courts' propensity to fashion contradictory, competing or varying "doctrines of ambiguity" has created a major problem for insured professionals and businesspersons: both state and federal courts are significantly more likely to deliver fairly unpredictable and inconsistent decisions in declaratory judgment trials when interpreting duty-to-defend provisions in both cyber-insurance and traditional-insurance contracts.<sup>236</sup>

#### IV. CYBER-TECHNOLOGY TORTS, THIRD-PARTY COMPLAINANTS, AND INSURERS' AMBIGUOUS LEGAL DEFENSE OBLIGATIONS UNDER TRADITIONAL AND CYBER-LIABILITY INSURANCE CONTRACTS

The term "technology" appears numerous times in this presentation. And, although a universal definition does not exist,<sup>237</sup> most jurists would embrace a narrow meaning: technology is knowledge that persons amass and apply, creating "tools," and ever learning how to employ "tools" efficiently and effectively.<sup>238</sup> Certainly, "tools" can be tangible or intangible, comprising simple stone-age tools, less-simple bronze- and iron-age tools, more sophisticated twentieth-century *biochemical-physical tools*, and today's cyber technologies.<sup>239</sup> Even more relevant, both supposedly primitive and highly sophisticated technologies can produce, and have produced, property damage, personal injuries and legal actions—"sounding in contract," "sounding in tort," and "sounding under both contract and tort principles."<sup>240</sup>

To illustrate how apparently unsophisticated technology can generate tort-based claims, consider the facts in several classic tort cases—which are required readings for many first-year law students. First, in *Weaver v. Ward*,<sup>241</sup> *McGuire v. Almy*,<sup>242</sup> and *I de S et ux. v. W de S*,<sup>243</sup> the defendants committed

235. *Id.*

236. See *infra* notes 617-25 and accompanying text.

237. Alan L. Durham, "Useful Arts" In *The Information Age*, 1999 B.Y.U. L. REV. 1419, 1444-45 ("[T]he more one looks at how 'technology' has been defined..., the less one is sure what it means.").

238. See Karehka Ramey, *What Is Technology – Meaning of Technology and Its Use*, USEOFTECHNOLOGY.COM (December 12, 2013), <https://www.useoftechnology.com/what-is-technology/> [<https://perma.cc/XQ4Q-JNWH>] (visited last on May 9, 2019); Durham, *supra* note 237 ("Narrower definitions of 'technology' encompass systematic techniques. . . used to create physical things... [for person's] practical needs... [Primitive] tools are undoubtedly 'technology.' [And], many useful things are devised without any understanding or application of science. Technology is purposive... [B]ut few would argue that it must be, in a strict sense, scientific.") (emphasis added).

239. See YOUR DICTIONARY, <https://www.yourdictionary.com/technology> [<https://perma.cc/8YFH-W5VK>].

240. See *infra* notes 213-36 and accompanying text.

241. Hobart 134, 80 Eng. Rep. 284 (K.B. 1616). See also *Law School Case Brief – Weaver v. Ward*, LEXISNEXIS, <https://www.lexisnexis.com/lawschool/resources/p/casebrief-weaver-v-ward.aspx> [<https://perma.cc/38EH-LURW>].

242. *McGuire v. Almy*, 8 N.E.2d 760 (Mass. 1937). See also *Law School Case Brief – McGuire v. Almy*, LEXISNEXIS, <https://www.lexisnexis.com/community/casebrief/p/casebrief-mcguire-v-almy> [<https://perma.cc/H78T-562H>].

243. Y.B. 22 Edw. III, Folio. 99, Placitum 60 (1348). See also *I de S et ux v. W de S at the Assizes*, Y.B. Lib. Ass. folio 99, placitum 60 (1348), LAW SCHOOL CASE BRIEFS, <http://deans-lawschoolcasebriefs.blogspot.com/2017/01/i-de-s-et-ux-v-w-de-s-at-assizes-yb.html> [<https://perma.cc/S34H-GJRW>].

intentional torts by using professedly simple technologies—”a powder-charged musket,”<sup>244</sup> “a low-boy leg,”<sup>245</sup> and “a hatchet,”<sup>246</sup> respectively. In each case, a judge or jury established tort liability by applying the common law. More importantly, in *Weaver*, *McGuire* and *I de S*, the specific characteristics, or sophistication, of those *applied technologies* had no bearing on the dispositions of the controversies.<sup>247</sup>

But, consider the dispositions of the personal-injury and property-damage claims in three additional law-school and classic-tort cases—*Katko v. Briney*,<sup>248</sup> *Vaughan v. Menlove*,<sup>249</sup> and *Lubitz v. Wells*.<sup>250</sup> In *Katko*, Edward and Bertha Briney owned an old and uninhabited farmhouse in Iowa.<sup>251</sup> To deter or stop trespassers from accessing, stealing or using their property, the Brineys installed a rudimentary residential-security system: they attached “a 20-gauge spring shotgun” to an iron bed and focused the barrel’s aim on the bedroom doorknob.<sup>252</sup> Without securing the Brineys’ permission, Marvin Katko accessed and invaded the property.<sup>253</sup> He was severely injured and filed an action for damages.<sup>254</sup>

Ultimately, the *Katko* jury awarded \$30,000 for actual and punitive damages. The jury reached that verdict after considering the judge’s instructions and charges, which focused on both 1) the specific characteristics of the Brineys’ security technology, and 2) whether settled tort-law principles allow property owners to employ dangerous property-security technologies. The jury charges read in pertinent part:

[A property owner] is prohibited from setting ‘spring guns’ and [similar] *dangerous devices* which [are] likely take life or inflict great bodily injury. . . .

244. *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616) (Weaver and Ward were members of a trained band. And while they were “skirmishing” in a military exercise with powder charged muskets, Weaver was injured. Ultimately, Weaver commenced trespass actions—assault and battery—against Ward and he was liable.). See VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ’S TORTS: CASES AND MATERIALS 5 (11th ed. 2005) (presenting the entire case).

245. *McGuire*, 8 N.E.2d at 761 (Almy and McGuire were “insane patient” and nurse, respectively. Almy disassembled some furniture and hit McGuire on the head—using the leg of a low-boy. McGuire filed an assault and battery lawsuit against the patient.). See also SCHWARTZ ET AL., *supra* note 244 (presenting the entire case); and *Low Boy*®, SIZEWISE, <https://sizewise.com/products/bed-frames/low-boy> [<https://perma.cc/BDG6-WQGL>] (“As the industry’s first bariatric low bed..., Low Boy® allows patients to enter or exit comfortably and safely by providing unlimited height adjustments... It will transport in any high/low position to assist in reducing the risk of caregiver injury...”).

246. *I de S et ux. v. W de S*, Y.B. 22. See *Dillon v. Legg*, 441 P.2d 912, 919 (Cal. 1968) (discussing an irate customer’s using a hatchet to commit an assault against a tavern-keeper’s wife—who sued successfully); and SCHWARTZ ET AL., *supra* note 244 (presenting the entire case).

247. See *supra* notes 244-46 (A review of the cited materials will verify that the *Weaver*, *McGuire* and *I de S* courts did not consider the tortfeasors’ technology when deciding whether to impose liability).

248. *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971). See also *Law School Case Brief – Katko v. Briney*, LEXISNEXIS, <https://www.lexisnexis.com/community/casebrief/p/casebrief-katko-v-briney> [<https://perma.cc/24DY-SV4S>].

249. *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837). See also *Vaughan v. Menlove Case Brief Summary*, LAW SCHOOL CASE BRIEFS (Oct. 10, 2014), <http://www.lawschoolcasebriefs.net/2014/10/vaughan-v-menlove-case-brief-summary.html> [<https://perma.cc/V34P-CU9Z>].

250. *Lubitz v. Wells*, 19 Conn. Supp. 322 (1955). See also *Law School Case Brief – Lubitz v. Wells*, LEXISNEXIS, <https://www.lexisnexis.com/community/casebrief/p/casebrief-lubitz-v-wells> [<https://perma.cc/K24H-LX92>].

251. *Katko*, 183 N.W.2d at 658.

252. *Id.*

253. *Id.*

254. *Id.*

[A property owner may only install] a ‘spring gun’ or a [similar] *dangerous device* . . . when [a trespasser is committing violence] or a felony punishable by death, or [when a trespasser is] endangering human life.<sup>255</sup>

In *Vaughan*, Menlove was a farmer and Vaughan was his neighbor. Menlove applied incorrectly a supposedly simple technology—the art of stacking hay.<sup>256</sup> Ignoring Vaughan’s incessant warnings of a spontaneous combustion, Menlove stacked moist hay in a negligent manner.<sup>257</sup> In the course of events, the hay burst into flames, and the spreading fire consumed Vaughan’s cottages.<sup>258</sup> The neighbor filed a negligence action.<sup>259</sup>

The jury concluded that Menlove was liable for the consequences of the hayrick fire.<sup>260</sup> To reach the verdict, the *Vaughan* judge also instructed a jury to weigh the specific characteristic of the *applied technology* that produced the property damaged. Unquestionably, before entering the judgment, the court acknowledged: Menlove made an honest mistake, because he did not possess “the highest order of intelligence.”<sup>261</sup> Still, embracing the jury’s verdict, the court focused on the actual and potential risks associated with the applied technology and stressed: among “objectively reasonable people” who understand hay-stacking techniques, it is well known that improperly stacked hay will ferment, explode and cause a fire.<sup>262</sup>

Finally, in *Lubitz*, Judith Lubitz and James Wells, Jr. were nine and eleven-years-old, respectively.<sup>263</sup> They were childhood friends. James junior’s father—James Wells, Sr.—owned a golf club. On one fateful day, the father left the golf club lying on the ground in his backyard.<sup>264</sup>

Swinging the golf club at a stone lying on the ground, James junior struck Judith on her jaw and chin.<sup>265</sup> A negligence cause of action was filed against the father and son—asserting that 1) junior negligently failed to warn Judith of his intention to swing the club, and 2) the father was vicariously liable for failing to remove the golf club from the backyard.<sup>266</sup>

255. *Id.* at 659.

256. *Vaughan*, 132 Eng. Rep. at 490-91. See Nikki Alvin-Smith, *It’s Hay Season — Are You Playing With Fire?*, HORIZON STRUCTURES BLOG, <https://www.horizonstructures.com/blog/it%E2%80%99s-hay-season-are-you-playing-fire> [https://perma.cc/2X8L-S7RR] (last visited May 10, 2019) (“Hay season is here... [I]t is smart to know a few basics of... hay storage safety [to ensure that] you are not playing with fire.”).

257. *Vaughan*, 132 Eng. Rep. at 468-69.

258. *Id.* at 490-91.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 491. Cf. Alvin-Smith, *supra* note 256 (“Always stack hay with the cut side down... [S]trings [should] always be on the side of the bale when you look at the stack... Hay should be stacked in a crisscross manner— one layer in one direction and the next layer the other direction... [It should not be] packed too tightly... Never store hay directly on concrete or the ground... [I]t will pull up moisture... [Use] a tarpaulin cover for the floor... [If your haystack is] building excessive heat, call the fire department immediately... [I]t may spontaneously combust with the introduction of fresh oxygen... Every year thousands of barns burn down just because of poor hay handling practices.”).

263. *Lubitz v. Wells*, 19 Conn. Supp. at 322.

264. *Id.*

265. *Id.*

266. *Id.* at 323.

The *Lubitz* court, however, refused to embrace young Judith's theory of liability.<sup>267</sup> Rather than considering and applying only settled principles of tort law, the court focused almost exclusively on the *purpose and characteristics of the technology—golf clubs*. In the end, the judge declared: 1) it would be nonsensical to conclude that a golf club is “obviously and intrinsically dangerous,”<sup>268</sup> and, 2) it would also be totally nonsensical to conclude that the father was negligent for leaving the golf club on the ground.<sup>269</sup>

Undeniably, tortfeasors employ various technologies to destroy property and cause personal injuries. And, in some trials, judges and juries have weighed a combination of factors to determine whether defendants were liable for committing intentional and negligence-based torts. To summarize, those factors are 1) whether plaintiffs proved their theories of recovery, 2) whether defendants used an “inherently dangerous” or an otherwise harmless instrument, tool or technology to damage property interests or intentional torts, and 3) whether defendants’ allegedly negligent use or failure to use a certain tool or technology caused property damage or personal injuries.

Therefore, in light of these observations, a highly related question seeks an answer: in declaratory judgment trials, and when determining whether traditional and cyber-liability insurers have a contractual duty to defend insureds, are judges more likely to weigh the characteristics and sophistication of the technologies that generated the cyber-technology torts? Or, are state and federal courts more likely to apply various doctrines of contract construction when fashioning and issuing duty-to-defend declarations? In this part of the article, these questions are addressed.

A. CONFLICTING JUDICIAL DECLARATIONS: WHETHER TRADITIONAL LIABILITY INSURERS MUST DEFEND INSUREDS AGAINST NEGLIGENCE-BASED CYBER-TECHNOLOGY TORTS

As discussed earlier, insurers voluntarily insert duty-to-defend clauses into traditional as well as into evolving cyber-insurance contracts. The general rule is fairly clear: if the language in a liability insurance agreement *reasonably* describes an allegation in a third-party complaint, the insurer has a duty to defend.<sup>270</sup> Certainly, some supreme courts have constructed slight variations of the general rule: 1) the duty to defend arises if the underlying allegation falls *potentially* within the insuring agreement<sup>271</sup>; 2) the duty to defend arises if there is a *mere possibility* of the liability insurance contract covering the third-party claim<sup>272</sup>; and, 3) an insurer has a duty to defend if a *fairly*

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267. *Id.*268. *Id.*269. *Id.*

270. *Fire Ins. Exchange v. Estate of Therikelsen*, 27 P.3d 555, 560 (Utah 2001) (“Throughout the United States, ‘as a general rule, an insurer’s duty to defend is determined by comparing the language of the insurance policy with the allegations in the complaint’” (citing 14 LEE R. RUSS & THOMAS F. SEGALLA, *COUCH ON INSURANCE* § 200:18 (3d ed. 1999))); *Penn–America Ins. Co. v. Disabled American Veterans*, 268 Ga. 564, 565 (1997) (reaffirming that, as a general rule, the duty to defend is determined by comparing the insurance contract and the allegations against the insured in the complaint).

271. *See, e.g., Lyons v. State Farm Fire and Casualty Co.*, 349 Ill. App. 3d 404, 406-07 (2004).272. *See, e.g., Nautilus Ins. Co. v. Lexington Ins. Co.*, 321 P.3d 634, 653 (Haw. 2014).

*debatable* dispute occurs about whether the contract covers a third-party claim.<sup>273</sup>

However, a cursory search of online legal-research databases reveals: third-party complainants typically file multiple-claims or mixed theories of recovery against insureds.<sup>274</sup> Therefore, assume: a third party files a multiple-claims lawsuit against an insured business entity. Also assume: the third party's negligence-based and cyber-related claims are *probably* covered under the insured's insurance contract; however, various federal and statutory claims are *probably* excluded. Now, consider the question: are *traditional* liability insurers excused from defending the business entity against the cyber-technology claim, since the third-party complaint contains both *covered* cyber-tort claims and *excluded* federal-statutory claims?

To help answer this question, ponder the duty-to-defend controversies and conflicting declaratory judgments in two noteworthy cyber-technology cases. First, in *Abrams, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP* ("*Abrams Firm*") v. *Underwriters at Lloyd's, London*,<sup>275</sup> the material facts are undisputed. Scott and Roselee Morrell were married. Arguably, Scott was a sophisticated investor.<sup>276</sup> He had a long history of taking risks and investing relatively large sums of money in various ventures.<sup>277</sup> Attorneys Abrams and Fensterman were partners in the Abrams Firm.<sup>278</sup> Like numerous law partners and associates across America,<sup>279</sup> Abrams and Fensterman owned and operated auxiliary businesses—MZ Consulting Company, LLC, MZ National, LLC, and the Golden Goslings, Inc.<sup>280</sup> Ultimately, these entities merged into MyZiva, Inc.—a business entity which was totally separated from the attorneys' law practice.<sup>281</sup>

MyZiva was a cyber-technology company: it sold Internet-based products and information to professionals who were affiliated with the nursing

273. See, e.g., *Red Arrow Products Co., Inc. v. Employers Ins. of Wausau*, 607 N.W.2d 294, 298 (Wis. Ct. App. 2000).

274. The following query was executed on Westlaw: ("DUTY #TO DEFEND" /S CLAIMS THEORIES) /P INSURANCE INSURER!). More than 10,000 cases were retrieved—in which the underlying third-party complaints contained multiple claims and theories of recovery.

275. *Abrams v. Underwriters at Lloyd's, London*, 918 F. Supp. 2d 114 (E.D.N.Y. 2013).

276. See Def.'s Rule 56.1 Statement of Undisputed Material Facts in Support of Its Mot. Summ. J. ¶¶ 61, 84, 92, *Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, v. Underwriters at Lloyd's of London*, No. CV 11 0665, 2012 WL 11852481 (E.D.N.Y. Aug. 10, 2012) [hereinafter *Lloyd's Underwriter's Statement of Undisputed Material Facts*] ("Morrell instructed his bank to wire \$500,000 [to the Abrams Firm]... [O]n or about August 13, 2008, Morrell executed a Subscription Agreement whereby he applied to purchase a \$500,000 Investor Membership Interest in AGIC. . . . On December 6, 2008, Attorney Fensterman sent an e-mail to Morrell stating 'that AGIC signed a deal with Aetna Insurance Company, [received] a letter of intent to from the Dubai Health Care Ministry, and was awarded a deal under which AGIC would insure one million families and generate approximately \$7 million to \$8 million per year.'").

277. *Id.*

278. *Id.* ¶ 1.

279. See Helen Hirschbiel, *When Wearing Two Hats May Get You Burned*, OR. ST. B. BULL., Dec. 2010, at 9 ("It is becoming more common to see lawyers who are also real estate brokers, mortgage brokers, financial planners, fiduciaries, psychologists, mediators and arbitrator... [M]ore and more lawyers seem to be supplementing their law practices with some other professional practice.").

280. *Lloyd's Underwriter's Statement of Undisputed Material Facts*, *supra* note 276, ¶¶ 166-173.

281. *Lloyd's Underwriter's Statement of Undisputed Material Facts*, *supra* note 276, ¶¶ 166-173.

home industry.<sup>282</sup> Allegedly, after weighing Attorney Fensterman's representations and legal advice, Scott loaned \$400,000 to MyZiva. Additionally, he invested \$100,000 in the cyber-tech company and received a 5% ownership interest.<sup>283</sup> Roselee also invested \$100,000 in MyZiva.<sup>284</sup> Even more pertinent, the Morrells received copies of various agreements—which “memorialized the terms and conditions” of the loan and investments.<sup>285</sup>

Approximately eight years after the parties executed the agreements, the cyber-technology entity experienced financial distress and was unable to repay the \$400,000 loan.<sup>286</sup> In response, the Morrells sued the Abrams Firm and the two law partners in a New York state court (“Morell suit”).<sup>287</sup> The mixed- and multiple-claims complaint comprised several theories of liability: 1) breach of contract, 2) unjust enrichment, 3) breach of fiduciary duty, 4) legal malpractice, and 5) fraudulent inducement.<sup>288</sup>

Within the legal profession, it is general knowledge that attorneys purchase liability insurance and pay insurers for accepting the risks and the costs of defending law partners and associates *solely* against negligence-based claims.<sup>289</sup> Therefore, before the financial dispute occurred, the Abrams Firm purchased a *traditional* professional liability insurance contract from Underwriters at Lloyd's of London.<sup>290</sup> The insuring agreement read in relevant part:

COVERAGE: [We agree to pay damages and expenses] which the insured shall become legally obligated to pay because of *any claim or claims . . . arising out of any act, error or omission of the insured* in rendering or failing to render *professional services* for others in the insured's *capacity as a lawyer*.<sup>291</sup>

DEFENSE: The Underwriters shall have the right and duty to defend, . . . any claim against the insured . . . , even if any of the allegations of the claim are groundless, false or fraudulent ....<sup>292</sup>

The Abrams Firm sent a timely demand letter to the Underwriters, providing details of the underlying Morrell suit, and demanding a legal defense.<sup>293</sup> Citing an exclusion in the insurance contract, the Underwriters

282. *Abrams*, 918 F. Supp. 2d at 118.

283. Lloyd's Underwriter's Statement of Undisputed Material Facts, *supra* note 276 ¶¶ 183-187.

284. Lloyd's Underwriter's Statement of Undisputed Material Facts, *supra* note 276 ¶¶ 187-188.

285. Lloyd's Underwriter's Statement of Undisputed Material Facts, *supra* note 276 ¶¶ 184-186.

286. Lloyd's Underwriter's Statement of Undisputed Material Facts, *supra* note 276 ¶ 192.

287. Lloyd's Underwriter's Statement of Undisputed Material Facts, *supra* note 276 ¶¶ 164-165.

288. Lloyd's Underwriter's Statement of Undisputed Material Facts, *supra* note 276 ¶¶ 164-165.

289. See, e.g., Mark Bassingthwaighe, *Minimizing Client-Driven Indemnity Provisions Could Be A Costly Mistake*, 42-JAN MONT. LAW. 20 (2017) (“A malpractice insurance policy is designed to cover lawyers’ . . . negligence.”); *Hummer v. St. Paul Fire & Marine Ins. Co.*, No. 90-3686, 1991 WL 119279, at \*1 (6th Cir. July 1, 1991) (reaffirming that professional liability insurance covers professional-negligence claims rather than purely contract-based disputes that clients commence against their attorneys).

290. See Pls.’ Am. V. Compl. ¶ 4, *Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, v. Underwriters at Lloyd's of London*, No. CV 11 0665, 2011 WL 12484083 (E.D.N.Y. Feb. 17, 2011) [hereinafter *Abrams Law Firm's Amended Declaratory Judgment Complaint*].

291. Lloyd's Underwriter's Statement of Undisputed Material Facts, *supra* note 276, ¶ 8 (emphasis added).

292. Lloyd's Underwriter's Statement of Undisputed Material Facts, *supra* note 276, ¶ 8 (emphasis added).

293. *Abrams*, 918 F. Supp. 2d at 120 (E.D.N.Y. 2013).

refused to defend.<sup>294</sup> Responding to the rejection, the Abrams Firm filed a declaratory judgment action in the Federal District Court for the Eastern District of New York.<sup>295</sup> The litigants filed cross-motions for summary-judgment. The federal district court reviewed the two exclusion clauses, that read:

[This policy does not cover] *any claim arising out of* any insured's activities as a . . . partner, officer, director or employee of . . . [a] corporation, company or business, *other than that of the named insured.*"<sup>296</sup>

[This agreement] excludes from coverage *any claim* made . . . in connection with *any business enterprise* . . . which is *owned by any insured* . . . [H]owever, this *exclusion only applies to any claims* made . . . against any business enterprise in which an insured has an ownership interest equal to or greater than: 1) 5% of the issued and outstanding voting stock of the shares in any business enterprise which is publicly traded; or 2) 10% if the shares in the business enterprise are closely or privately held.<sup>297</sup>

After focusing almost entirely on the exclusion clauses, the federal judge declared that the Underwriters had no obligation defend the Abrams Firm against the Morrell suit. Federal district judges have complete discretion to grant or deny summary-judgment motions or declaratory relief.<sup>298</sup> Still, the *Abrams* court conducted an arguably curious analysis to reach its conclusion. The federal court focused its attention almost entirely on the attorneys' ownership interests in the cyber-technology company, applying almost exclusively New Jersey, Minnesota and the First Circuit's laws, and declaring that the cyber-torts arose from those ownership interests.<sup>299</sup>

Viewed from the attorneys' perspective, the federal court's analysis and conclusion were fatal, because the underlying cyber-negligence claim was not fully addressed, and the court did not apply New York's multiple-claims rule strictly.<sup>300</sup> New York's rules are exceedingly clear and pro-insureds.<sup>301</sup> A liability insurer has a duty to defend *if* certain conditions are present: 1) a third party filed an underlying mixed-theories or mixed-claims complaint, 2) an insured purchased a liability insurance contract to cover negligence claims, and 3) all underlying third-party claims arose from the "covered events."<sup>302</sup> In contrast, the *Abrams* court acknowledged but also refused to apply an equally important New York law: the duty to defend arises *whenever* allegations in an underlying lawsuit fall within the scope of the risks insured against—even *if* the allegations are false or groundless.<sup>303</sup> That an underlying

294. *Id.*

295. *Id.*

296. *Id.* at 119 (emphasis added).

297. *Id.* at 119-20 (emphasis added).

298. *Cf. Berger v. Seyfarth Shaw, LLP*, No. C 07-05279 JSW, 2008 WL 2468478, at \*1 (N.D. Cal. June 17, 2008) (stressing that the Declaratory Judgment Act confers upon this court complete discretion whether to hear a counterclaim for declaratory judgment); *Gilmore v. Bostic*, 636 F. Supp. 2d 496, 513 (S.D. W. Va. 2009) (recognizing that the decision to convert a motion to dismiss to a motion for summary judgment is one of "complete discretion" for district courts).

299. *Abrams*, 918 F. Supp. 2d at 119-20.

300. *See Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 N.Y.2d 435, 445 (2002).

301. *Id.*

302. *See id.* at 443-44.

303. *Abrams*, 918 F. Supp. 2d at 120 (citing *Seaboard Sur. Co. v. Gillette Co.*, 476 N.E.2d 272, 275 (N.Y. 1984)) (emphasis added); *Goldberg v. Lumber Mut. Cas. Ins. Co.*, 297 N.Y. 148, 154, 77 N.E.2d 131 (N.Y. 1948).

third-party complaint *also* contains some allegations which are barred under the insurance policy's exclusion clauses is wholly immaterial.<sup>304</sup>

Now, consider the cyber-tort claims and duty-to-defend dispute in *Governo v. Allied World Insurance Company*.<sup>305</sup> David Governo founded the Governo Law Firm ("GLFirm")—a boutique entity that litigates asbestos and toxic-tort disputes.<sup>306</sup> Approximately sixteen years after the firm's formation, a group of David's law partners tried to purchase GLFirm and its assets.<sup>307</sup> Governo—the managing partner—refused to sell.<sup>308</sup> In the course of events, the dissatisfied partners left GLFirm and formed a competing firm—CMBG3 Law, LLC ("CMFirm").<sup>309</sup>

David accused the departing attorneys of taking GLFirm's tangible and intangible property—proprietary and case-management databases, clients' electronic records, laptop computers, and iPads.<sup>310</sup> The CMFirm attorneys refused to return the property; therefore, GLFirm filed a lawsuit in a Massachusetts superior court (the "GLFirm suit").<sup>311</sup> GLFirm's complaint identified eight defendants—the CMFirm and seven attorneys who left the GLFirm.<sup>312</sup> Several theories of recovery and mixed claims appeared in GLFirm's cyber-torts complaint: 1) conversion, 2) misappropriation of trade secrets, 3) breach of loyalty, 4) tortious interference with contractual and advantageous relations, 4) civil conspiracy, and 5) unfair and deceptive trade practices.<sup>313</sup>

Responding to the GLFirm's cyber-torts lawsuit, CMFirm and the departing attorneys filed a third-party, cyber-tort lawsuit against Governo and GLFirm ("CMFirm suit").<sup>314</sup> In the second underlying complaint, CMFirm included a declaratory-judgment action—asking the court to declare whether GLFirm or CMFirm owned the disputed tangible and intangible legal-practice technologies.<sup>315</sup> Also, in the CMFirm suit, the departing attorneys sued Governo and GLFirm for allegedly interfering with the departing attorneys' contractual business relationships, and failing to transfer and release certain clients' paper and electronic files.<sup>316</sup>

Before the underlying lawsuits commenced, GLFirm purchased a lawyers' professional liability insurance contract from Allied World Insurance Company.<sup>317</sup> Thus, Governo contacted the insurer—demanding a legal defend against the underlying CMFirm suit.<sup>318</sup> After Allied World rejected the

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304. *Id.*

305. 335 F. Supp. 3d 125 (D. Mass. 2018).

306. *Id.* at 128.307. *Id.*308. *Id.*309. *Id.*310. *Id.*311. *Id.*312. *Id.* at 128-29.313. *Id.* at 129.314. *Id.*315. *Id.*316. *Id.*317. *Id.*318. *Id.*

demand, Governo filed a declaratory-judgment action in federal court.<sup>319</sup> Before the District Court for the District of Massachusetts, Governo encouraged the federal judge to declare that Allied World had a duty to defend GLFirm and himself.<sup>320</sup>

To begin its analysis, the Massachusetts district court examined the coverage provision in the professional liability insurance contract. In pertinent part, the contract read:

INSURING AGREEMENT: [Allied World has] the right and *duty to defend any claim* seeking damages that are covered by this policy and made against the insured . . . The insurer will pay on behalf of an insured . . . all amounts . . . that an insured becomes legally obligated to pay as damages and claim expenses because of a *claim arising out any of the following wrongful acts* by an insured first made during the policy period or any extended reporting period: A) *legal services wrongful act*, B) *privacy wrongful act*, and C) *network-security wrongful act*.<sup>321</sup>

Even more significantly and unlike the federal district court in *Abrams*, the *Governo* court embraced squarely the *Erie* doctrine—judiciously examining, discussing and applying a state’s duty-to-defend rules.<sup>322</sup> In particular, the *Governo* court acknowledged: business-dispute claims—rather than “wrongful legal-services acts”—arose when David terminated the organizational structure, modified certain attorney-client relationships, changed management procedures, and refused to transfer certain electronic files.<sup>323</sup> Still, the district judge concluded that the business-dispute allegations did not preclude Allied World’s obligation to defend GLFirm against CMFirm’s mixed, traditional, cyber-related and tort-based claims.<sup>324</sup>

To help reach its conclusion, the *Governo* court applied Massachusetts’ laws: 1) Ambiguous language must be construed against the insurer,<sup>325</sup> and 2) an insurance clause is ambiguous only if words and phrases are susceptible to multiple meanings and reasonably intelligent persons disagree about the terms proper definitions.<sup>326</sup> Additionally, the federal court cited the Massachusetts Supreme Court’s declaration in *Billings v. Commerce Insurance Company*<sup>327</sup> and reaffirmed:

The duty to defend is . . . based on the [allegations] in the complaint. . . . [F]or the duty of defense to arise, the underlying complaint need only show, through *general allegations*, a *possibility* that the liability claim falls within the insurance coverage. There is *no requirement* that the [allegations] in the complaint [to] *specifically and unequivocally* [state] a

319. *Id.* at 130.

320. *Id.*

321. *Id.*

322. *Id.* at 130-131. *See also* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 841 (2d Cir. 1967) (“[T]he *Erie* doctrine wisely prevents [a federal courts’] engaging in . . . extensive law-making on local tort liability, a subject which the people of New York have entrusted to their legislature and . . . courts, not to us. Our task is . . . more modest—assessing the sufficiency of the evidence within the framework of New York[s] decisions.”).

323. *Governo*, 335 F.Supp.3d at 134.

324. *Id.*

325. *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd’s, London*, 871 N.E.2d 418, 425 (Mass. 2007).

326. *Ins. Co. v. Gomez*, 688 N.E.2d 951, 953 (Mass. 1998).

327. *Governo*, 335 F.Supp.3d at 131.

claim within the coverage.<sup>328</sup>

B. SPLIT JUDICIAL DECLARATIONS: WHETHER TRADITIONAL LIABILITY INSURERS MUST DEFEND INSUREDS AGAINST CYBER-SPECIFIC “PERSONAL AND ADVERTISING INJURY” CLAIMS

Many professionals and businesspersons as well as consumers and insurers do not completely understand the difference between the Internet and “World Wide Web” (the Web).<sup>329</sup> The Internet is the cyber world’s physical infrastructure— comprising network servers, laptop and desktop computers, fiber-optic cables and routers.<sup>330</sup> Stated slightly differently, the Internet is a global network, comprising hundreds of thousands of independent computer networks, personal computers and servers’ sending and receiving digitized information.<sup>331</sup> In contrast, the Web comprises intangible digital technologies—“electronic packets” or digital files—which transfer electronic documents, photographs, videos, and audio clips over the Internet.<sup>332</sup>

Globally, an estimated 4.5 billion people access the Web.<sup>333</sup> In the United States, approximately 300 million people access the Web each day.<sup>334</sup> Thus, given the accelerated and exponential growth of Web traffic, millions of professional and business entities advertise goods and services on the Web.<sup>335</sup> Online advertisements appear under different labels—affiliate, contextual, pay-per-click, email, video, content, search-engine-optimization, social-media and network marketing.<sup>336</sup> To help track or monitor web users’ purchasing and viewing habits, cyberspace advertisers use a “web beacon” application, or install “cookies” technology on users’ smartphones, tablets, laptops and desktop computers.<sup>337</sup>

Certainly, like conventional-media retailers and marketers, cyberspace advertisers can generate personal-injury lawsuits when publishing or sharing assertedly intrusive and offensive advertisements.<sup>338</sup> Cyber-advertising torts

328. *Billings v. Commerce Ins. Co.*, 936 N.E.2d 408, 414 (Mass. 2010) (emphasis added).

329. *See In re Doubleclick, Inc., Privacy Litig.*, 154 F. Supp. 2d 497, 501 (S.D.N.Y. 2001).

330. *Doubleclick*, 154 F. Supp. 2d at 501.

331. *Id.*

332. *Id.*

333. *See World Internet Usage and Population Statistics*, INTERNET WORLD STATS, <https://www.internetworldstats.com/stats.htm> [<https://perma.cc/C2NJ-RSE9>] (On June 30, 2019, approximately 4.5 billion people used the World Wide Web.).

334. *Id.*

335. *See, e.g.*, Press Release, Interactive Advertising Bureau, Digital Advertising Revenues Rise to \$26.2 Billion in Q3 2018, Up 22% Year-Over-Year (Feb. 14, 2019), [https://iab.com/wp-content/uploads/2019/02/IAB\\_Internet-Ad-Revenue-Report-Q3-2018\\_2019-02-14\\_FINAL-1.pdf](https://iab.com/wp-content/uploads/2019/02/IAB_Internet-Ad-Revenue-Report-Q3-2018_2019-02-14_FINAL-1.pdf) [<https://perma.cc/RSN5-2TTV>].

336. *See* Garima Kakkar, *Ten Types of Online Marketing Channels & Their Practical Applications*, DIGITAL VIDYA (March 9, 2017), <https://www.digitalvidya.com/blog/types-of-online-marketing-channels/> [<https://perma.cc/ES38-Q6HB>].

337. *Id.*

338. *See generally* Marianna Bonner, *The Risks of Lawsuits From Online Advertising*, THE BALANCE SMALL BUSINESS (Mar. 30, 2019), <https://www.thebalancesmb.com/risks-of-online-advertising-462630> [<https://perma.cc/T25N-CBZH>]; Adam R. Bialek & Scott M. Smedresman, *Internet Risk Management: A Guide to Limiting Risk Through Web Site Terms and Proactive Enforcement*, 20 INTELL. PROP. & TECH. L.J. 1, 1 (2008) (highlighting the legal risks and claims associated with advertisers and sellers’ online activities—cyber-intrusion torts, breach of contract and warranty claims, liability for failing to protect

appear under several broad headings—intentional torts,<sup>339</sup> state and federal intellectual-property-rights violations,<sup>340</sup> and statutory deceptive trade practices violations.<sup>341</sup>

1. “Personal and Advertising Injury” Insurance Coverage, Third-Party Intentional Cyber-Technology Claims and Conflicting Duty-to-Defend Decisions

To help defend against cyber-technology claims and legal actions, some businesses and professionals purchase traditional comprehensive general liability (“CGL”) insurance contracts, that contain a “personal and advertising injury” provision.<sup>342</sup> Commencing in 1986, CGL insurers began offering so-called “Coverage B” or “personal and advertising injury” coverage.<sup>343</sup> Typically, Coverage B provisions read in relevant part:

We will pay those sums that the insured becomes legally obligated to pay as damages because of *personal injury* or *advertising injury*. . . This insurance applies to. . . advertising injury caused by an offense committed in the course of advertising your goods, products or services. Advertising injury means injury arising out of one or more of the following offenses:

- a) Oral, written, televised or videotaped publication of material that slanders or libels a person or organization or disparages a person’s. . . goods, products or services;
- b) Oral, written, televised or videotaped publication of material that violates a person’s right of privacy;
- c) Misappropriation of advertising ideas or style of doing business;
- or
- d) Infringement of trademark, copyright, title or slogan.<sup>344</sup>

However, among and between state and federal courts, major disagreements exit over whether the standard clause requires CGL insurers to defend insured professional and business entities against “controversial” advertising-injury claims.<sup>345</sup> For example, some state courts preclude persons from

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consumers’ personal information as well as intellectual property, copyright or trademark infringement claims).

339. *Id.* (“Errors in advertising [are] torts like defamation, invasion of privacy, improper use of someone’s advertising idea, or violation of someone else’s advertising idea.”).

340. *Id.* (“Intellectual property includes copyrights, patents, trademarks, service marks, trade dress and trade secrets. Federal law bars the use of this property without the permission of the creator.”).

341. *Id.* (“[A]n online ad might violate federal fair trade laws [and states’ deceptive trade practices statutes]... [T]hese laws are designed to protect the public from [businesses’] unfair, deceptive or fraudulent practices...”).

342. *See* Westfield Ins. Co. v. Factfinder Mktg. Research, Inc., 860 N.E.2d 145, 148-49 (Ohio Ct. App. 2006) (“The Insurance Services Office is an organization that drafts the standard-form commercial general liability policy. The ISO first introduced standard-form coverage for ‘advertising injury’ in 1973. The ISO amended the policy language for advertising-injury coverage in 1986 and 1998.”). *See also* James W. Bryan, Laura A. Foggan & Seth D. Lamden, *Emerging Coverage B Claims*, AMERICAN COLLEGE OF COVERAGE AND EXTRACONTRACTUAL COUNSEL (2018), <https://www.nge.com/portalresource/lookup/poid/Z1tOI9NPluKPtDNIqLMRV56Pab6TfzcRXncKbDtRr9tObDdEr4ZC/arFile.name=/Emerging%20Coverage%20B%20Claims.pdf> [https://perma.cc/VE6T-9UTL] (last visited May 21, 2019) (“[Presently, the CGL insurance contract covers] damages [arising from] enumerated ‘personal and advertising injury’ offenses... From 1986 through 2007, standard CGL policies... provided personal and advertising coverage, although they defined ‘personal injury’ and ‘advertising injury’ separately... ISO’s 1973 CGL Form did not provide personal injury coverage.”).

343. Bryan et al., *supra* note 342.

344. Fireman’s Fund Ins. Co. of Wis. v. Bradley Corp., 660 N.W.2d 666, 674-75 (Wis. 2003) (emphasis added).

345. *See and compare* the cases and parenthetical statements in *infra* notes 346 and 349.

insuring against the adverse consequences of their intentional torts.<sup>346</sup> Yet, those same courts interpret the “personal injury” provision liberally, and force CGL insurers to defend insureds against third-party intentional-tort claims.<sup>347</sup> Similarly, several state courts enforce Coverage-B “personal and advertising injury” clauses, and compel CGL underwriters to defend against its insureds<sup>348</sup> against defamation—an intentional tort.<sup>349</sup>

Additionally, federal courts are seriously divided over whether an unsolicited fax advertisement is an advertising injury under a CGL insurance contract.<sup>350</sup> The Fourth and Seventh Circuits have declared: a “personal and advertising injury” clause does not cover claims arising from insureds’ unsolicited “junk advertising faxes.”<sup>351</sup> A majority of federal courts, however, embrace a different position: privacy includes the right to be left alone—free from the invasion of unsolicited facsimiles.<sup>352</sup> Therefore, construing

346. See, e.g., *Western Protectors Ins. Co. v. Shaffer*, 624 F.Supp.2d 1292, 1301 (W.D. Wash. 2009) (citing Washington’s law and finding coverage for a third party’s invasion of privacy claim); *Penzer v. Transp. Ins. Co.*, 545 F.3d 1303, 1310-11 (11th Cir. 2008) (concluding that Florida’s public policy against insuring one’s own intentional misconduct does not apply if personal liability is not predicated on intent); *Butler v. Clarendon Am. Ins. Co.*, 494 F.Supp.2d 1112, 1132 (N.D. Cal. 2007) (applying California’s law and concluding personal injury coverage is triggered when an injury arises out of an enumerated offense); *Freightquote.com, Inc. v. Hartford Cas. Ins. Co.*, 316 F.Supp.2d 937, 941 (D. Kan. 2003) (applying Kansas’s law and declaring that a CGL personal and advertising injury clause covers tortious interference with contractual relationship claims); *CIM Ins. Corp. v. Midpac Auto Center, Inc.*, 108 F.Supp.2d 1092, 1099 (D. Haw. 2000) (applying Hawaii’s law and declaring that personal injury liability provision covered an injury arising from enumerated torts); *North Bank v. Cincinnati Ins. Cos.*, 125 F.3d 983, 986-87 (6th Cir. 1997) (applying Michigan’s law and concluding that the personal injury clause covered intentional torts and the definition of “covered occurrences”—which excluded intentional torts—was ambiguous).

347. *Id.*

348. See, e.g., *Waffle House, Inc. v. Travelers Indem. Co. of Ill.*, 114 S.W.3d 601, 612 (Tex. Ct. App. 2003) (concluding that CGL insurer had a duty to defend the insured against a former employee’s defamation and tortious interference with contractual relationship claims); *Barnett v. Fireman’s Fund Ins. Co.*, 108 Cal.Rptr.2d 657, 664 (Cal. Ct. App. 2001) (declaring that CGL insurer had a duty to defend against defamation claims); *McCormack Baron Mgmt. Serv., Inc. v. Am. Guarantee & Liab. Ins. Co.*, 989 S.W.2d 168, 171 (Mo. 1999) (finding that the CGL insurance policy required the insurer to defend the insured against a tortious interference with contractual relationship claim); *Maine State Academy of Hair Design, Inc. v. Commercial Union Ins. Co.*, 699 A.2d 1153, 1159 (Me. 1997) (concluding the CGL policy provided “personal injury” coverage, which required the insurer to defend employer against employee’s sexual-harassment and invasion of privacy claims); *12th Street Gym, Inc. v. General Star Indem. Co.*, 93 F.3d 1158, 1163 (3d Cir. 1996) (declaring that the CGL policy provided “personal injury” coverage and requiring the insurer to defend the insured against the gym patron’s invasion of privacy, civil conspiracy, defamation and intentional/negligent infliction of emotional distress claims).

349. *Id.*

350. *Id.*

351. See *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 640 (4th Cir. 2005) (declaring that an insured’s sending unsolicited fax advertisements was not covered under the insurance policies’ advertising injury provisions); *Am. States Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 392 F.3d 939, 943 (7th Cir. 2004) (declaring that the CGL insurer did not have a duty to defend the insured because advertising injury provisions do not cover the normal consequences of “junk advertising faxes”).

352. See *Park University Enterprises, Inc. v. Am. Casualty Co. of Reading, Pennsylvania*, 314 F.Supp.2d 1094, 1109 (D. Kan. 2004) (insurer had a duty to defend under the policy’s advertising injury provision, because transmitting an unwanted fax constitutes an intrusion on seclusion and a violation of one’s right of privacy); *Hooters of Augusta, Inc. v. Am. Glob. Ins. Co.*, 272 F.Supp.2d 1365, 1373 (S.D. Ga. 2003) (declaring that insured’s sending unsolicited facsimiles to businesses violated the Act and was an advertising injury under the coverage provision); *Western Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 269 F.Supp.2d 836, 846-47 (N.D. Tex. 2003), *aff’d*, 96 Fed. Appx. 960 (5th Cir. 2004) (declaring that faxing an unwanted advertisement may constitute a written publication); *Prime TV, LLC v. Travelers Ins. Co.*, 223 F.Supp.2d 744, 753 (M.D.N.C. 2002) (concluding that the insured’s faxing allegedly unsolicited advertisements was an advertising injury within meaning of policy). See also *TIG Ins. Co. v. Dallas Basketball*,

“advertising injury” clauses in favor of insureds, most federal courts force CGL insurers to provide a legal defense when allegedly unsolicited faxes violate third parties’ right to privacy.<sup>353</sup>

## 2. The “First Publication Exclusion” Rule, The “Illusory Coverage” Doctrine and Courts’ Conflicting Duty-to-Defend Declarations

As discussed earlier, many courts apply the reasonable expectation doctrine when interpreting insurance contracts.<sup>354</sup> To satisfy insureds’ reasonable and bargained-for-exchange expectations, state and federal courts are more likely to construe controversial insurance provisions in favor of insureds.<sup>355</sup> The common-law illusory coverage doctrine is closely related to the reasonable expectation doctrine.<sup>356</sup> In fact, courts fashioned the doctrine of illusory coverage to protect the reasonable expectations of insureds.<sup>357</sup>

Generally, insurance coverage is illusory when an insured purchases insurance, pays sufficient consideration to cover certain risks, and discovers unexpectedly 1) a purportedly “deceptively constructed” exclusion clause bars the very “risks insured against” or, 2) the exclusion precluded any reasonable expectation of coverage.<sup>358</sup> Stated slightly differently, illusory insurance coverage arises when insuring terms provide extremely minimal coverage, and “no realistic coverage” for specific groups of injured persons.<sup>359</sup> The general rule is clear: an illusory-coverage clause violates public policy.<sup>360</sup> And, the violation prevents courts from enforcing any deceptively fashioned exclusion or limitation clause in an insurance contract.<sup>361</sup>

Cyberspace advertisers are increasingly raising the question: does a standard CGL “personal and advertising injury” provision create merely an “illusion of coverage” for enumerated risks, when an accompanying exclusion clause bars coverage for the very same risks.<sup>362</sup> However, research reveals that courts apply conflicting legal standards when addressing the

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Ltd., 129 S.W.3d 232, 238 (Tex. App. 2004) (declaring that one’s sending unsolicited and faxed advertisements fell within the CGL advertising injury clause).

353. *Id.*

354. *See supra* notes 192-199 and accompanying text.

355. *Cf. Morgan, Lewis & Bockius LLP v. Hanover Ins. Co.*, 929 F.Supp. 764, 771 (D.N.J. 1996) (“[An insurance contract] must be interpreted to [satisfy] the reasonable expectations of the insured... [However, it] would be patently unreasonable to expect an insurer to protect its insured against liabilities for which the insured did not bargain.”).

356. *See Western Reserve Mut. Cas. Co. v. Holland*, 666 N.E.2d 966, 968 (Ind. Ct. App. 1996) (reaffirming that public policy disfavors illusory coverage and courts will enforce a provision to satisfy an insured’s reasonable expectation); *Monticello Ins. Co. v. Mike’s Speedway Lounge*, 949 F. Supp. 694, 702 (S.D. Ind. 1996) (“[A]n insurance policy that provides only illusory coverage will be enforced... to [support] the reasonable expectation of the insured.”).

357. *American Casualty Co. v. Baker*, No. CV 90-125 AHS, 1993 U.S. Dist. LEXIS 6981, at \*17 (C.D. Cal. Apr. 29, 1993).

358. *Fid. & Guar. Ins. Underwriters, Inc. v. Everett I. Brown Co.*, 25 F.3d 484, 490 (7th Cir. 1994). *See also City of Lawrence v. Western World Ins. Co.*, 626 N.E.2d 477, 480 (Ind. Ct. App. 1993).

359. *Martinez v. Idaho Counties Reciprocal Mgmt. Program*, 999 P.2d 902, 907 (Idaho 2000).

360. *See, e.g., Fid. & Guar. Ins. Underwriters*, 25 F.3d at 490; *Landis v. Am. Interinsurance Exch.*, 542 N.E.2d 1351, 1354 (Ind. Ct. App. 1989) (declaring that the coverage provision provided illusory coverage and interpreting the language to satisfy the reasonable expectations of the insured).

361. *See, e.g., National Union Fire Ins. Co. of Pittsburgh, P.A. v. Dixon*, 112 P.3d 825, 829 (Idaho 2005) (reaffirming that public policy voids limitation and exclusion provisions when insurance contracts only provide an illusion of coverage).

362. *See infra* notes 369-400 and accompanying discussion.

question.<sup>363</sup> Some courts declare that insurance coverage is illusory when an exclusion clause *only contradicts* a “personal and advertising injury” coverage provision.<sup>364</sup> Other courts embrace a different standard: insurance coverage is illusory if an exclusion clause *bars completely* the possibility of any coverage under the insuring clause.<sup>365</sup>

Again, professionals and businesspersons are increasingly using the Web and social media to advertise goods and services.<sup>366</sup> Thus, those entrepreneurs are encouraged to act prudently, and only purchase cyber-insurance contracts that promise to unequivocally defend insureds against cyber-technology torts.<sup>367</sup> But, cyberspace advertisers should be aware that complex coverage issues and competing rules influence whether cyber insurers must defend insureds against “personal and advertising injury” claims.<sup>368</sup> To underscore cyberspace advertisers’ serious legal challenges, and the unpredictability of courts’ duty-to-defend rulings, consider the plight of several web-based advertisers in two timely and highly instructive decisions.

In *Princeton Express v. DM Ventures USA LLC*,<sup>369</sup> the cyberspace advertiser is DM Ventures USA, LLC (“DLLC”).<sup>370</sup> DLLC’s principal place of business as well as its ventures—restaurants and entertainment venues—are located in Palm Beach County, Florida.<sup>371</sup> To promote its businesses, DLLC used websites, social media and other forms of advertisements.<sup>372</sup> In 2015, DLLC “published” several professional models’ photographs on various DLLC’s websites and shared the images on social media.<sup>373</sup> The professionals did not

363. See and compare the cases and parenthetical statements in *infra* notes 364 and 365.

364. *Interline Brands, Inc. v. Chartis Specialty Ins. Co.*, 749 F.3d 962, 967 (11th Cir. 2017) (finding no illusion of coverage because the exclusion clause did not “completely contradict the insuring provisions”); *Purrelli v. State Farm Fire & Cas. Co.*, 698 So.2d 618, 620 (Fla. Dist. Ct. App. 1997) (declaring that insurance coverage becomes illusory “when limitations or exclusions completely contradict the insuring provisions”).

365. *Young v. Illinois Union Ins. Co.*, No. C07-05711 SBA, 2008 WL 5234052, at \*1 (N.D. Cal. 2008) (“In order for a policy to be deemed illusory, it must afford no coverage whatsoever.”). See also *Evanston Ins. Co. v. Atain Specialty Ins. Co.*, 254 F. Supp. 3d 1150, 1166 (N.D. Cal. 2017) (noting that a court may refuse to apply an exclusion if the exclusion completely eliminates any potential insurance coverage); *Jeff Tracy, Inc. v. U.S. Specialty Ins. Co.*, 636 F. Supp. 2d 995, 1007 (C.D. Cal. 2009) (“Insurance coverage is... illusory when the insured ‘receives no benefit’ under the policy.” (interpreting *Md. Cas. Co. v. Reeder*, 221 Cal. App. 3d 961, 978 (1990))).

366. See *supra* notes 2-4 and accompanying text.

367. See, e.g., Press Release, Verisk, ISO Introduces Cyber Risk Program to Help Cover \$7 Trillion E-Commerce Market (Jan. 11, 2005), <https://www.verisk.com/archived/2005/iso-introduces-cyber-risk-program-to-help-cover-7-trillion-e-commerce-market/> [<https://perma.cc/LWG5-UD3E>] (“[Insurance Services Office Inc. (ISO)] has introduced a new line of insurance to cover cyber risk. . . ISO’s Internet Liability And Network Protection Policy... [covers] website publishing liability, ... network security liability... replacement or restoration of electronic data, cyber extortion. . . and coverage for loss of business income or extra expenses incurred as a result of an extortion threat or e-commerce incident... Under the liability insuring agreements, . . . the insurer has a duty to defend its policyholders in litigation. Defense expenses are payable within the limits of the policy.”).

368. See *infra* notes 349-397, 429-434 and accompanying text.

369. 209 F. Supp. 3d 1252 (S.D. Fla. 2016).

370. First Am. Pet. Decl. J. ¶¶ 3-4, *Princeton Express v. DM Ventures USA LLC*, No. 9:15-cv-81685, 2016 WL 950381, ¶¶ 11-14 (S.D. Fla. Jan. 20, 2016) [hereinafter *Princeton Express* First Amended Petition].

371. *Princeton Express*, 209 F. Supp. 3d at 1254.

372. *Id.*

373. *Id.*

give their consent.<sup>374</sup> Apparently DLLC and the complainants were strangers. The models resided approximately 2,775 miles away in Orange, Los Angeles and Santa Barbara Counties, California.<sup>375</sup>

In late August 2015, the complainants filed a lawsuit (“Underlying suit”), raising multiple common law and statutory causes of action: 1) civil theft, 2) defamation, 3) conversion and misappropriation, 4) invasion of privacy, 5) fraudulent misrepresentation and misappropriation, 6) direct and vicarious-liability negligence, 7) an action under the federal Trademark-Lanham Act, 8) an action under Florida’s trade and commerce statute—alleging that DLLC misappropriated the models’ name or likeness, 9) an action under Florida Deceptive and Unfair Trade Practices Act, and 10) an unfair-trade-competition action.<sup>376</sup>

Princeton Express and Surplus Lines Insurance Company (“Princeton Express”) insured DLLC’s ventures under multiple commercial general liability (“CGL”) insurance contracts.<sup>377</sup> Upon learning about the Underlying suit, Princeton filed a federal declaratory judgment action in the Southern District Court for Florida.<sup>378</sup> Princeton asserted that it had no obligation to defend DLLC against the “advertising injury” claims in the Underlying lawsuit.<sup>379</sup>

The controversial traditional CGL contract comprised several coverage provisions. However, DLLC sought relief under the widely marketed and standardized “Coverage B” provision.<sup>380</sup> It read: “We will pay those sums that the insured becomes legally obligated to pay as damages because of ‘*personal and advertising injury*’. . . . We will have the. . . *duty to defend* the insured against *any* ‘suit’ seeking those damages.”<sup>381</sup> The CGL defined “personal and advertising injury” as an injury which arises from certain offenses: . . .

- d) [A] *written publication* . . . that *slanders* or *libels* a person or organization;
- e) [A] written publication . . . that violates a person’s *right of privacy*;
- f) The *use* of another’s advertising *idea* in your “advertisement”; or
- g) *Infringing* upon another’s *copyright*, *trade dress* or slogan in your “advertisement”.<sup>382</sup>

The insuring agreement in *Princeton* also read: “‘Advertisement’ means a *notice* that is . . . *published* . . . about your. . . products or services for the purpose of attracting customers. . . . [Notices also] include *material placed on the Internet* or on *similar electronic means of communication*. . . . Regarding *websites*, only that part of a website that [discusses] your goods. . . or services [to attract] customers. . . is considered an advertisement.”<sup>383</sup>

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374. *Id.*

375. *Princeton Express* First Amended Petition, ¶¶ 15-22.

376. *Princeton Express*, 209 F. Supp. 3d at 1254-55.

377. *Id.* at 1256.

378. *Id.* at 1255.

379. *Id.* at 1253.

380. See James W. Bryan et al., *supra* note 342 (“Coverage B of the standard Insurance Services Office, Inc. CGL policy—(CG 00 01)—provide coverage for damages because of enumerated “personal and advertising injury” offenses committed during the policy period.”).

381. *Princeton Express*, 209 F. Supp. 3d at 1256.

382. *Id.* at 1257 (emphasis added).

383. *Id.*

Significantly, when DLLC received a copy of the CGL agreement, a “general policy changes” endorsement was attached.<sup>384</sup> More importantly, an extraordinarily broad, and, apparently, never-before-disclosed “field of entertainment exclusion” clause was in the endorsement:

This insurance *does not* apply to any. . . “suit” for damages. . . arising out of. . . *any*:

- a) Actual or alleged. . . *intellectual property infringement* [of] . . . copyright, patent, *trade dress*, trade secrets, *trade name*, *trademark* or service mark;
- b) Actual or alleged *invasion of privacy*;
- c) Actual or alleged libel, slander, or any form of *defamation*; [or],
- d) Actual or alleged *unauthorized use* of [*names*, *ideas*, *characters*] . . . or *other material*. . .<sup>385</sup>

Significantly, DLLC and Princeton agreed on two points: 1) the exclusion precluded all remedies for any injury appearing in the Coverage-B “personal and advertising injury” section,<sup>386</sup> and, 2) The exclusion-clause language directly contradicted the language in the advertising-injury coverage clause.<sup>387</sup> But Princeton insisted: the “field of entertainment exclusion” *appeared in an endorsement*; therefore, the exclusion language was superior to the terms in the contract —precluding any alleged duty to defend.<sup>388</sup> In response, DLLM stressed that the unduly broad exclusion clause effectively made any ostensibly advertising-injury coverage illusory.<sup>389</sup>

To begin its analysis, the federal judge found several probative facts: the Coverage-B clause unambiguously covered an “advertising injury.”<sup>390</sup> The “field of entertainment exclusion” did not preclude coverage just for *some* types or classes of “advertising injuries.”<sup>391</sup> Instead, the exclusion barred coverage for *all* types of “advertising injuries.”<sup>392</sup> And, the CGL exclusion clause completely contradicted the coverage provision.<sup>393</sup>

The federal district court weighed several relevant principles which govern the interpretation of insurance contracts in Florida:<sup>394</sup> 1) an ambiguous exclusion provision must be construed in favor of the insured;<sup>395</sup> 2) an insuring agreement is not ambiguous, if an exclusion clause modifies or limits the scope of coverage;<sup>396</sup> 3) insurance coverage is illusory when limitations or

384. *Id.* at 1256.

385. *Id.* at 1257 (emphasis added).

386. *Id.* at 1258.

387. *Id.*

388. *Id.* at 1258-59 (“[I]n general, to the extent an endorsement is inconsistent with the body of the policy, the endorsement controls” (citing *Steuart Petroleum Co., Inc. v. Certain Underwriters at Lloyd’s London*, 696 So.2d 376, 379 (Fla. Dist Ct. App. 1997))).

389. *Princeton Express*, 209 F.Supp.3d at 1258.

390. *Id.* at 1260.

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.* at 1255-56.

395. *See Deni Assoc. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1140 (Fla. 1998) (“We decline to adopt the doctrine of reasonable expectations. There is no need for it if the policy provisions are ambiguous because in Florida ambiguities are construed against the insurer.”).

396. *See Ajax Bldg. Corp. v. Hartford Fire Ins. Co.*, 358 F.3d 795, 799 (11th Cir. 2004) (applying Florida’s law).

exclusions *completely contradict* the terms in a coverage provision;<sup>397</sup> and 4) To determine whether an insurer has a duty to defend, a court must compare the allegations in an underlying complaint with the terms in the insurance contract.<sup>398</sup> Ultimately, the district court applied the illusory coverage doctrine, and declared that Princeton had a duty to defend DLLM against the Underlying lawsuit.<sup>399</sup> And, the court reached that decision, because enforcing the exclusion clause would have made coverage for an “advertising injury” illusory under Florida’s law.<sup>400</sup>

Now, consider a fairly similar dispute, but a contrary declaration in *Secard Pools, Inc. v. Kinsale Insurance Company*<sup>401</sup>—which was decided one year after *Princeton*. Secard Pools, Inc. is a family-owned business in California.<sup>402</sup> Joe Secard and his son, Edmund Secard, are the company’s executives and majority shareholders.<sup>403</sup> When this dispute erupted, Joe Secard had been selling pool products for nearly a half century.<sup>404</sup> Solar Sun Rings, Inc. (“SSR”) is also a family-owned and California-based enterprise.<sup>405</sup> In 2003, SSR began selling solar-heating products for pools and spas in various venues. SSR advertised the products on its website—*www.solarsunrings.com*.<sup>406</sup>

In 2007, Secard became aware of SSR’s primary product—circular objects which float on the surface of a pool and absorb heat from the sun (“Solar Sun Rings”).<sup>407</sup> In December 2011, Joe Secard became inspired and decided to improve Solar Sun Rings.<sup>408</sup> He designed and created “Solar Sun Squares.”<sup>409</sup> More relevant, he registered the domain name *solar-sunsquares.com*,<sup>410</sup> built the *http://www.solarsunsquares.com* website, and published information about the competitive products.<sup>411</sup>

397. See *Colony Ins. Co. v. Total Contracting & Roofing, Inc.*, No. 10-23091-CIV, 2011 WL 4962351, at \*5 (S.D. Fla. Oct. 18, 2011).

398. See, e.g., *Jones v. Florida Ins. Guar. Ass’n, Inc.*, 908 So.2d 435, 442-43 (Fla. 2005).

399. *Princeton Express*, 209 F.Supp.3d at 1260.

400. *Id.*

401. *Secard Pools, Inc. v. Kinsale Ins. Co.*, 318 F. Supp. 3d 1147 (C.D. Cal. 2017).

402. Appellate Brief, *Secard Pools, Inc., v. Kinsale Ins., Inc.*, 318 F. Supp. 3d 1147 (C.D. Cal. 2017) (No. 17-55534), 2017 WL 4330218, at \*5.

403. *Id.*

404. *Solar Sun Rings, Inc. v. Secard Pools*, No. EDCV14-2417 PSG (KKx), 2016 WL 6139615, at \*1 (C.D. Cal. Jan. 13, 2016).

405. Patrick Healy, *Family Business Took on Walmart Over Alleged Patent Infringement*, NBC LOS ANGELES (Dec. 1, 2012, 5:35 PM), <https://www.nbclosangeles.com/news/local/family-business-took-on-walmart-over-alleged-patent-infringement/1943487/> [https://perma.cc/2DTK-NSWU] (“[I]n 2011, a Temecula-based company... developed... Solar Sun Ring—an inflatable vinyl cover for spas and pools. Family-owned Solar Sun Rings, Inc. contended [that Walmart sold] ‘Solar Pad’ [which] infringed on the design patent for the Ring.”).

406. First Am. Countercl. of *Secard Pools Inc.* ¶¶ 1, 16-18, *Solar Sun Rings, Inc. v. Secard Pools*, No. 5:14-edcv-02417-PSG (KKx), 2015 WL 4724229 (C.D. Cal. Mar. 6, 2015) [hereinafter Counterclaims—*Solar Sun Rings v. Secard Pools*, 2015 WL 4724229] (“On its website <http://www.solarsunrings.com/about.html#H01>, [https://perma.cc/69KW-SNMU] Solar Sun Rings and SSR Officers state: Solar Sun Rings™ are equipped with six magnets to improve clarity and decrease hardness of the water in your pool. The statement that magnets on the Solar Sun Rings products improve clarity and decrease hardness of water is without validity and false.”).

407. *Id.* ¶¶ 16-18.

408. *Solar Sun Rings*, 2016 WL 6139615, at \*1.

409. *Id.*

410. *Id.*

411. *Secard Pools*, 318 F. Supp. 3d at 1154.

In November 2014, SSR sued Secard Pools, Joe Secard and his son for damages.<sup>412</sup> The action was filed in the District Court for the Central District of California (“SSR lawsuit”).<sup>413</sup> The complaint alleged the following: Secard fashioned offensive advertisements using “marks, color schemes, and trade dress” which mirrored those appearing on SSR’s various websites.<sup>414</sup> The complaint also raised multiple theories of recovery under federal and state tort-based statutes: 1) Trademark Infringement, under the Federal Lanham Act, 15 U.S.C. § 1114(1); 2) Trade Dress Infringement, under the Federal Lanham Act, 15 U.S.C. § 1125(a); 3) False Origin/Advertising and Unfair Competition, under the Federal Lanham Act, 15 U.S.C. § 1125(a); 4) Trade-mark Dilution, under the Federal Lanham Act, 15 U.S.C. § 1125(c); 5) Trademark Infringement under California common law; and 6) Unfair Business Practices under California Bus. & Prof. Code §17200.<sup>415</sup>

Like DLLM in *Princeton*, Secard Pools purchased a traditional CGL insurance contract. It became effective in August 2014—three months before the underlying SSR lawsuit commenced.<sup>416</sup> Kinsale Insurance Company sold the policy—which insured Secard Pools against the risks associated with “personal and advertising injury” claims.<sup>417</sup> Under a Coverage-B clause, Kinsale promised to compensate third-party victims, if Secard Pools caused an “advertising injury,” and the insured became “legally obligated to pay” damages.<sup>418</sup> Kinsale’s insuring agreement also promised to defend Secard Pools, as well as Joe and Edmund Secard, against “advertising injury” claims.<sup>419</sup>

More importantly, the definition of “personal and advertising injury” in the Kinsale’s agreement mirrored the definition in Princeton’s insuring contract:

“Personal and advertising injury” means injury—including consequential “bodily injury”—arising out of one or more of the following offenses: . . .  
 f) The use of another’s advertising idea in your “advertisement”; or  
 g) Infringing upon another’s *copyright, trade dress* or slogan in your “advertisement.”<sup>420</sup>

In addition, the definition of “advertisement” in Kinsale’s liability insurance contract mirrored precisely the definition in Princeton’s Coverage-B provision. In relevant part, it read: “‘Advertisement’ means a [*published notice* regarding] your. . . products or services for the purpose of attracting customers. . . . [Notices also] include *material placed on the Internet* or on *similar electronic means of communication*. . . .Regarding *websites*, only that part of a website

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412. *Id.*

413. Appellate Brief, *supra* note 402, at \*6.

414. *Secard Pools*, 318 F. Supp. 3d at 1154.

415. *Solar Sun Rings*, 2016 WL 6139615, at \*1.

416. *Secard Pools*, 318 F. Supp. 3d at 1150.

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

that [discusses] your goods. . . or services [to attract] customers. . . is considered an advertisement.”<sup>421</sup>

Even more significantly, when Kinsale sold the CGL policy, the agreement contained a standard exclusion clause—which excluded coverage for copyright-infringement, patent, trademark, trade-secret and *some advertising-injury* claims.<sup>422</sup> Like the CGL insurer in *Princeton*, Kinsale *replaced* its original exclusion clause by attaching an endorsement. However, in *Kinsale*, the modified language was an exceedingly broader “intellectual property exclusion” (“IP-exclusion”) rather than a “field of entertainment exclusion.”<sup>423</sup> In relevant part, the IP-exclusion read:

This insurance *does not* apply to *any* claim or “suit” arising out of *any*:

- 1) Actual or alleged *infringement of copyright*, patent, *trademark*, *service mark*, *slogan*, *trade dress*, *trade secret* or . . . *intellectual property rights*;
- 2) Actual or alleged *false advertising* [or] false designation of origin. . . or
- 3) *Products*. . . manufactured [or] sold. . . by the insured [which violate] *any law*, . . . including. . . the Lanham Act.<sup>424</sup>

One month after SSR filed its lawsuit, Joe Secard sent a letter to Kinsale, demanding a legal defense.<sup>425</sup> The insurer rejected the demand.<sup>426</sup> In response, Secard Pools sued Kinsale in federal court, claiming that the insurer breached the CGL insurance contract, and its implied covenant of good faith and fair dealing.<sup>427</sup> Before, the District Court for the Southern District of California, Kinsale cited language in the broad IP-exclusion and insisted that the “advertising injury” clause did not cover *any* of the claims in the SSR lawsuit.<sup>428</sup>

The federal district court embraced Kinsale’s defenses, and declared that the liability insurer had no duty to defend Secard Pools and its executives.<sup>429</sup> Arguably, the district court did not weigh and apply judiciously California’s well-established principles: 1) disputed insurance exclusion provisions are “strictly construed against the insurer and liberally interpreted in favor of the insured”;<sup>430</sup> and 2) an insurer has a duty to defend if third-party claims are *possibility* or *potentially* covered under the insuring agreement.<sup>431</sup>

Instead, the district court considered and applied overwhelming the laws of various federal panels and circuits.<sup>432</sup> One major federal principle reads: “A ‘personal and advertising injury’ provision provides illusory coverage only when an exclusion clause *totally* eliminates the possibility of any

421. Appellate Brief, *supra* note 402, at \*6 (emphasis added).

422. *Secard Pools*, 318 F. Supp. 3d at 1151 (emphasis added).

423. *Id.*

424. *Id.* (emphasis added).

425. *Id.*

426. *Id.*

427. *Id.* at 1149.

428. *Id.* at 1151.

429. *Id.* at 1149-50.

430. *Delgado v. Heritage Life Ins. Co.*, 157 Cal. App. 3d 262, 271 (1984).

431. *Gray v. Zurich Ins. Co.*, 54 Cal. Rptr. 104, 112-13 (Cal. 1966).

432. *Secard Pools*, 318 F. Supp. 3d at 1150-54.

coverage.”<sup>433</sup> Debatably, the *Secard* court’s heavy reliance on *federal substantive* judicial decisions generated a questionable and less-than-judicious analysis, because the district court declared: 1) Kinsale’s e IP-exclusion expressly excluded coverage *every* common-law and statutory cyber-tort allegation in the SSR complaint<sup>434</sup>; and 2) The potentiality of coverage for the third-party cyber-technology claims never existed under the “advertising injury” provision.<sup>435</sup>

Yet, the federal judge also insisted: 1) “[T]he mere possibility of *some coverage* under the ‘advertising injury’ clause was sufficient to defeat an illusory-coverage argument”<sup>436</sup>; and 2) The “personal and advertising injury” provision would cover a cyberspace defamation claim—if Joe or Edmund Secard’s hypothetical “defamatory remarks” appeared on websites or on social-media platforms.<sup>437</sup>

Clearly, a cyber-related defamation claim did not appear in the SSR complaint. But assuming that it did, the district court’s decision would still beg for a more persuasive and well-reasoned analysis. Why? Under California’s common law, defamation can be an intentional or a negligence-based tort.<sup>438</sup> Also, statutory defamation comprises both slander and libel, which could include *trade libel*.<sup>439</sup> The IP-exclusion in *Secard Pools*, however, plainly stated: “This insurance *does not apply* to *any* claim or ‘suit’ arising out of *any* . . . actual or alleged . . . *trade libel*.”<sup>440</sup> Thus, under California’s law, Kinsale would a duty to defend. Quite simply, the exclusion would have barred all cyber-related-tort claims—including “trade libel”—and substantiated that the clause provided only an illusion of coverage.

Again, the declarations in *Princeton* and *Secard Pools* are only examples of conflicting duty-to-defend decisions involving the scope of cyber-liability coverage under *traditional* CGL insurance contracts. Assuredly, there are other splits. For instance, so-called “first publication,”<sup>441</sup> “prior acts,”<sup>442</sup> and “prior

433. *Id.* at 1153, *aff’d*, 366 F. Appx. 777 (9th Cir. 2010) (“In order for a policy to be deemed illusory, it must afford no coverage whatsoever” (citing *Young v. Illinois Union Ins. Co.*, No. C07-05711SBA, 2008 WL 5234052, at \*1 (N.D. Cal. Dec. 15, 2008)); *Jeff Tracy, Inc. v. U.S. Specialty Ins. Co.*, 636 F. Supp. 2d 995, 1007 (C.D. Cal. 2009) (“Insurance coverage is . . . illusory when the insured ‘receives no benefit’ under the policy.”)).

434. *Secard Pools*, 318 F. Supp. 3d at 1149.

435. *Id.*

436. *Id.* at 1153-54.

437. *Id.* at 1154.

438. *Cf. Uhrich v. State Farm Fire & Cas. Co.*, 109 Cal. App. 4th 598, 610 (2003) (“[A]n insured could be liable for defamation [by] negligently publishing a defamatory statement”).

439. *See Polygram Records, Inc. v. Superior Court*, 216 Cal. Rptr. 252, 255-256 (Cal. Ct. App. 1985) (reaffirming that “trade libel” and defamation are independent and very similar torts and stressing that and underscoring that under the Civil Code section 46, slander includes “a false and unprivileged publication. . . which. . . [injures any person’s]. . . trade or business[.]”).

440. *Secard Pools*, 318 F. Supp. 3d at 1151.

441. *See, e.g., Platinum Technology, Inc. v. Fed. Ins. Co.*, No. 99 C 7378, 2001 WL 109814, at \*1 (N.D. Ill. Feb. 2, 2001), *rev’d sub nom. Platinum Tech., Inc. v. Fed. Ins. Co.*, 282 F.3d 927 (7th Cir. 2002) (concluding that the first publication exclusion did not preclude coverage if allegedly infringing trademarks were not published before the beginning of the policy period).

442. *See, e.g., Maxtech Holding, Inc. v. Fed. Ins. Co.*, 202 F.3d 278 (9th Cir. 1999) (finding that the first publication of the offending and injurious name “Maxtech” occurred before the formation of the insurance contract and declaring that the insurer had no duty to defend defendant Maxtech Holding under the contract’s *prior acts* exclusion).

publication”<sup>443</sup> exclusions appear in traditional CGL insurance contracts. Such coverage limitations prevent insureds from purchasing insurance to cover third-party claims that occurred *before* the formation of the insurance contract.<sup>444</sup> However, courts disagree about the scope of these rules’ applicability. A minority of courts adopt the position that a prior-publication exclusion extinguishes an insurer’s duty to defend an insured *only against some* alleged publication and advertising injuries.<sup>445</sup> Most courts, however, embrace and apply a contrary rule: a first-publication exclusion *totally* abrogates an insurer’s duty to defend, if the insured’s actual or alleged conduct caused *any* injury before purchasing a CGL insurance contract.<sup>446</sup>

Finally, courts are also divided over 1) whether a traditional CGL “personal and advertising injury” clause covers all, some or certain types of cyber-tort theories of recovery,<sup>447</sup> and 2) whether traditional insurers have a duty to defend insureds against technology-abuse claims—those “sounding only in tort,” “sounding only in contract,” or “sounding in both tort and contract.”<sup>448</sup>

443. See *Design Basics LLC v. Best Built Inc.*, No. 14-CV-597, 2016 WL 1060253, at \*1 (E.D. Wis. Mar. 15, 2016) (insurers’ arguing that the plain language of the prior publication exclusion applied).

444. See *Capitol Indemnity Corp. v. Elston Self Service Wholesale Groceries, Inc.*, 559 F.3d 616, 620 (7th Cir.2009).

445. See *Irons Home Builders Inc. v. Auto-Owners Ins. Co.*, 839 F. Supp. 1260, 1265 (E.D. Mich. 1993); *Adolfo House Distributing Corp. v. Travelers Property and Casualty Ins. Co.*, 165 F. Supp. 2d 1332, 1341 (S.D. Fla. 2001) (applying Florida law and holding that the first publication exclusion only applies to advertising injuries arising from libel, slander, or invasion of privacy, rather than to those arising out of copyright infringement).

446. See *Capitol Indemnity Corp. v. Elston Self Service Wholesale Groceries, Inc.*, 559 F.3d 616, 620 (7th Cir. 2009) (declaring that a prior publication exclusion clause abrogates an insurer’s duty to defend only if the allegedly injurious material in the underlying third-party complaint occurred *before* the insurance contract was purchased); *Taco Bell Corp. v. Continental Casualty Co.*, 388 F.3d 1069, 1072 (7th Cir. 2004) (applying the prior publication exclusion to resolve a duty-to-defend dispute involving third-party misappropriation and copyright-infringement claims); *Ringer Assoc. Inc. v. Md. Cas. Co.*, 80 Cal. App. 4th 1165, 1185 (2000) (concluding that an insurer has no duty to defend because the first-publication exclusion broadly bars coverage for the allegedly underlying defamatory utterances or publications of material whose first publication took place before the inception of the insurance contract); *Matagorda Ventures Inc. v. Travelers Lloyds Ins. Co.*, 203 F. Supp. 2d 704, 718 (S.D. Tex. 2000) (applying the first publication exclusion and defeating all personal and advertising injury” claims); *Applied Bolting Technology Products, Inc. v. United States Fidelity & Guaranty Co.*, 942 F. Supp. 1029, 1037-38 (E.D. Pa. 1996) (rejecting *Irons Home* and declaring that the first publication exclusion applies to all personal and advertising injury claims—including misappropriation and copyright-infringement allegations).

447. Compare *Iron Home Builders, Inc. v. Auto-Owners Ins. Co.*, 839 F. Supp. 1260 (E.D. Mich. 1993) (concluding the exclusion applied only to advertising injury resulting from slander, libel or invasion of privacy), and *United Nat. Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, (9th Cir. 2009) (abrogating *Arnette Optic Illusions, Inc. v. ITT Hartford Group, Inc.*, 43 F. Supp. 2d 1088 (C.D. Cal. 1998) (declaring that an exclusion clause precluded the excess insurer’s for having to provide a legal defense against a cyber-infringement claim), with *Fireman’s Fund Ins. Co. of Wis. v. Bradley Corp.*, 660 N.W.2d 666, 682 (Wis. 2003) (declaring that the insurer had a duty to defend the insured against third-party advertising-injury claims—unfair-competition claim under the federal Lanham Act and trademark infringement—the entire field of trademarks, service marks, trade names, and trade dress”).

448. Compare *Motorola, Inc. v. Associated Indem. Corp.*, 878 So. 2d 824, 830-37 n.5 (La. Ct. App. 2004) (declaring that the liability insurer had a duty to defend Motorola against “delictual or mixed” causes of action that “sounded in tort”—negligent or intentional misrepresentation of cellphones’ radio-radiation emissions, and the negligent or intentional misrepresentation health risks, effects, and dangers associated with using Motorola’s cellphones) (emphasis added), and *Bryam Hills Cent. School Dist. No. 1 v. State Ins. Fund*, 467 N.Y.S.2d 690, 691-92 (1983) (declaring that the state insurance fund had no duty to defend a school district against two underlying claims that “sounded in contract”—which the insurance policy excluded) (emphasis added), with *Burlington Ins. Co. v. United Coatings Mfg. Co., Inc.*, 518 F. Supp. 2d 1241, 1251-52 nn.3-4 (D. Haw. 2007) (declaring that the commercial general liability insurer had no duty to defend an acrylic-coating seller against third-party claims because the insuring agreement

## V. THE SCOPE OF INSURERS' DUTY TO DEFEND AGAINST THIRD-PARTY CLAIMS UNDER "TRUE" AND STANDALONE CYBER-LIABILITY INSURANCE CONTRACTS

Generally, insurers offer four types of cyber-insurance agreements.<sup>449</sup> Some underwriters offer a traditional 1940s-vintage insurance agreement, like the arguably "bait-and-switch"<sup>450</sup> contracts in *Princeton* and *Secard Pools*. Such agreements cover cyber-tort, cyber-event and advertising-injury claims, but simultaneously and routinely exclude coverage for the same cyber-perils in an endorsement.<sup>451</sup> Many insurers sell standard CGL policies which weave both "cyber-risk and traditional-risk coverage" into a totally integrated and binding contract.<sup>452</sup> Still, other offer a traditional insuring agreement, comprising a "single coverage extension or endorsement" that covers cyber-injury claims.<sup>453</sup> Specialty insurers offer a stand-alone cyber-insurance contract—containing varying "coverage grants, exclusions, conditions and definitions."<sup>454</sup>

Market forecasters and analysts report that until the late 2020s, the cyber-insurance market will remain immature.<sup>455</sup> Nevertheless, some small-to-large businesses have begun to purchase "specialized" cyber-insurance contracts and CGL-cyber-risk endorsements.<sup>456</sup> More relevant, businesspersons and professionals have begun to sue cyber-risk insurers for allegedly refusing to provide a legal defense against third-party, cyber-technology claims.<sup>457</sup> Consequently, novel and timely cyberinsurance questions have emerged: 1) whether a standard 1940s-era CGL policy—plus an attached cyber-insurance endorsement—comprise a totally integrated cyberinsurance "contract"; 2) whether a cyber-insurance endorsement expands, narrows or totally replaces a Coverage-B provision in a CGL insuring agreement; and 3) whether cyber-risk endorsements and "specialized" insurance contracts

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excluded claims *sounding in both contract and tort*—negligence, negligent misrepresentation and strict products liability).

449. See *infra* notes 451-455 and accompanying text.

450. Cf. *Hardy v. Progressive Specialty Ins. Co.*, 67 P.3d 892, 897 (Mont. 2003) (rejecting the insurer's "bait and switch" exclusion defense); *Penn Star Ins. Co. v. Real Estate Consulting Specialists, Inc.*, 1 F. Supp. 3d 1168, 1175 (D. Mont. 2014) (ordering the insurer to defend the insured and stressing that 1) a court may not give effect only to an insurer's interpretation which excludes coverage; and, 2) "exclusions cannot be accomplished by bait-and-switch tactics."); *Comcast Spectacor L.P. v. Chubb & Son, Inc.*, No. 05-1507, 2006 U.S. Dist. LEXIS 55226, at \*1 (E.D. Pa. Aug. 8, 2006) (a professional hockey-team owners' alleging that they purchased a performance-bonus insurance contract for a player from Certain Underwriters at Lloyd's, London and the underwriters executed a "bait and switch" by changing the terms of the contract without notifying the owners).

451. See BLACK ET. AL., *supra* note 149, at 1.

452. See BLACK ET. AL., *supra* note 149, at 1.

453. See *id.*

454. See *id.* ("Cyber policies often provide multiple coverage grants. Insurers divide these coverages differently and sometimes include sublimits for specific coverage types. Cyber coverage grants are more narrowly divided than coverage grants in other common policy forms.")

455. See *id.* at 13.

456. See *id.* at 1.

457. See, e.g., BLACK ET. AL., *supra* note 149, at 10, 12-13 (discussing first- and third-party cyber-insurance and litigated insurance-disputed cases).

require insurers to defend insureds against all types of cyber-tort claims.<sup>458</sup> This part of the article reviews duty-to-defend cases in which courts provided conflicting answers to these timely questions.

A. CYBER-LIABILITY INSURERS' CONFLICTING LEGAL-DEFENSE OBLIGATIONS UNDER "WEB XTEND" ENDORSEMENTS

Beginning in the mid-twentieth century, businesses allowed consumers to pay for goods and services—using credit and debit cards as well as smartphone applications.<sup>459</sup> In addition, some businesses allow their customers to access dedicated websites and print or download receipts.<sup>460</sup> Historically, online-register receipts have displayed credit cards' expiration dates, as well as "more than the last five digits" of credit-card numbers.<sup>461</sup> Therefore, to arrest consumers' concerns, Congress enacted the Fair and Accurate Credit Transaction Act ("FACTA")<sup>462</sup>—an amendment to the Fair Credit Reporting Act.<sup>463</sup> In relevant part, FACTA reads:

Truncation of Credit Card and Debit Card Numbers—(1) Except as otherwise provided, no person [who] accepts credit cards or debit cards for the transaction of business shall *print* more than the last 5 digits of the card number or the expiration date upon any receipt provided . . . *at the point of the sale or transaction*. . . (2) This subsection shall apply *only to receipts [which] are electronically printed and shall not apply* to transactions. . . which . . . [record] a *credit card or debit card* account number . . . by *handwriting* or by an *imprint* or copy of the card.<sup>464</sup>

Whether FACTA § 1681c(g) covers internet-transaction receipts has generated much litigation between consumers and businesses.<sup>465</sup> More significantly, federal courts have debated whether a displayed "e-mail order confirmation" on a computer screen is an "electronically printed receipt," under FACTA. Applying the plain meaning rule, most federal courts embrace the view: a displayed confirmation of a business transaction on a

458. Cf. BLACK ET. AL., *supra* note 149, at 10 ("Some [cyberinsurance] forms or endorsements may have additional language particular to the cyber-risk context") (emphasis added).

459. See James Alm & Jay A. Soled, *W(h)ither The Tax Gap?*, 92 WASH. L. REV. 521, 530-32 (2017) (discussing the history and types of electronic-payment applications and cards).

460. See, e.g., *Romano v. Active Network Inc.*, No. 09 C 1905, 2009 WL 2916838, at \*4 (N.D. Ill. Sep. 3, 2009).

461. *Id.* at \*1.

462. 15 U.S.C. § 1681c(g) (1970).

463. 15 U.S.C. § 1681 (1970) et seq.

464. 15 U.S.C. § 1681c(g) (1970) (emphasis added).

465. See *infra* notes 471-511 and accompanying text.

computer screen is not an “electronically printed” receipt under FACTA.<sup>466</sup> A significant minority of courts, however, adopt the opposite view.<sup>467</sup>

The judicial split surrounding the scope of FACTA’s protections has contributed to the confusion surrounding another issue: whether evolving cyberinsurance endorsements require CGL insurers to defend businesspersons against consumers’ FACTA lawsuits. To illustrate, consider the duty-to-defend controversies in *Travelers Property Casualty Company of America v. Kansas City Landsmen, LLC*,<sup>468</sup> and *Whole Enchilada, Inc. v. Travelers Property Casualty Company of America*.<sup>469</sup> Remarkably, the disputes in both cases have common features: the same insurer-defendant, identical cyberinsurance endorsements, and similar third-party, cyber-tort claims under FACTA. Yet, the courts’ respective analyses and dispositions are very different.

First, in *Kansas City Landsmen*, Robert Galloway filed a putative class action in the District Court for the Western District of Missouri (the “Galloway suit”).<sup>470</sup> The defendants were Kansas City Landsmen, LLC, *d/b/a* Budget Rent A Car, and A Betterway Rent-A-Car, Inc. (“Budget Rentals”).<sup>471</sup> In the underlying complaint, Galloway alleged that Budget Rentals knowingly violated FACTA by failing to protect Galloway and other similarly situated consumers against identity theft and credit-card fraud.<sup>472</sup> More specifically, the complaint alleged that Budget Rentals printed credit-card receipts that displayed “more than the last five digits of the card’s number and expiration date.”<sup>473</sup>

Before the Galloway suit evolved, Travelers Property Casualty Company of America insured Budget Rentals under several commercial general liability insurance policies.<sup>474</sup> Upon learning about the underlying suit,

466. See *Turner v. Ticket Animal, LLC*, No. 08-61038-CIV, 2009 WL 1035241, at \*3 (S.D. Fla. Apr. 16, 2009) (holding that an e-mail order confirmation is not a printed receipt under FACTA); *Smith v. Zazzle.com, Inc.*, 589 F. Supp. 2d 1345, 1348 (S.D. Fla. 2008) (holding that “the plain meaning of the unambiguous term ‘print’ establishes that the Plaintiff does not have a cause of action under FACTA for [an] internet receipt”); *Smith v. Under Armour, Inc.*, 593 F. Supp. 2d 1281, 1287 (S.D. Fla. 2008) (holding that the plain meaning of “print” does not coincide with “display on a computer screen”); *Grabein v. Jupiterimages Corp.*, No. 07-22288-CIV, 2008 WL 2704451, at \*8 (S.D. Fla. July 7, 2008) (holding that “print” under FACTA only refers to a “tangible, paper receipt”); *King v. Movietickets.com, Inc.*, 555 F. Supp. 2d 1339, 1340 (S.D. Fla. 2008) (holding that e-mail receipts are not printed within the meaning of FACTA); *Haslam v. Federated Dep’t Stores, Inc.*, No. 07-61871 CIV, 2008 WL 5574762, at \*4 (S.D. Fla. May 8, 2008) (holding that “the word ‘print’ commonly refers to a tangible, paper receipt and not an on-screen computer display”); *Narson v. GoDaddy.Com, Inc.*, No. CV-08-0177-PHX-SRB, 2008 WL 2790211, at \*5 (D. Ariz. May 5, 2008) (holding that FACTA covers “tangible, paper receipts” but not “displays on a consumer’s computer screen”).

467. See *Romano*, 2009 WL 2916838, at \*4 (holding that a computer display is included within the term “electronically printed” under FACTA); *Grabein v. 1-800-Flowers.com, Inc.*, No. 07-22235, 2008 WL 343179, at \*3 (S.D. Fla. Jan. 29, 2008) (rejecting the argument that the statute covers only receipts printed at a specific point of sale and holding that FACTA applies to electronic receipts); *Vasquez-Torres v. Stubhub, Inc.*, No. CV 07-1328 PSG (SSx), 2007 U.S. Dist. LEXIS 63719, at \*7 (C.D. Cal. July 2, 2007) (holding that “the display of information on the plaintiff’s computer screen” is electronically printed under FACTA).

468. 592 Fed. Appx. 876 (11th Cir. 2015).

469. 581 F. Supp. 2d 677 (W.D. Pa. Sept. 29, 2018).

470. *Kansas City Landsmen*, 592 Fed. Appx. at 878.

471. *Id.*

472. *Id.* at 879.

473. *Id.*

474. *Id.*

Travelers filed a declaratory judgment action in the District Court for the Northern District of Georgia, asserting that it had no duty to defend the car-rental company.<sup>475</sup> Budget Rentals countersued, raising breach-of-contract and bad-faith claims.<sup>476</sup>

The district court reviewed the traditional CGL insurance contract and established several facts. First, a “Web Xtend Liability Endorsement” *amended* the Coverage-B provision in the 1940s-era CGL policy. The modified provision read: “Coverage B. Personal and Advertising Injury Liability is *deleted* in its *entirety* and *replaced* by Coverage B. Personal Injury, Advertising Injury and Web Site Injury Liability.”<sup>477</sup> The amended provision read: “We will pay [damages that] the insured becomes legally obligated to pay [after causing a] ‘personal injury,’ ‘advertising injury’ or ‘web site injury’. . . .”<sup>478</sup> In fact, barring the phrase “web site injury,” the CGL policy and Web-Xtend endorsement contained identical Coverage-B provisions.<sup>479</sup>

Second, the Web-Xtend endorsement also included a familiar definition of “personal injury”: “[An] injury, other than ‘bodily injury,’ [that arises] out of one or more of the following offenses: . . . (e) Oral, written or *electronic* publication of material that *appropriates* a person’s *likeness*, unreasonably places a person in a *false light* or gives unreasonable *publicity* to a person’s private life.”<sup>480</sup> Additionally, there was an exclusion clause in the endorsement. It stated that, “This insurance does not apply to. . . [personal injury] caused by or at the direction of the insured [who knows that an] act would violate the rights of another and . . . inflict personal injury.”<sup>481</sup>

Travelers moved for summary judgment. The district court, however, did not decide whether the Web Xtend endorsement covered the Galloway allegations.<sup>482</sup> Instead, the district court granted Travelers’ motion, finding that the Web-Xtend exclusion precluded coverage for allegedly and knowingly FACTA violations, and declaring that Travelers had no duty to defend.<sup>483</sup> Budget Rentals appealed to the Court of Appeals for the Eleventh Circuit.

Significantly, without deciding the issues, the Eleventh Circuit assumed implicitly: 1) electronic-payment technologies are inherently Internet-based systems which can foster identity theft<sup>484</sup> 2) credit- and debit-card violations

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475. *Id.* at 877.

476. *Id.*

477. *Id.* at 879-80 (emphasis added).

478. *Id.*

479. *Id.*; see also *An Application for the Trademark “WEB XTEND” Has Been Filed by Travelers Companies Trademarks*, INSURANCE WEEKLY NEWS, 2016 WLN 7560718, (March 18, 2016) (reporting that an agent of Travelers Companies filed a trademark application for “WEB XTEND”—general liability insurance that covers “web site injury” claims).

480. *Kansas City Landsmen*, 592 Fed. Appx. at 880 (emphasis added).

481. *Id.*

482. *Id.* at 881.

483. *Id.*

484. *Id.* at 886 (observing that FACTA’s stated purpose is to “prevent identity theft” and stressing that the remedial statute “should be construed broadly”); *cf.* *U.S. v. Bormes*, 568 U.S. 6, 8-9 (2012) (“The Fair Credit Reporting Act [was enacted] to ‘protect consumer privacy’... [Attorney Bormes] filed a putative class action... under FCRA... [Using his credit card, he] paid a \$350 federal-court filing fee... on *Pay.gov*—an Internet-based system [for processing] online payment transactions. According to Bormes,

are cyber-torts like other federal misappropriation and infringement violations,<sup>485</sup> and 3) Travelers's Web-Xtend endorsement created a completely "new" cyberinsurance contract.<sup>486</sup> Even more relevant, to resolve the duty-to-defend dispute, the Eleventh Circuit did not fashion new doctrines to interpret the cyberinsurance endorsement. Instead, the appellate court diligently applied Georgia's settled rules,<sup>487</sup> concluding that the Web-Xtend provision could potentially cover the FACTA allegations,<sup>488</sup> and declaring that the Web-Xtend exclusion did not abolish Travelers's duty to defend.<sup>489</sup>

Now, consider the simple facts and a contrary decision in *Whole Enchilada*, a case which involved a similar controversy, the same insurer, and the same Web-Xtend cyberinsurance contract. Big Burrito Holding Company ("BBHC") is a parent corporation, and Whole Enchilada, Inc. ("Enchilada") is its subsidiary.<sup>490</sup> In March 2007 and on behalf of himself and other similarly situated persons, Thomas A. Reed Jr. filed a class action against Enchilada ("Reed suit").<sup>491</sup> The suit commenced in the Western District Court for the District of Pennsylvania.<sup>492</sup> The underlying FACTA-related complaint alleged: 1) Enchilada willfully printed receipts that revealed expiration dates and "more than the last five digits" on customers' credit or debit cards<sup>493</sup>; and 2) Enchilada willfully exposed its customers to "an increased risk of identity theft and credit- and/ or debit-card fraud."<sup>494</sup>

Like Budget Rentals in *Kansas City Landsmen*, BBHC and Enchilada purchased Travelers' traditional CGL Coverage-B insurance contract.<sup>495</sup> The same controversial Web-Xtend cyber-insurance endorsement was attached to Enchilada's CGL policy.<sup>496</sup> Still, Travelers refused to defend Enchilada, asserting that the underlying FACTA allegations did not fall within the

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his *Pay.gov* electronic receipt included the last four digits of his credit card [and the]... expiration date—a willful violation of § 1681c(g)(1).”).

485. *Cf. NorFab Corp. v. Travelers Indem. Co.*, 555 F. Supp. 2d 505, 513 (E.D. Pa. May 5, 2008) (declaring that the insurer had a duty to defend the corporation against dilution, trade-dress, trademark and other intellectual-property infringement claims under a WebXtend liability insurance endorsement).

486. *Kansas City Landsmen*, 592 Fed. Appx. at 879-80 (stressing that the Web-Xtend endorsement “amended” and “replaced” *entirely* the CGL contract—promising to “pay on behalf of... the named insured all sums... that the named insured becomes legally obligated to pay as damages... under an *insured contract*”) (emphasis added).

487. *Id.* at 882 (stressing that any doubt regarding a liability insurer's duty to defend should be resolved in favor of the insured (citing *Penn-Am. Ins. Co. v. Disabled Am. Veterans, Inc.*, 490 S.E.2d 374, 376 (Ga. 1997))); *First Specialty Ins. Corp. v. Flowers*, 264 S.E.2d 453, 455 (Ga. App. Ct. 2007) (holding that an insurer may rely solely on the allegations in a third-party complaint to determine whether an exclusion precludes coverage); *Nationwide Mut. Fire Ins. Co. v. Somers*, 591 S.E.2d 430, 434 (Ga. App. Ct. 2003) (holding that an insurer has a duty to defend an entire action even if some of the allegations ultimately are not covered under an insurance contract); *City of Atlanta v. St. Paul Fire & Marine Ins. Co.*, 498 S.E.2d 782, 784 (Ga. Ct. App. 1998) (declaring that an insurer has no duty to defend when an exclusion clause bars coverage for the underlying allegations).

488. *Kansas City Landsmen*, 592 Fed. Appx. at 887.

489. *Id.* at 884.

490. *Whole Enchilada*, 581 F. Supp.2d at 684.

491. *Id.* at 682.

492. *Id.* at 684.

493. *Id.* at 683.

494. *Id.* at 683-84.

495. *Id.* at 684.

496. *Id.*

CGL's *traditional* Coverage-B provision.<sup>497</sup> Therefore, eight months after the Reed suit commenced, Enchilada filed a declaratory judgment action in the same federal district court.<sup>498</sup> Enchilada asserted that Travelers had a contractual duty to provide a legal defense.<sup>499</sup>

Unlike the Eleventh Circuit in *Kansas City Landsmen*, the federal judge in *Whole Enchilada* declared that Travelers did not have to defend Enchilada against the cyber-technology torts.<sup>500</sup> To reach that conclusion, the district court fashioned an arguably complicated analysis, acknowledging but refusing to apply various doctrines of contract interpretation in favor of Enchilada.<sup>501</sup> The federal judge reviewed Pennsylvania's law: 1) a court must respect and enforce the plain meaning of words and phrases in insuring agreement<sup>502</sup>; 2) an insurance provision is ambiguous when its terms are susceptible to more than one possible construction<sup>503</sup>; 3) when an ambiguity exists, a court must construe the language in favor of the insured and against the insurer<sup>504</sup>; and, 4) when construing an insurance contract, a court must give effect to the reasonable expectations of the insured.<sup>505</sup>

Curiously, although the "Web-Xtend Coverage B" clause *completely replaced* the "traditional CGL Coverage B" provision, the district court declared: Enchilada's duty-to-defend argument stretched "beyond any *reasonable expectation* of coverage."<sup>506</sup> Moreover, citing very specific language in the Web-Xtend clause, and dismissing the allegations in the Reed complaint, the district court declared: "[I]n order to *trigger* a duty to defend, the underlying complaint *must allege* [that a] . . . written or electronic publication. . . appropriates a person's likeness, unreasonably places a persons in a false light or gives unreasonable publicity to a person's private life."<sup>507</sup> Clearly, the *Whole Enchilada* court's declaration clashes with the Supreme Court of Pennsylvania's settled principles that the allegation in an underlying complaint *solely* determines an insurer's duty to defend.<sup>508</sup> Moreover, under Pennsylvania's law, FACTA-related allegations, rather than a particular cause of action, or just the wording in a Web-Xtend, Coverage-B provision, must *trigger* an insurer's duty to defend.<sup>509</sup> Once more, the Rush complainants asserted that Enchilada's "electronically printed receipts . . . increased the risk of identity theft,"

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497. *Id.* at 686.

498. *Id.* at 681.

499. *Id.*

500. *Id.* at 698.

501. *Id.* at 689-90.

502. *Id.* at 689 (citing *Bateman v. Motorists Mutual Ins. Co.*, 590 A.2d 281, 283 (Pa. 1991)).

503. *Id.* at 689 (citing *O'Connor-Kohler v. United Services Auto. Ass'n.*, 883 A.2d 673, 679 (Pa. Super. Ct. 2005)).

504. *Id.* (citing *Millers Capital Ins.e Co. v. Gambone Bros. Dev. Co.*, 941 A.2d 706, 715 (Pa. Super. Ct. 1998)).

505. *Id.* at 690 (citing *Bubis v. Prudential Prop. & Casualty Ins. Co.*, 718 A.2d 1270, 1272 (Pa. Super. Ct. 1998)).

506. *Id.* at 698 (emphasis added).

507. *Id.* at 695 (emphasis added).

508. *See* *Cadwallader v. New Amsterdam Casualty Co.*, 152 A.2d 484, 488 (Pa.1959) (emphasis added).

509. *See* *Mutual Benefit Ins. Co. v. Haver*, 725 A.2d 743, 745 (Pa.1999).

which probably explained BBHC's and Enchilada's decisions to purchase cyberinsurance.<sup>510</sup> Arguably, that specific allegation *potentially* fell within the Web-Xtend coverage for personal injuries—as it arose from an “electronic publication” and gave “unreasonable publicity to a person's private life.”<sup>511</sup>

B. CYBER-LIABILITY INSURERS' CONFLICTING LEGAL-DEFENSE OBLIGATIONS  
UNDER STAND-ALONE “CYBERFIRST TECHNOLOGY ERRORS & OMISSIONS  
LIABILITY” INSURANCE CONTRACTS

As reported earlier, insurers have begun to sell standalone cyberinsurance contracts.<sup>512</sup> Thus, businesspersons, practicing attorneys and other professionals must exercise elevated prudence, caution and judgment before purchasing a supposedly “true” cyberinsurance policy. And the reason is not terribly complicated: a standalone policy might be a *cyber-indemnity* rather than a cyber-liability insurance contract. Generally, under cyber-indemnity agreements, insurers do not promise to defend insureds against tort- and contract-based claims.<sup>513</sup> Instead, indemnity underwriters agree to reimburse out-of-pocket expenditures after insured merchants and professionals hire attorneys and pay legal-defense costs.<sup>514</sup> Also, indemnity insurers promise to pay damages only if certain cyber-perils or cyber-events cause third-party “website injury” or “personal and advertising injuries.”<sup>515</sup>

510. *Whole Enchilada*, 581 F. Supp. 2d at 683 (emphasis added).

511. *Id.* at 685. *See Gedeon v. State Farm Mutual Auto. Ins. Co.*, 188 A.2d 320, 321-322 (Pa.1963) (“Since the insurer thus agrees to relieve the insured of the burden of defending *even those suits which have no basis in fact*, our cases have held that the obligation to defend arises whenever the complaint filed by the injured party *may potentially* come within the coverage of the policy.”) (emphasis added).

512. *See Harrington*, *supra* note 141 (“[There is] a very distinct move from cyber-related coverage bundled into property and liability policies to standalone cyber coverage... [M]ore than two-thirds of cyber premiums in the United States are now written on standalone policies.”).

513. *See BLACK ET. AL.*, *supra* note 149, at 10 (“Many, *though not all*, cyberinsurance policies impose a duty on the insurer to defend its insured [against third-party claims]”) (emphasis added). *See also* TRAVELERS INDEMNITY COMPANY, CYBERFIRST TECHNOLOGY ERRORS & OMISSIONS LIABILITY COVERAGE FORM - PR T1 02 01 12 (2012), <http://www.eperils.com/pol/prt102.pdf> [<https://perma.cc/G7A4-KPSY>] (last visited June 8, 2019) (A product of the Insurance Services Office, Inc). Professionals, practicing attorneys and others who use the Web frequently to “publish” and make transactions are strongly encouraged to read *the entire* insuring agreement carefully.

514. *See Millennium Lab., Inc. v. Allied World Assurance Company (U.S.), Inc.*, 726 Fed. Appx. 571, 574 (9th Cir. 2018) (underscoring that indemnity insurance contracts “are not written on a duty-to-defend basis” like a comprehensive general liability policy and reaffirming that defense costs are damages requiring indemnification); *Exec. Risk. Indem., Inc. v. Jones*, 89 Cal. Rptr. 3d 747, 751 n.4 (Cal. Ct. App. 2009) (“D & O policies are indemnity-only policies, whereby the insurer reimburses defense expenditures only after the insured selects counsel, controls the defense, and submits the defense bill.”).

515. *Cf. Florida Farm Bureau Ins. Co. v. Martin*, 377 So. 2d 827, 829 (Fla. Dist. Ct. App. 1979) (stressing that indemnity insurance's primary purpose is to pay restitution after a loss); *Harriett v. Bal-las*, 383 Pa. 124, 130 (Pa. 1955) (reaffirming that “the purpose of buying indemnity insurance is primarily to protect oneself from serious financial losses”); *Automobile Underwriters' Ins. Co. v. Murrah*, 40 S.W.2d 233, 233 (Tex. Ct. App. 1931) (stressing that the insured purchased an indemnity-insurance contract to pay proceeds when the insured accidentally injures third parties and becomes legally obligated to pay damages). *See also CyberFirst® Coverage for Technology Companies*, TRAVELERS INSURANCE, <https://www.travelers.com/cyber-insurance/technology> [<https://perma.cc/B2SR-SLYN>] (last visited June 8, 2019) (reporting that CyberFirst provides broad and flexible coverage to meet the complex needs of technology companies. And, it covers the risks and liabilities associated with technology errors and omissions, network and information systems breaches and communications-media violations).

Still, given the purportedly bright-line distinction between cyber-liability and cyber-indemnity insurance,<sup>516</sup> an important question has evolved: whether *cyber-indemnity* insurers have a *duty to defend* cyberspace users and cyber-technology companies against cyber-tort lawsuits? Quite unexpectedly, the author uncovered two striking, timely and highly instructive decisions which provide conflicting analyses and different answers. Yet, the controversies in both cases involved the same cyber-insurer, the same cyberinsurance contract, and fairly identical third-party conversion claims.<sup>517</sup>

Consider the first controversy in *Travelers Property Casualty Company of America v. Federal Recovery Services, Inc.*<sup>518</sup> In 2012, Global Fitness Holdings, LLC (“G-Fitness”) owned and operated fitness centers in numerous states.<sup>519</sup> Paramount Acceptance is a multi-pronged business entity, comprising Federal Recovery Services, Inc. (“FRS”), and Federal Recovery Acceptance, Inc., *d/b/a* Paramount Acceptance (“FRA”).<sup>520</sup> During the same period, FRA/FRS sold “gym software and efficient billing services” to physical fitness centers.<sup>521</sup>

G-Fitness collected membership fees, using its members’ credit-card or bank-account information.<sup>522</sup> Needing professional data-management assistance, G-Fitness formed a “servicing contract” with FRA.<sup>523</sup> G-Fitness promised to upload the members’ credit-card, checking-account, and/or savings-account information to FRA’s encrypted website.<sup>524</sup> FRA agreed to withdraw appropriate funds from the members’ accounts, deduct a service fee, and transfer the remaining funds to G-Fitness.<sup>525</sup> To minimize security risks and on behalf of G-Fitness, FRA retained the only digital copy of the members’ accounts and payment history.<sup>526</sup>

In due course, G-Fitness decided to sell its enterprise and transfer its customers’ accounts to L.A. Fitness.<sup>527</sup> FRA only returned some of the electronic data, withholding the members’ account data until G-Fitness satisfied allegedly outstanding debts.<sup>528</sup> Ultimately, G-Fitness sued both FRA/FRS in the District Court for the Eastern District of Kentucky, alleging conversion of property, tortious interference with a contractual relationship, breach of

516. *Cf.* *Waugh v. American Casualty Co.*, 378 P.2d 170, 176 (Kan.1963) (discussing the difference between a liability and an indemnity insurance policy).

517. *See infra* notes 518-546 and accompanying text.

518. 103 F. Supp. 3d 1297 (D. Utah. 2015).

519. *Id.* at 1299.

520. Compl. Decl. Relief ¶¶ 3-4, *Travelers Prop. Cas. Co. of Am. v. Fed. Recovery Servs., Inc.*, No. 2:14CV00170, 2014 WL 1015765 (D. Utah. Mar. 7, 2014) [hereinafter *Declaratory Relief Pleading—Travelers v. Federal Recovery*].

521. *About Us*, PARAMOUNT ACCEPTANCE COMPANY, <https://paramountacceptance.com/about-us/> [https://perma.cc/9PCV-93Q9] (visited last June 11, 2019).

522. *Federal Recovery Services, Inc.*, 103 F. Supp. 3d at 1299.

523. *Id.*

524. *Id.*

525. *Id.*

526. *Id.*

527. *Id.*

528. *Id.* at 1300.

contract, and breach of the implied covenant of good faith and fair dealing. (“G-Fitness suit”).<sup>529</sup> The underlying action was transferred to the District Court for the District of Utah.<sup>530</sup>

When the *G-Fitness* dispute unfolded, Travelers Casualty Insurance Company of America (“Travelers Casualty”), and Travelers Property-Casualty Company of America (“Travelers Property”) insured “FRA and/or FRS” under two different policies.<sup>531</sup> Travelers Casualty insured only FRA under a commercial general liability (“CGL”) insurance contract.<sup>532</sup> Rather significantly, excluding an endorsement, FRA’s CGL policy mirrored exactly the CGL insurance contracts that the insureds purchased in *Kansas City Landsmen* and *Whole Enchilada*. In particular, FRA’s policy contained a Coverage-B “personal and advertising injury” clause, which required Travelers Casualty to pay proceeds when FRA became “legally obligated to pay. . . damages.”<sup>533</sup> The CGL agreement also obligated Travelers Casualty—the liability insurer—to defend FRA “against any suit.”<sup>534</sup>

In contrast, Travelers Property insured “both FRA and FRS” under a “CyberFirst Technology Errors and Omissions Liability” insurance contract (“CyberFirst policy”).<sup>535</sup> Although the word “liability” appeared in the name, the CyberFirst agreement was a standalone cyber-indemnity insurance contract. To prove the point, the “Errors and Omissions Liability Coverage” provision read in pertinent part:

a) We *will pay* those sums that the insured must pay as “*damages*”. . . . The amount we will pay for “*damages*” is limited. . . . b) This insurance applies to [a] *loss only if*. . . [t]he *loss* arises out of . . . “your work” [that was]. . . performed for others. . . [or the] loss is caused by an “errors and omissions *wrongful act*”. . . .”<sup>536</sup>

And to underscore that the CyberFirst contract was a cyber-indemnity rather than a cyber-liability agreement, the coverage provisions contained the following relevant definitions:

*Damages* means . . . compensatory damages imposed by law. . . or consequential damages for the *breach of a contract*. . . .<sup>537</sup> *Errors and omissions wrongful act* means any error, omission or *negligent act* arising out of your “*technology products or services*.”<sup>538</sup> . . . [And] *technology products or services* means any computer or electronic information technology product . . . or service provided or performed for others, including:

- a) System, network . . . or web-site analysis. . . or related services;
- b) Software development, installation. . . licensing or maintenance;

529. *Id.* at 1300.

530. *Declaratory Relief Pleading—Travelers v. Federal Recovery*, 2014 WL 1015765, ¶ 8.

531. *Id.* ¶¶ 1-2.

532. *Id.* ¶ 19 (“Travelers Casualty issued (a Commercial General Liability) covering December 13, 2011 to December 13, 2012. . . FRA is the only named insured under the General Liability policy”).

533. *Id.* ¶ 22.

534. *Id.*

535. *Id.* ¶ 16 (“Travelers Property issued policy No. TT 06307323—covering the period from December 30, 2011 to December 30, 2012—pursuant to all of the terms, conditions, limitations, exclusions, and endorsements”).

536. *Id.* ¶ 17 (emphasis added).

537. *Id.* ¶ 18 (emphasis added).

538. *Id.*

- c) Technical training, staffing, maintenance, repair or support services;
- d) Electronic or computer. . . hardware marketed or sold to others;
- e) Electronic [data]processing, storage, and transmission; or
- f) Hosting, managing or administering computer systems[.]<sup>539</sup>

Referencing the coverage provisions under the CyberFirst indemnity and the CGL agreements, FRA and FRS asked both Travelers Property and Travelers Casualty to provide a legal defense against the *G-Fitness* action.<sup>540</sup> Reserving its rights to litigate the duty-to-defend issue, Travelers Casualty launched a defense.<sup>541</sup> Although the CyberFirst contract *did not* have a duty-to-defend clause, Travelers Property also reserved its rights and began to defend FRA.<sup>542</sup> Shortly thereafter, the insurers filed a declaratory-judgment action.<sup>543</sup>

The question before the federal district court was whether Travelers Property had a duty to defend FRA and FRS under the CyberFirst policy.<sup>544</sup> Curiously, to interpret the *indemnity* insurance contract, the district court *applied duty-to-defend rules*, that the Utah courts, and a majority of supreme courts, only apply to interpret *liability* insurance contracts.<sup>545</sup> Finding that the *G-Fitness* complaint did not include a *negligence* claim, the district court declared that Travelers Property had no duty to defend FRA under the CyberFirst indemnity policy.<sup>546</sup> Arguably, the District Court of Utah misapplied liability-insurance-specific rules to resolve a duty-to-defend dispute under a cyber-indemnity insurance agreement,<sup>547</sup> because the CyberFirst contract did not contain a duty-to-defend clause which required an interpretation.

However, the *G-Fitness* complaint included another allegation—breach of the implied covenant of good faith and fair dealing.<sup>548</sup> Under Utah’s law, a cause of action for breaching the implied covenant sounds in contract.<sup>549</sup> However, in other states, the same breach sounds in tort.<sup>550</sup> Thus, will courts

539. *Id.*

540. *Federal Recovery Services, Inc.*, 103 F. Supp. 3d at 1301.

541. *Id.*

542. *Id.*

543. *Id.*

544. *Id.*

545. *Id.*

546. *Id.* at 1302 (“To trigger Travelers Property’s duty to defend, there must be allegations in the *Global* action that sound in negligence... [Here,] there are no such allegations”).

547. Compare *ALPS Auto., Inc. v. Gen. Motors Corp.*, No. 256597, 2006 WL 51141, at \*1 (Mich. Ct. App. Jan. 10, 2006) (acknowledging that the general rules for contractual indemnity—rather than specific duty-to-defend rules—apply to indemnity claims and applying the distinction when a trial court erroneously resolves a duty-to-defend controversy, rather than a controversial indemnity provision), with *Certain Underwriters at Lloyd’s, London v. Boeing Co.*, 385 Ill. App. 3d 23, 41 (2008) (reaffirming that any obligation to repay insureds’ costs for settling a suit arises out of the insurer’s duty to indemnify), and *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 154 Ill.2d 90, 127 (1992) (stressing that once an insured accrues liability for underlying claims, the insurer’s duty to indemnify rather than duty to defend is implicated).

548. *Federal Recovery Services, Inc.*, 103 F. Supp. 3d at 1300.

549. See *Guardian Title Company of Utah v. Mitchell*, 54 P.3d 130, 134 (Utah 2002) (declaring that Guardian Title’s implied covenant of good faith and fair dealing claim “sounded exclusively in contract”).

550. See, e.g., *Carmichael v. Adirondack Bottled Gas Corp. of Vermont*, 635 A.2d 1211, 1216 (Vt. 1993) (reaffirming that an action for breaching an implied covenant of good faith is essentially a tort action, because the duty of good faith is imposed by law and is not a contractual); *Gibson v. Western Fire Ins. Co.*, 682 P.2d 725, 738 (Mont. 1984) (concluding that an action breaching

force cyber-indemnity insurers to defend cyber-technology designers, manufacturers, marketers, sellers, and consumers for allegedly breaching the implied covenant of good faith and fair dealing? Very likely, the federal court's decision in *Federal Recovery Services* will contribute to more judicial confusion surrounding the scope of coverage under evolving cyber-indemnity insurance contracts.

To illustrate, consider the final duty-to-defend dispute in *Travelers Property Casualty Company v. Medversant Technologies, LLC*.<sup>551</sup> Affiliated Health Care Associates (“AHCC”) is an Illinois professional corporation.<sup>552</sup> Edward Simon is a chiropractor who provides medical services in California.<sup>553</sup> Medversant Technologies, LLC is a California-based technology company, providing data management, innovative technologies as well as centralized, standardized, and automated services to the healthcare industry.<sup>554</sup>

The Telephone Consumer Protection Act (“TCPA”)<sup>555</sup> was enacted to protect privacy interests.<sup>556</sup> TCPA bars faxed advertisements and other highly intrusive, artificial or prerecorded messages.<sup>557</sup> The Junk Fax Prevention Act of 2005 (“JFPA”)<sup>558</sup> amended TCPA, and created an exception: if a business or professional entity forms a business relationship with a consumer, JFPA allows the entity to send commercial facsimiles to the consumer without securing the consumer's express consent.<sup>559</sup>

In September 2014, Simon filed a class action against Medversant in the District Court for the Central District of California.<sup>560</sup> The complaint alleged that Medversant sent “tens of thousands of unauthorized junk faxes” to Simon and other similarly situated professionals—violating the TCPA

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the implied covenant of good faith and fair dealing also sounds in tort); *Comunale v. Traders & General Ins. Co.*, 328 P.2d 198, 203 (Cal. 1958) (holding that was held that an action for breaching the implied covenant of good faith and fair dealing sounds in both contract and tort). *See also* *Arnold v. National County Mutual Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) (declaring that a common law duty of good faith and fair dealing exists if insurers and insureds have a “special relationship,” and a breach of that common-law duty permits a cause of action—sounding in tort and allowing insured to recover actual and punitive damages).

551. No. CV15-8205 PA (AGRX), 2016 WL 6609197, at \*1 (C.D. Cal. Apr. 14, 2016).

552. First Am. Compl. ¶ 9, *Travelers Prop. Cas. Co. v. Medversant Techs., LLC*, No. CV15-8205 PA (AGRX), 2016 WL 6609197 (C.D. Cal. Apr. 14, 2016).

553. *Id.* at 8.

554. *About Us*, MEDVERSANT, <https://www.medversant.com/about-us.html> [<https://perma.cc/5685-ZX5H>] (last visited June 13, 2019) (“Our web-based provider data management platform automatically and continuously checks for changes in license, OIG status, DEA certification, contact information, and much more... Whether you are a government agency, healthcare organization, or medical provider, our solutions decrease cost and risk while increasing patient safety”).

555. 47 U.S.C. § 227(b)(1)(A)(iii) (2018).

556. *See* *International Science & Tech. Inst. v. Inacom Commc'n., Inc.*, 106 F.3d 1146, 1150 (4th Cir. 1997) (“the TCPA was enacted to ‘protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers’” (citing S. Rep. No. 102–178, at 1 (1991))).

557. *See* *Missouri ex rel. Nixon v. Amer. Blast Fax, Inc.*, 323 F.3d 649, 657 n.5 (8th Cir. 2003) (citing S. Rep. No. 102–178, at 4 & n.4, at 5 & n.5 (1991)).

558. 47 U.S.C. § 227(a)(2) (2018).

559. *Chamber of Commerce of U.S. v. Lockyer*, No. 2:05-CV-2257MCEKJM, 2006 WL 462482, at \*3 (E.D. Cal. Feb. 27, 2006).

560. First Am. Compl., *supra* note 552, ¶ 4.

and JFPA (“Simon suit”).<sup>561</sup> Three months later, AHCA also filed a class action against Medversant in the District Court for the Eastern District of Illinois (“AHCA suit”).<sup>562</sup> The *AHCA* complaint contained similar cyber-tort claims: common-law nuisance, conversion, trespass to chattel as well as allegedly violations under Illinois Consumer Fraud Act<sup>563</sup> and the TCPA.<sup>564</sup>

When the two class actions commenced, Travelers Property Company of America (“Travelers Property”) insured Medversant’s business activities under multiple insurance contracts: 1) a series of pre-2012 commercial general liability (CGL) insurance contracts, 2) a post-2012 CGL policy, and 3) a CyberFirst Technology Errors and Omissions Liability (CyberFirst) insurance contract.<sup>565</sup> Medversant contacted Travelers Property and demanded a legal defense.<sup>566</sup> Travelers agreed to defend Medversant, reserving its right to petition a court for a review and various remedies.<sup>567</sup>

Eventually, the insurer filed a declaratory-judgment action in the Central District Court for California.<sup>568</sup> Before the federal district court, Travelers Property asserted: 1) the CyberFirst indemnity-insurance policy as well as each CGL insurance contract expressly excluded coverage for the *Simon* and *AHCA* claims; 2) the CyberFirst indemnity and CGL policies precluded a legal defense; and 3) the contracts required Medversant to reimburse funds that Travelers had spent to defend Medversant.<sup>569</sup>

The federal judge reviewed relevant sections in the various insurance contracts. Like the Coverage-B insurance provisions in *Princeton Express*, *Secard Pools*, *Kansas City Landsmen*, *Whole Enchilada* and *Federal Recovery Services*, each of the pre- and post-2012 policies stated that Travelers Property would defend Medversant “against claims which are covered or potentially covered under the policy.”<sup>570</sup> Furthermore, covering a five-year period, an exclusion endorsement was attached to each CGL policy.<sup>571</sup> The definition of “unsolicited communication” in the pre-2012 endorsement read:

This insurance *does not apply* to ‘bodily injury’, ‘property damage’, ‘personal injury’, ‘advertising injury’, or ‘website injury’ arising out of *unsolicited communications* by. . . any insured. *Unsolicited communications* means any form of communication—facsimile, electronic mail, posted mail or telephone —[and]. . . communications which [actually or allegedly violate] the Telephone Consumer Protection Act . . . and/or state statutes[.]<sup>572</sup>

561. First Am. Compl., *supra* note 552, ¶ 4.

562. First Am. Compl., *supra* note 552, ¶ 4.

563. 815 Ill. Comp. Stat. 505/2; 720 Ill. Comp. Stat. 5/26-3(b).

564. Travelers Prop. Cas. Co. v. Medversant Techs., LLC, No. CV15-8205 PA (AGRX), 2016 WL 6609197, at \*1 (C.D. Cal. Apr. 14, 2016).

565. *Id.*

566. First Am. Compl., *supra* note 552, ¶ 5.

567. First Am. Compl., *supra* note 552, ¶ 5.

568. First Am. Compl., *supra* note 552, ¶ 5.

569. First Am. Compl., *supra* note 552, ¶ 5.

570. First Am. Compl., *supra* note 552, ¶ 12.

571. First Am. Compl., *supra* note 552, ¶ 16.

572. Opp’n of Def. at 5, Travelers Prop. Cas. Co. v. Medversant Techs., LLC, No. CV15-8205 PA (AGRX), 2016 WL 3356265 (C.D. Cal. Feb. 22, 2016) (emphasis added) [hereinafter Medversant’s Opposition Travelers’ Motion].

In 2012, Travelers modified the “unsolicited communications” definition, removing all references to TCPA-based claims.<sup>573</sup> The post-2012 CGL exclusion read: “‘Unsolicited communication’ means *any* communication, in *any* form, that the recipient . . . did not specifically request[.]”<sup>574</sup> Reading the exclusionary language broadly and applying California’s law, the district judge determined that the CGL policies unambiguously precluded coverage for all of the *Simon* and *AHCA* claims.<sup>575</sup> Consequently, Travelers had no obligation to defend Medversant against those charges.<sup>576</sup>

Like the policy in *Federal Recovery Services*, the CyberFirst contract in *Medversant* did not have a duty-to-defend clause.<sup>577</sup> But, relying on the representations of Travelers’ agent, Medversant assumed that its failure to include an “opt out notice on thousands of unauthorized junk faxes” would be “potentially covered,” triggering the insurer’s duty to defend.<sup>578</sup> For nearly a year, Travelers actually defended Medversant. Then, the insurer suddenly stopped defending less than six months before the underlying trial began.<sup>579</sup> Moreover, the cyber-indemnity insurer demanded and Medversant paid a \$10,000 deductible—a condition precedent under the insurance contract.<sup>580</sup>

So, did the cyber-insurer have a *contractual* duty to defend under the CyberFirst-indemnity insurance contract? Travelers said “no.” Medversant said “yes.”<sup>581</sup> The Central District Court for California agreed with Medversant, and also said “yes.”<sup>582</sup> Applying the doctrine of waiver,<sup>583</sup> the court found that Travelers potentially waived an otherwise sound “no-coverage defense” by demanding and accepting the deductible payment.<sup>584</sup> In the end, the federal judge denied Travelers Property’s motion for summary-

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573. *Id.*

574. *Id.*

575. *Medversant Techs.*, 2016 WL 6609197, at \*4.

576. *Id.* at \*4-5 (“According to Medversant, . . . Travelers [has] a duty to defend. . . under the CGL policies. . . Medversant has incorrectly interpreted the CGL policies. . . [T]he pre-2012 [and] post-2012 exclusion[s] unambiguously preclude[] coverage for all communications made in violation of the TCPA [as well as California and Illinois consumer protections statutes]” The court also stressed that the underlying common law claims were excluded from coverage because they arose out of the same facts and events that formed the basis of the alleged TCPA violations).

577. First Am. Compl. ¶ 11, *Travelers Property Ca. Co. of America v. Medversant Technologies, LLC*, No. 2:15-cv-8205-PA (AGR), 2015 WL 11111506 (C.D. Cal. Oct. 28, 2015). *See also* TRAVELERS INDEMNITY COMPANY, *supra* note 513.

578. Medversant’s Opposition Travelers’ Motion, *supra* note 572, at 5.

579. Medversant’s Opposition Travelers’ Motion, *supra* note 572, at 18.

580. *Medversant Techs.*, 2016 WL 6609197, at \*5.

581. Medversant’s Opposition Travelers’ Motion, *supra* note 572, at 18 (For nearly a year, . . . Travelers defended Medversant under the CyberFirst policy before filing this action. . . By defending Medversant for nearly a year and accepting Medversant’s policy deductible payment, however, Travelers acted inconsistently with any intent to enforce its apparently reserved rights”).

582. *Medversant Techs.*, 2016 WL 6609197, at \*4.

583. *Id.* at \*5. *See VierraMoore, Inc. v. Cont’l Cas. Co.*, 940 F. Supp. 2d 1270, 1283 (E.D. Cal. 2013) (reaffirming that an insurer “waives its right to deny coverage by intentionally relinquishing that right. . . or by acting in a manner inconsistent with an intent to enforce that right as to induce a reasonable belief that such right has been relinquished” (quoting *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal. 4th 1, 33-34 (1995))).

584. *Medversant Techs.*, 2016 WL 6609197, at \*6.

judgment, and refused to declare that the cyberinsurance contract barred a legal defense.<sup>585</sup>

Like the court's truncated analysis in *Federal Recovery Services*, the *Medversant* court's waiver analysis is likely to generate another judicial split surrounding the scope of coverage under evolving cyber-indemnity insurance contracts. The reason is familiar: an insured's subjective understanding of its insurer's conduct is insufficient to fashion a successful waiver argument.<sup>586</sup> Instead, an effective waiver defense requires clear and convincing evidence of an *intentional* relinquishment of a known right.<sup>587</sup> Such evidence is clearly absent in *Medversant*. Furthermore, the general rule is clear: the doctrines of waiver and estoppel may not expand or create any coverage or obligation (duty-to-defend or otherwise) under any insurance contract.<sup>588</sup> Both an insurer's and insured's intent to enter into an agreement—the meeting of minds—is necessary to add, expand or modify rights and obligations under insurance contracts—including evolving cyberinsurance contract.<sup>589</sup> Arguably those prerequisites are not satisfied in *Medversant*.

## VI. AN EMPIRICAL STUDY OF DECLARATORY JUDGMENTS IN FEDERAL AND STATE COURTS' DISPOSITIONS OF DUTY-TO-DEFEND DISPUTES UNDER TRADITIONAL AND CYBER-RISK INSURANCE CONTRACTS

In recent years, diverse sets of opinions have emerged about whether cyber-professionals and cyber-technology businesses should purchase traditional or markedly more expensive cyber-liability insurance.<sup>590</sup> For example, *cyber-liability* insurers and brokers stubbornly assert that every twenty-four hours, a majority of “commercial businesses face *very scary* cyber-related risks—hackers, data breaches, computer viruses, cyber extortion, security breach-related expenses, fines and penalties and the potential loss of reputation.”<sup>591</sup> Cyber-liability insurers also stress that cyber-risk insurance “is *absolutely necessary*”<sup>592</sup>; therefore, law practitioners and other businesses “*need cyber*

585. *Id.*

586. *See, e.g., City of Ukiah v. Fones*, 64 Cal. 2d 104, 107-108 (1966).

587. *Id.*

588. *Cf. Ulico Cas. Co. v. Allied Pilots Assoc.*, 262 S.W.3d 773, 787 (Tex. 2008) (reiterating that waiver and estoppel “generally cannot be used to create insurance coverage when *none* exists under the terms of an insurance policy... Changing a policy's coverage to encompass risks [*which are*] not covered must be... contractual) (emphasis added).

589. *Id.*

590. *See* Virginia Hamill, *Cyber Liability Insurance: Cost, Coverage & More*, FITSMALLBUSINESS.COM (May 22, 2019), <https://fitsmallbusiness.com/cyber-liability-insurance/> [<https://perma.cc/6N5B-EYB5>] (“[A] number of factors—including revenue and number of stored personal records—can raise annual premiums to the higher end of the price, around \$7,500 for businesses of all sizes. Small businesses whose primary operation is handling larger firms' data may see significantly higher costs—sometimes as high as \$40,000 per year.”) (emphasis added). *See also* Nelson & Simek, *supra* note 160, at 14 (“Expensive? Oh yes. Get ready for sticker shock when you purchase cyber insurance”).

591. Shawn Dougherty, *Are You Covered for Cyber Exposures?*, VERISK BLOG (Aug. 14, 2013), <https://www.verisk.com/blog/are-you-covered-for-cyber-exposures/> [<https://perma.cc/C49QE:QV9>].

592. Nelson & Simek, *supra* note 160, at 14 (emphasis added).

insurance,” if they rely on various cyber technologies.”<sup>593</sup> On the other hand, some *cyber-technology* experts and cyber-savvy attorneys argue: 1) cyber-risk insurance contracts are extremely complicated, comprising too many ambiguous words and phrases<sup>594</sup>; 2) cyber-risk insurance contracts confuse even highly sophisticated professionals and businessowners,<sup>595</sup> who are more likely to “flood the cyberinsurance market<sup>596</sup>; and, 3) many consumers’ cynicism about cyberinsurance is totally justified.<sup>597</sup>

Certainly, one should not readily embrace or summarily dismiss these competing opinions, before weighing some compelling and provable facts. First, approximately sixty national and international underwriters sell unstandardized cyber-liability insurance contracts.<sup>598</sup> Moreover, in theory, cyberinsurance is “relatively new.”<sup>599</sup> It is important to highlight, however, a prior observation: barring a few cyber-related terms, the Coverage-B language in standalone cyber-liability insurance contracts mirrors the Coverage-B language in vintage-1940s liability insurance contracts.<sup>600</sup> And, yes. Like traditional liability insurance, cyber-liability insurance confuses many “sophisticated” and “unsophisticated” professionals and businesspeople.<sup>601</sup> Still, the cyber-insurance market is expanding rapidly, promising to generate approximately \$6.2 billion in sale by 2020 and growing 20 to 30 percent per year in the near future.<sup>602</sup>

Even more relevant, to predict future losses and litigation costs, *traditional* liability insurers regularly analyze an extremely large historical database, which contains insurance claims-loss and judicial-outcomes information.<sup>603</sup> In contrast, *cyber-liability* insurers have not generated a critical mass of *cyber-insurance-specific* experiences and claims-loss data that would allow them to predict their likelihood of winning duty-to-defend lawsuits

593. Nelson & Simek, *supra* note 160, at 14 (emphasis added).

594. See Caitlin Plunkett, *Untangling Cyber Insurance Confusion*, VERISK BLOG (Oct. 16, 2018), <https://www.verisk.com/insurance/visualize/untangling-cyber-insurance-confusion/> [https://perma.cc/R7DV-SFK6] (reporting the findings of a worldwide survey involving cyber insurance brokers, agents, and underwriters and disclosing that potential insureds do not understand cyber-risk exposures and cyber-risk insurance coverages).

595. Nelson & Simek, *supra* note 160, at 14 (emphasis added).

596. Harrington, *supra* note 141.

597. Nelson & Simek, *supra* note 160, at 14 (emphasis added).

598. See Judy Selby, *Removing the Mystery from Cyber Insurance*, LAW PRACTICE MAGAZINE (Jan. 1, 2019), [https://www.americanbar.org/groups/law\\_practice/publications/law\\_practice\\_magazine/2019/january-february/JF2019Selby/](https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2019/january-february/JF2019Selby/) [https://perma.cc/FKX4-A54L].

599. *Id.*

600. See *infra* notes 697-699 and accompanying text.

601. See Judy Selby, *supra* note 598.

602. Press Release, Verisk, ISO’s New Cyber Insurance Program Implemented in 42 States and U.S. Territories (Mar. 19, 2018), <https://www.verisk.com/press-releases/2018/march/isos-new-cyber-insurance-program-implemented-in-42-states-and-us-territories/> [https://perma.cc/YEP8-W429]. See also Nelson & Simek *supra* note 160, at 17 (“According to Fitch Ratings, in 2016 the cyber insurance industry grew by 35 percent. Allied Market Research predicted that the global market may reach \$14 billion by 2022”).

603. Cf. Josephine Wolff, *What Does Cyberinsurance Actually Cover?*, SLATE MAGAZINE (July 30, 2018, 8:00 AM), <https://slate.com/technology/2018/07/cyberinsurance-company-refuses-to-pay-out-full-amount-to-bank-after-hacking.html> [https://perma.cc/N5EC-5L74] (“[R]etailers, banks, and healthcare providers began [exploring] cyber-insurance in the early 2000s... [After accumulating 20 years’ worth of cyber-insurance-claims data], underwriters still struggle with how to model and quantify a unique type of risk...Typically [insurers] use the past as prediction for the future”) (emphasis added).

against professionals and businesses.<sup>604</sup> Therefore, given the absence of statistically reliable predictive models,<sup>605</sup> another important question has emerged: why do cyber-liability insurers advertise their contracts so widely, confidently and aggressively without relying on cyber-insurance-specific claims-loss information?

Briefly, the Insurance Services Office (“ISO”) regularly collects claims-loss and costs-loss statistics focusing on approximately twenty predictor variables.<sup>606</sup> Currently, ISO’s database comprises “more than 32,000” historical or *traditional-insurance-dispute* cases—including the outcomes of *litigated* and *settled* insurance disputes.<sup>607</sup> ISO sells predictive analytics and historical data to cyber-risk insurers.<sup>608</sup> Therefore, like traditional insurers, *cyber-liability* insurers can search ISO’s huge database, employ robust predictive models, secure answers to *traditionally litigated* questions, and make sound statistical inferences about the likelihood of winning cyber-related, duty-to-defend disputes in the state, and federal courts.<sup>609</sup>

Actually, ISO’s combined databases contain approximately twenty billion insurance-claims records.<sup>610</sup> Thus, after carefully retrieving and analyzing *traditional duty-to-defend cases*, cyber-liability insurers probably have found reasonably sound *inferential answers* to several timely questions: 1) whether *underlying negligence* or *intentional* cyber-technology claims are likely to influence courts’ disposition of duty-to-defend disputes; 2) whether *state* or *federal courts* are likely to decide duty-to-defend controversies against cyber-liability

604. Cf. DELOITTE CENTER FOR FINANCIAL SERVICES, DEMYSTIFYING CYBER INSURANCE COVERAGE (2017), <https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/financial-services/deloitte-nl-fsi-demystifying-cyber-insurance-coverage-report.pdf> [<https://perma.cc/R65A-8ETA>] (“[I]nsurers have struggled to get their arms around cyber risk... [because] the lack of historical data... makes it difficult to build... *predictive models* that can help assess probability of loss... [I]nsurers have not been selling cyber insurance long enough or on a big enough scale to generate their own critical mass of data... Another challenge facing cyber insurers... is the inherent volatility of this ever-evolving risk, which limits the value of historical experience and undermines the exposure’s predictability. Existing cyber exposures keep mutating, while new ones are continually arising... [E]ven as insurers collect more data and *hone predictive models* based on prior cyberthreats, the underlying exposure keeps changing. It’s therefore difficult to create a reliable predictive model... Insurers simply don’t know what they don’t know when it comes to cyber risks”) (emphasis added).

605. *Id.*

606. Plunkett, *supra* note 594 (“[The Insurance Services Office] has developed a flexible cyber program... The report describes how ISO leveraged a data set—with more than 32,000 historical cases—to create this program... Verisk’s AIR Worldwide business has tackled the data challenge with its cyber risk analytics—[assessing] risk selection, portfolio management, and risk transfer”).

607. Cf. Press Release, Verisk, *supra* note 602 (“ISO announced... that 42 states and U.S. territories have implemented ISO’s cyber insurance program, which features an array of coverage options and extensive rating information to help insurers address the growing and diverse cyber market... Cyber risk is changing at a rapid pace, leaving many insurers without the tools... to serve the growing market”).

608. See Marianne Bonner, *What is the Insurance Services Office?*, THE BALANCE SMALL BUSINESS (May 16, 2019), <https://www.thebalancesmb.com/insurance-services-office-iso-462706> [<https://perma.cc/9GBJ-MBH6>] (“Losses become *more predictable* as the amount of data increases... [I]nsurers can predict future losses more accurately when they have a large amount of loss data... [M]any insurers rely on ISO for data. ISO collects loss data from the insurers, ...processes all of the data... [and resells it] to the insurers—[who use the] data to... look for loss trends”) (emphasis added).

609. *Id.* (“One important service ISO provides for insurers is policy writing... Insurers can avoid... some of the risks associated with policy writing... [Courts may interpret insurers’ crafted policies differently] than the insurers intended. ISO forms generally present fewer risks since [courts have already analyzed] much of the policy language”).

610. *Id.* (“[ISO’s] databases of more than 19 billion records—with a few billion new records being added each year—[contain insurance details as well as risk-management information]”).

insurers or in favor of insured cyber-professionals and cyber-merchants; 3) whether third parties' *federal cyber-technology* claims are likely to influence courts' dispositions of insurance-defense disputes; and 4) whether cyber-liability insurers' *contract-based affirmative defenses* are likely to influence courts' duty-to-defend declarations.

Once more, Coverage-B provisions in both traditional- and cyber-liability insurance agreements are nearly identical. And cyber-liability insurers use historical claims-loss data and *outcomes in litigated cases* to predict future cyber-specific losses and litigation costs. On the other hand, both "sophisticated" and "unsophisticated" insureds—various business entities, law firms, solo attorneys, and other professionals—are precluded from accessing ISO's rich databases.<sup>611</sup> Therefore, the author conducted an empirical study to determine the statistical effects of certain predictors on courts' dispositions of duty-to-defend disputes.

The discussions in Parts IV and V revealed two important facts. Cyber-liability insurance is fairly new. Thus, the very *same legal principles* should trigger *both* traditional- and cyber-liability insurers' duty to defend. As of 2019, less than one hundred cyber-related insurance disputes had been litigated. Nevertheless, split judicial declarations have begun to occur among state and federal courts over whether cyberinsurers have a duty to defend insureds against cyber-technology torts.

In this part, the author presents the results of the empirical study. The investigation covered both *traditional-* and *cyber-liability* insurance coverage. The study was designed to measure the effects of *legal* and *extralegal* variables on courts' disposition of duty-to-defend disputes. Perhaps, the reported statistically significant findings will help insured businesspersons and professionals to predict or make *reasonable inferences* about their likelihood of prevailing against ISO-supported cyberinsurers in state and federal courts.

#### A. SOURCE OF DATA AND SAMPLING PROCEDURES

A simple null hypothesis was crafted: no statistically significant difference exists between insurers' and their insureds' likelihood of winning duty-to-defend actions. The alternate hypothesis is equally simple: extralegal or extrajudicial variables<sup>612</sup> are more likely to explain any statistically significant

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611. See *id.* ("ISO serves as an administrative backbone and guiding resource... for insurance companies. Its databases and risk management... give the company a unique ability to provide necessary products and services to insurers"). But compare *Pennsylvania Nat'l Mutual Cas. Ins. Co. v. Progressive Direct Ins. Co.*, No. 6:14-CV-0038-SLB, 2015 WL 5719178, \*13 (N.D. Ala. Sept. 30, 2015) ("[T]his case does not present an *unsophisticated* insured against a *sophisticated* insurer. Both Penn National and Progressive are well acquainted with the requirements... in insurance policies"), with *Strauss Painting, Inc. v. Mt. Hawley Ins. Co.*, 26 N.E.3d 218, 227 (N.Y. 2014) ("[I]t might be possible for... a relatively sophisticated representative of an insured to have a good faith, reasonable belief that notice... is sufficient. [But] Drewes was not an *unsophisticated* 21-year-old—who was dependent upon... the insurance broker... [He] was the longtime day-to-day operations manager of two construction contractors in New York City").

612. See, e.g., *Recent Publications*, 124 HARV. L. REV. 1343, 1344 (2011) (reviewing and reporting an author's empirical findings: "[The author employs] an expertise in political science and a robust understanding of legal analysis to illuminate the impact [of extrajudicial factors on the decision in a case]. By tracing the judicial response to the recent explosion in immigration appeals, [the author] sketches a

difference between liability insurers' and insureds' probability of winning duty-to-defend disputes in state or federal courts.

The author searched law reporters as well as LEXIS-NEXUS and WESTLAW databases. The goal was to uncover reported and unreported duty-to-defend dispute that involved *cyber-liability* insurance. Given that cyber-insurance is a recent development,<sup>613</sup> the search uncovered less than one hundred duty-to-defend cases involving cyber-specific, standalone contracts.<sup>614</sup> The author, therefore, fashioned an extremely broad query to include *any* duty-to-defend case which involved *any traditional* third-party-liability, professional-liability, business-owners-liability or first-party-property insurance contract.<sup>615</sup> The second search generated approximately 6,800 decisions.<sup>616</sup>

To secure a targeted sample of duty-to-defend *and* cyber-related cases, the author crafted a narrower query which contained only cyber-technology words and phrases: *technology, computer, smartphone, hardware, software, cyberspace, cyber!, website, webpage, "domain name," "office equipment," "virtual office," internet, online, "social media," "chat room"* and more.<sup>617</sup> The third search produced 2,325 decisions. After deleting cases which did not focus exclusively on a duty-to-defend question, nearly nineteen hundred (N= 1,840) declarations were selected for the study. Ultimately, multiple binary (0,1) or "dummy" variables were created,<sup>618</sup> a content analysis<sup>619</sup> of each case was performed, data were collected and inserted into a large matrix, various statistical procedures were applied, and the results were analyzed.<sup>620</sup>

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divided federal court system where the de facto final oversight of [appellate] courts render them more sympathetic to the facts of a case than the policy-driven Supreme Court.”).

613. See *infra* notes 695-707 and accompanying text.

614. Using Westlaw, the following query generated less than one hundred cases: adv: (duty /5 defend) /p (cyber! website! /p policy policies contract! agreement!) (last visited July 26, 2019).

615. Duty-to-Defend Cases Involving Cyber-Specific, Standalone Contracts, WESTLAW, <http://l.next.westlaw.com> (In the search bar, the following query was entered: SY(insurer /s “duty to defend”).

616. *Id.*

617. Duty-to-Defend Cases Involving Cyber-Specific, Standalone Contracts, WESTLAW, <http://l.next.westlaw.com> (In the search bar, a cyber-specific query was inserted: adv: (insurer /s “duty #to defend”) /p profession! “business entit!” manufacture! technology technologies software, hardware “virtual office” “office management” website! web! “office equipment” internet online “social media” “chat room!” smartphone “domain name!” cybersquar! computer “computer storage”).

618. In a nutshell, each subcategory is an independent binary (0, 1) or “dummy” variable. See Claudia M. Landeo & Kathryn E. Spier, *Irreconcilable Differences: Judicial Resolution of Business Deadlock*, 81 U. CHI. L. REV. 203, 223 n.54 (2014) (discussing the application of a probit analysis and the construction of binary (0, 1) or “dummy variables”); see WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* 116-118 (5th ed. 2003) (explaining the purpose and use of dummy variables in regression analysis).

619. See generally Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 77 n.58, 88 n.103, 90-91 nn.111-12 (2008) (presenting a fairly comprehensive history and description of Professor Rice’s published content-analysis surveys as well as theoretical and statistical analyses of common-law and statutory questions of law); Daniel T. Young, *How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Ackerman’s Theory of Constitutional Change*, 122 YALE L.J. 1990, 2010-13 (2013) (observing that technology makes it easier to manipulate larger and larger datasets and stressing that social scientists have embraced content analysis as procedure in their studies); Robert E. Mitchell, *The Use of Content Analysis for Explanatory Studies*, 31 PUB. OPINION Q. 230, 237 (1967).

620. See *infra* Table 1 and accompanying discussion. The findings and discussion presented in Part VI are derived from and based on a statistical analysis of 1,840 declaratory judgments and rulings. See Willy E. Rice, *Cyber-Technology Torts and Insurers’ Ambiguous Obligations to Defend Professionals and Business Entities: Statistical and Legal Inferences from Cyber-Liability and Traditional Insurers’ Declaratory Judgment, 1940-2019* (unpublished working paper) (on file with author) (includes an Excel database of cases, all statistical

TABLE 1. ATTRIBUTES OF INSURED AND INSURERS WHO LITIGATED TRADITIONAL DUTY-TO-DEFEND DISPUTES IN TRIAL AND APPELLATE DECLARATORY JUDGMENT PROCEEDINGS, 1940-2019

ATTRIBUTES	Trial Courts (N = 1,520) <sup>+</sup>	Appellate Courts (N = 903)	
		Percent	Percent
<b>TYPES OF JURISDICTIONS:</b>			
State-Court Jurisdiction		51.7	43.4
Federal-Court Jurisdiction		48.3	56.7
<b>GEOGRAPHIC ORIGINS OF LAWSUITS:</b>			
Eastern Courts		23.8	21.8
Midwestern Courts		29.1	31.3
Southern Courts		16.3	14.7
Southwestern Courts		10.0	14.5
Western Courts		20.8	17.7
<b>INSURED AND PLAINTIFFS:</b>			
Individuals & Property Owners		22.2	18.7
Professionals & Small Businesses		19.1	19.9
Medium-to-Large Corporations		39.5	42.3
Local & State Governments		7.3	7.1
Allegedly Third-Party Victims		6.0	6.1
Financial & Medical Services Entities		5.8	5.9
<b>TRADITIONAL PROPERTY &amp; LIABILITY INSURANCE CONTRACTS:</b>			
Comprehensive General Liability (CGL)		59.5	60.8
Professional Malpractice Insurance		2.5	3.1
Business Owner's Liability Insurance		5.7	5.9
Commercial Property Insurance		2.8	3.4
Residential Property Insurance		10.3	8.5
Vehicle & Automobile Insurance		14.9	13.2
*Other Insurance Coverage		4.3	5.0
<b>UNDERLYING THIRD-PARTY CLAIMS:</b>			
"Negligence"		38.5	39.1
"Breach of Contract"		1.8	1.8
"Breach of Warranty"		3.6	3.8
"Trespass to Person and Property"		5.5	5.3
"Battery and Molestation"		2.2	2.1
"Fraudulent Misrepresentation"		5.2	4.6
"Conversion of Property"		2.2	1.8
"Intentional Infliction of Mental Distress"		5.2	4.6
"Defamation—Libel & Slander"		2.0	1.8
Mixed Common-Law Claims		3.5	4.9
State & Federal Statutory Claims		30.2	30.0
<b>OUTCOMES OF DUTY-TO-DEFEND DISPUTES:</b>			
Favorable for Insureds		42.4	46.5
Unfavorable for Insureds		57.6	53.5

<sup>+</sup> The total database comprises N = 1,840 cases. This table does not include duty to indemnify and related cases.

\* This category comprised workers-compensation, annuity, marine, inland marine and title insurance cases.

#### B. DEMOGRAPHIC CHARACTERISTICS OF INSURERS AND INSURED

TABLE 1 illustrates some demographic characteristics of insureds and insurers who litigated duty-to- defend disputes in trial and appellate courts' declaratory-judgment proceedings. The findings reveal that 1,520 began their litigation in lower courts. Of the 1,520 cases that were initially litigated in state-trial or federal-district courts, nearly 60% of the litigants (n = 903) appealed adverse declarations to state and federal courts of appeals.

procedures, generated tables, and statistics). The variables-construction and content-analysis procedures have been published and explained elsewhere.

The six categories of percentages illustrate more specific information about the litigants: *Types of Jurisdictions*, *Geographic Origins of the Lawsuits*, *Types of Insured-Plaintiffs*, *Types of Traditional Insurance Contracts*, *Types of Underlying Third-Party Claims*, and *Outcomes of Duty-to-Defend Disputes*. Comparing the two columns of percentages, some noteworthy findings are revealed. First, state trial courts rather than federal district courts *exercised* slightly more jurisdiction over duty-to-defend controversies—**51.7%** and **48.3%**, respectively. However, appreciably more litigants appealed to *federal* rather than to *state* courts of appeals—**56.7%** and **43.4%** respectively. Also, litigants initially filed a majority of lawsuits in *Eastern* and *Midwestern* trial or federal district courts—**23.8%** and **29.1%**, respectively. Similarly, the *Eastern* and *Midwestern* appellate courts also resolved the majority of duty-to-defend controversies. The respective percentages are **21.8%** and **31.3%**, respectively.

TABLE 1 also describes the types of plaintiffs who commenced declaratory judgment actions in trial courts. Three large *aggregates* of fairly similar complainants filed the overwhelming majority of duty-to-defend pleadings—“*single individuals and property owners*,” “*professionals and small businesses*,” and “*medium-to-large corporations*.” At the trial-court level, the aggregates’ respective percentages were **22.2%**, **19.1%** and **39.5%**

As discussed earlier in this article, many property and automobile insurance contracts are “hybrid” contracts, providing both first-party-property coverage, as well as third-party-liability coverage.<sup>621</sup> Consequently, both automobile and property insurance agreements also generate duty-to-defend disputes. TABLE 1 highlights the types of insurance contracts which produced the majority of disputes: they are “*comprehensive or commercial general liability (“CGL”)*,” “*vehicle-automobile*,” and “*residential-property insurance contracts*.” At the trial court level, the respective percentages are **59.5%**, **14.9%** and **10.3%**.

Why do third parties sue various insured professionals, business entities and others? Nearly forty percent (**38.5%**) of the underlying third-party complaints contained *common-law negligence* claims. Additionally, thirty percent (**30.2%**) of the underlying complaints comprised *state and federal statutory claims*—which are typically negligence-based rather than intentional torts.<sup>622</sup> These two findings are not surprising, because most businesses, professionals and other consumers purchase liability insurance to cover third-party negligence-based claims and lawsuits.<sup>623</sup> Another finding, however, is more

621. See *supra* notes 61, 149-52, 162 and accompanying text.

622. Cf. *DiLucido v. Terminix Int’l, Inc.*, 676 A.2d 1237, 1240 (Pa. Super. Ct. 1996) (noting that statutory causes of action sound in both contract and tort); *Marshall v. Miller*, 276 S.E.2d 397, 400 (N.C. 1981) (noting that the deceptive trade practices act supplements common law tort remedies); *Slaney v. Westwood Auto, Inc.*, 322 N.E.2d 768, 779 (Mass. 1975) (stressing that statutory actions for unfair or deceptive practices sound partly in tort); *Fin. Software Sys., Inc. v. First Union Nat. Bank*, No. CIV. A. 99-CV-623, 1999 WL 1241088, at \*1 (E.D. Pa. Dec. 16, 1999) (noting that a cause of action for deceptive trade practices also sounds in tort); *Mulch Mfg., Inc. v. Advanced Polymer Solutions, LLC*, 947 F. Supp. 2d 841, 854 (2013) (declaring that claims under the Ohio Deceptive Trade Practices Act are akin to negligent misrepresentation claims).

623. See, e.g., *Sony Comput. Entm’t Am. Inc. v. Am. Home Assur. Co.*, 532 F.3d 1007, 1012 (9th Cir. 2008) (stressing that the policy obligated the insurer to provide defense costs for lawsuits arising from a “negligent publication”); *Sundaram v. COVERYS*, 130 F. Supp. 3d 419, 424 (D. Maine. 2015) (finding that the professional liability insurance contract promise to pay damages for any third-party negligence

interesting: third parties filed multiple and a variety of intentional-tort allegations against insureds. Collectively, these latter allegations appeared in **31.2%** of the underlying third-party pleadings.

Finally, TABLE 1 shows the “*outcomes of duty-to-defend disputes*.” In declaratory-judgment proceedings, both trial and appellate courts are significantly more likely to rule *against insureds* and in favor of insurers. Among trial courts and *viewed from the insureds’ perspectives*, the reported “favorable” and “unfavorable” percentages are **42.4%** and **57.6%**—respectively. Among courts of appeals, the respective percentages are **46.5%** and **53.5%**.

C. BIVARIATE RELATIONSHIP BETWEEN PREDICTORS AND APPELLATE COURTS’ DECISIONS TO GRANT OR DENY DECLARATORY RELIEF IN DUTY-TO-DEFEND PROCEEDINGS

Underscoring a prior observation, as of early 2019, insurers had not collected a large amount of cyber-specific claims-loss data.<sup>624</sup> Thus, using only *cyber-insurance-specific* data, insurers cannot predict confidently the likely outcomes of cyber-insurance disputes in state and federal courts.<sup>625</sup> Yet, insurers are hastily, confidently and persuasively advertising and selling cyber-insurance.<sup>626</sup> Does *traditional liability* insurers’ propensity to win a significant majority of duty-to-defend controversies explain in part *cyber-liability* insurers’ confidence and billions-dollars sales? The short answer is, perhaps. Thus, it is important to determine which factors are more likely to increase insureds’ or insurers’ propensity to win duty-to-defend disputes.

TABLE 2 highlights some statistically significant and bivariate relationships between several predictors and the outcomes of duty-to-defend disputes. First, both state and federal courts of appeals are more likely to decide *in favor of insurers*—**51.4%** and **55.0%**, respectively.

On the other hand, when focusing on the “*types of liability insurance contracts*,” the results show insureds are more likely to win against “*professional-malpractice*” liability insurers—**67.9%** versus **32.1%**. Also, insureds are significantly more likely to prevail against “*automobile-vehicle liability*” insurers—**55.5%** versus **44.5%**. In contrast, “*CGL*,” “*business-owners*,” “*commercial-property*” and “*residential-property liability*” insurers are substantially more likely to prevail against insureds. The statistically significant percentages are **54.6%**, **62.3%**, **61.3%** and **57.1%**—respectively.

claim); *Travelers Property Cas. Co. of Am. v. Fed. Recovery Serv., Inc.*, 103 F. Supp. 3d 1297, 1302 (D. Utah, 2015) (finding that a “Technology Errors and Omissions Liability” contract would require Travelers to provide a legal defense if “any negligent act” caused a loss or third-party injury).

624. Nelson & Simek, *supra* note 160, at 17 (reporting that “in 2016, the cyber insurance industry grew by 35 percent”; “the global market may reach \$14 billion by 2022”; a lot of lawyers will have to determine if the words and phrases in cyber-insurance contracts actually mean what insurers think they mean; and “cyber insurance is evolving [without the help] of precedents”).

625. Nelson & Simek, *supra* note 160, at 17.

626. Nelson & Simek, *supra* note 160, at 17.

TABLE 2. APPELLATE COURTS' DISPOSITIONS OF TRADITIONAL DUTY-TO-DEFEND CONTROVERSIES IN DECLARATORY JUDGMENT PROCEEDINGS BY SELECTED ATTRIBUTES OF LITIGANTS

Selected Attributes	Subcategories	Dispositions of Insurance-Defense Disputes		
		From the Perspectives of Various Insureds		
		Favorable	Unfavorable	(N = 903)
		Percent	Percent	Number
JURISDICTIONS	State Appellate Courts	48.6	51.4	(N = 391)
	Federal Appellate Courts	45.0	55.0	(N = 512)
GEOGRAPHIC ORIGINS OF THE DECLARATORY JUDGMENT ACTIONS	Eastern Courts	49.2	50.8	(N = 198)
	Midwestern Courts	51.0	49.0	(N = 283)
	Southern Courts	41.0	59.0	(N = 132)
	Southwestern Courts	48.1	51.9	(N = 131)
	Western Courts	38.4	61.6	(N = 160)
TYPES OF TRADITIONAL <sup>+</sup> PROPERTY, LIABILITY & HYBRID INSURANCE CONTRACTS	CGL Insurance	44.4	54.6	(N = 549) **
	Professional Malpractice	67.9	32.1	(N = 28) **
	Business Owners' Liability	37.7	62.3	(N = 53) **
	Commercial Property	38.7	61.3	(N = 31)
	Residential Property	42.9	57.1	(N = 77)
CGL COVERAGE FOR "ADVERTISING AND "PUBLISHING" INJURY	Automobile & Vehicle	55.5	44.5	(N = 119) **
	Coverage—Present	42.9	57.1	(N = 406) *
	Coverage—Absent	52.5	47.5	(N = 143) *
TYPES OF UNDERLYING THIRD-PARTY MIXED, AND SINGLE, COMMON LAW AND STATUTORY CLAIMS AND THEORIES	"Negligence Claims"	53.8	46.2	(N = 353) **
	"Breach of Contract"	41.2	58.8	(N = 17) **
	"Breach of Warranty"	50.0	50.0	(N = 34)
	"Trespass / Invasions"	41.7	58.3	(N = 48)
	"Battery / Molestation"	21.1	78.9	(N = 19)
	"Fraud / Misrepresentation"	42.9	57.1	(N = 42) **
	"Conversion of Property"	50.0	50.0	(N = 16)
	"Intent-Emotional Distress"	26.2	73.8	(N = 42)
	"Defamation"	52.9	47.1	(N = 17) **
	Mixed-Claims Complaint	45.5	54.5	(N = 44)
INSURERS' TRADITIONAL INSURANCE SPECIFIC AND COMMON LAW AFFIRMATIVE DEFENSES	Statutory Claims	42.8	57.2	(N = 271)
	"No Occurrence"	53.6	46.4	(N = 224)
	"Excluded Perils"	46.0	54.0	(N = 311)
	"Excluded Intentional Acts"	41.8	58.2	(N = 158)
	"Breach of Conditions"	43.6	56.4	(N = 62)
	Procedural Defenses	43.2	56.8	(N = 148)

\*\* Chi square test statistically significant at  $p \leq .01$ \* Chi square test statistically significant at  $p \leq .04$ <sup>+</sup> Forty-five workers-compensation, marine and inland-marine insurance cases were not used in this calculation.Otherwise, the level of statistical significance would be Chi square 12.08 at  $p = .06$ 

Once more, CGL insurers are significantly more likely to win duty-to- defend disputes. But a totally unexpected statistically significant finding appears in TABLE 2: when third parties file "*advertising injury*" claims against insureds and the CGL insurance contracts cover "*advertising injury*" claims, insureds are substantially less likely to prevail. Or, stated slightly differently, the findings reveal that courts of appeals overwhelmingly declare that CGL insurers have no obligation to defend insureds against any "*advertising injury*" claim when liability-insurance contracts cover such claims. The respective percentages are **42.9%** versus **57.1%**. In contrast, when third-party complainants file identical claims and the CGL policy does not cover an

“advertising injury” claim, appellate courts are significantly more likely to “decide in favor of insureds”—**52.5%** versus **47.5%**.

What explains these latter and, arguably, bizarre findings? As communicated earlier, before 1986, CGL insurance contracts did not cover cyber-technology claims.<sup>627</sup> However, after 1986, CGL agreements began to cover “advertising injury claims.”<sup>628</sup> The post-1986 CGL agreements also contained a cyber-exclusion provision.<sup>629</sup> Perhaps, when a cyber-exclusion clause is present, appellate courts are more likely to apply the purportedly “draconian” or “harsh” plain-meaning rule, and declare that CGL insurers have no obligation to defend insureds against any cyber-related or any “advertising injury” claim.<sup>630</sup> Nonetheless, the universal rules are exceedingly clear: Insurers have a duty to analyze third parties’ allegations to determine whether coverage is possible.<sup>631</sup> And, if there is any doubt about coverage, it must be resolved in favor of insureds.<sup>632</sup>

TABLE 2 also illustrates the statistically significant effects of “third parties’ allegations and actions” on the dispositions of duty-to-defend disputes. First, courts of appeals are substantially more likely (**53.8%**) to compel a legal defense when third parties file negligence actions against insureds. This is not surprising, since liability insurance contracts are structured and sold to cover negligence-based lawsuits. Other findings, however, are somewhat surprising. For example, when third parties file defamation actions against insureds, appellate courts are significantly more likely (**52.9%**) to compel a legal defense. On the other hand, insurers are significantly more likely to prevail when third parties file various “*intentional-tort*” actions against insureds. The respective percentages are **58.8%**, **58.3%**, **78.9%**, **57.1%** and **73.8%**. This latter finding is also unexpected, since insurers must provide a legal defense against any potentially or possibly covered third-party cause of action.<sup>633</sup>

Furthermore, the law is fairly clear regarding another issue: insurers must defend insureds, if 1) third-party complainants allege “multiple” or “mixed” common-law and statutory claims, and 2) the insurance contract excludes some of the claims.<sup>634</sup> Yet, in TABLE 2, the findings reveal an

627. BLACK ET AL., *supra* note 149, at 2 (“As more small- and mid-market organizations purchase cyber insurance, use of ISO forms will likely grow, but variation in available policy wording will persist”).

628. BLACK ET AL., *supra* note 149, at 2.

629. BLACK ET AL., *supra* note 149, at 2.

630. *Cf.* Koken v. Reliance Ins. Co., 893 A.2d 70, 82 (Pa. 2006) (“In light of the plain language... the lower [court concluded that a different reading]... would lead to a harsh or draconian result... [I]t is important to note that a plain language interpretation... does not... produce a harsh, absurd or unreasonable result”); Larson v. Nationwide Agribusiness Ins. Co., No. CIV. 12-1290 RHK/FLN, 2013 WL 375581, at \*1 (D. Minn. Jan. 31, 2013), *aff’d*, 739 F.3d 1143 (8th Cir. 2014) (“The policy language is clear... Although the result in this case may be harsh, the policy’s language is unambiguous... [W]hen language in an insurance contract is unambiguous, [a] court *must apply* it according to its plain meaning”) (emphasis added).

631. *See, e.g.*, Am. Bumper & Mfg. Co. v. Hartford Fire Ins. Co., 452 Mich. 440, 451-52 (1996).

632. Paradigm Ins. Co. v. Tex. Richmond Corp., 942 S.W.2d 645, 649 (Tex. App.—Houston [14th Dist.] 1997) (stressing that insurers must commence a legal defense, despite the theories of liability or causes of action raised in third-party complaints).

633. *Id.*

634. *See, e.g.*, State Farm Fire and Cas. Co. v. Schwan, 308 P.3d 48, 51 (Mont. 2013) (“Montana follows what other courts have termed the ‘mixed-action’ rule—which requires an insurer to defend all counts in a complaint so long as one count potentially triggers coverage, even if the remaining counts

unsettling truth: appellate courts are markedly less likely to compel a legal defense when third parties file “mixed-actions” (**54.5%**) or “*statutory claims*” (**57.2%**) against insureds.

Finally, both traditional and cyber-liability insurers insert substantially similar “*occurrence*,” “*conditions*,” and “*exclusion*” provisions into insurance contracts.<sup>635</sup> For example, in one cyberinsurance contract, the “*occurrence*” provision stated in relevant part: “[Coverage] will apply. . . only if the following *conditions precedent* to coverage are satisfied: . . . [T]he insured incurs. . . expenses within 12 months of discovering. . . that a privacy breach. . . had *occurred*, and the privacy breach . . . *occurs* during the policy period. . .”<sup>636</sup> And, in standard liability insurance contracts, a typical “*occurrence*” clause reads in pertinent part: “The company will pay . . . all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . *caused by an occurrence*.”<sup>637</sup> Generally, an occurrence is an accidental bodily injury which was “*neither expected nor intended* from the standpoint of the insured.”<sup>638</sup>

Stated briefly, insurers frequently raise “*no-occurrence*,” “*breach-of-condition*” and “*exclusion*” defenses in duty-to-defend trials. Therefore, consider the last five rows of data in TABLE 2. The bivariate relationship between disposition of cases and types of affirmative defenses is not statistically significant for an obvious reason: when appellate courts weigh insurers’ “*exclusion*,” “*breach-of-condition*” and “*common-law procedural*” defenses, insurers are predictably and substantially more likely to prevail. The reported percentages are **54.0%**, **58.2%**, **56.4%** and **56.8%**. Conversely, insureds are slightly more likely (**53.6%**) to prevail, only when insurers advance a “*no-occurrence*” defense.

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would not be covered”) (emphasis added); Buss v. Superior Court, 939 P.2d 766, 774-75 (Cal. 1997) (“It follows that, in a ‘mixed’ action, in which some of the claims are at least potentially covered and the others are not, the insurer has a duty to defend as to the claims that are at least potentially covered. . . We. . . justify the insurer’s duty to defend the entire ‘mixed’ action prophylactically, as an obligation imposed by law in support of the policy”) (emphasis added); Jackson TP. ETC. v. Hartford Acc. & Indem, 451 A.2d 990, 995 (N.J. Super. 1982) (holding that an insurer is not excused from its duty to defend when there are claims against an insured alleging intentional and willful actions and the underlying “claims are *mixed* or *based on conflicting theories*, one which requires coverage and one which does not, the carrier has no choice, it must defend”) (emphasis added). See also Rhodes v. Chicago Ins. Co., 719 F.2d 116, 119 (5th Cir.1983) (“Whether a complaint pleads in the alternative or *alleges more than one cause of action*, the insurer is obligated to defend, as long as the complaint alleges at least one cause of action within the coverage of the policy”) (emphasis added).

635. Compare EVEREST NATIONAL INSURANCE COMPANY, CYBER LIABILITY INSURANCE FORM, <http://abais.com/Data/Sites/1/media/specimen/bank/cyber-cover.pdf> [<https://perma.cc/F9CD-NRSH>] (last visited July 1, 2019) (outlining various and multiple “occurrence,” “conditions,” and “exclusions” provisions), with TOKIO MARINE SPECIALTY INSURANCE COMPANY, COMMERCIAL GENERAL LIABILITY COVERAGE FORM, [www.tmsic.com/pdfs/CommercialGeneralLiabilityCoverageForm\\_OccurrenceBasis.pdf](http://www.tmsic.com/pdfs/CommercialGeneralLiabilityCoverageForm_OccurrenceBasis.pdf) [<https://perma.cc/EXE9-PDPP>] (last visited July 1, 2019). See also ABA INSURANCE SERVICES, SPECIMEN POLICIES AND ENDORSEMENTS, <http://abais.com/specimen> [<https://perma.cc/55BW-SWKS>] (last visited July 1, 2019) (listing and allowing comparisons of numerous, various and *overlapping* cyber-liability and traditional-liability insurance contracts).

636. EVEREST NATIONAL INS. CO., *supra* note 635, at 2 (emphasis added).

637. See, e.g., Ottumwa Housing Authority v. State Farm Fire and Cas. Co., 495 N.W.2d 723, 726 (Iowa 1993) (emphasis added).

638. *Id.* (emphasis added).

Again, insurers are aggressively marketing and selling cyber-liability insurance contracts which cover purportedly cyber-technology torts or “*occurrences*.” Nevertheless, before purchasing these contracts, professionals and businesspersons should be cautious: state and federal courts are seriously divided over whether certain torts are indeed “*occurrences*” under liability insurance agreements.<sup>639</sup> Even more disquieting, when insurers raise a no-occurrence defense, the “*geographic locations*” of state and federal courts influence whether a particular tort is an “occurrence” and whether insurers have an obligation to defend their insureds.

To support the last assertion, consider the six columns of results in TABLE 3. The initial five rows of percentage data illustrate the bivariate relationship between appellate courts’ geographic locations,<sup>640</sup> and insureds’ likelihood of winning/losing duty-to-defend disputes, focusing exclusively on cases in which insurers advanced a “*no-occurrence*” defense. First, among “*state appellate courts*” in the “*Midwest*” and “*West*”, a “*no-occurrence defense*” slightly increases insurers’ likelihood of winning. The respective percentages are **53.5%** and **60.9%**. Additionally, among *federal courts of appeals* in the “*Southwest*” and “*West*”, a “*no-occurrence defense*” substantially increases insurance underwriters’ likelihood of winning duty-to-defend disputes. The statistically significant percentages are **64.5%** and **66.7%**—respectively.

In contrast, among “*state courts of appeals*” in the “*East*”, “*South*” and “*Southwest*,” insureds are more likely to win duty-to-defend disputes, even when insurers advance a no-occurrence defense. The respective percentages are **67.6%**, **60.0%** and **85.7%**. Similarly, among *federal appellate courts* in the “*East*”, “*Midwest*” and “*South*,” insureds are substantially more likely to prevail when liability insurers raise a “*no-occurrence defense*.” The statistically significant percentages are **68.0%**, **61.7%** and **59.1%**—respectively.

Again, TABLE 2 reports an unexpected finding: insureds are more likely (**53.6%**) to win of duty-to-defend disputes when liability insurers raise the “*no-occurrence defense*.” The last two rows of statistics in TABLE 3 provide a plausible explanation: *state appellate courts* order significantly more insurers to defend their insureds—dismissing insurers’ “*no-occurrence defense*” and ignoring

639. For example, courts are split over whether various insureds’ allegedly negligent misrepresentations are “occurrences.” *Compare* Wood v. Safeco Ins. Co. of Am., 980 S.W.2d 43, 54 (Mo. Ct. App. 1998) (declaring that a third party’s “negligent misrepresentation” claim is an “occurrence” and forcing the insurer to defend the insured), *and* Sheets v. Brethren Mutual Ins. Co., 679 A.2d 540, 551 (Md. 1996) (same), *with* Miller v. Western General Agency, Inc., 49 Cal. Rptr. 2d 55, 58 (Cal. Ct. App. 1996) (declaring that the insured’s purposeful misrepresentations—which caused investment and economic losses—were not occurrences or accidental events); Allstate Ins. Co. v. Chaney, 804 F. Supp. 1219, 1221-22 (N.D. Cal. 1992) (declaring that under California law, negligent misrepresentation is essentially fraudulent conduct rather than an “accident” or an “occurrence” under an insurance policy); Safeco Ins. Co. of Am. v. Andrews, 915 F.2d 500, 502 (9th Cir. 1990) (declaring that the insured’s misrepresentations—in connection with the sale of property—were not “occurrences” under the policy).

640. “*Eastern*” includes Delaware, the District of Columbia, Massachusetts, Maryland, New Jersey, New York, and Pennsylvania; “*Midwestern*” comprises Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, West Virginia, and Wisconsin; “*Northeastern*” includes Connecticut, Maine, New Hampshire, Rhode Island, Vermont, Puerto Rico, and Guam; “*Southern*” comprises Alabama, Georgia, Florida, Mississippi, Kentucky, North Carolina, South Carolina, Tennessee, and Virginia; “*Southwestern*” includes Arkansas, Louisiana, Oklahoma, and Texas; and, “*Western*” includes Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

**TABLE 3. THE EFFECTS OF THE “NO OCCURRENCE” AFFIRMATIVE DEFENSE ON THE OUTCOMES OF TRADITIONAL DUTY-TO-DEFEND DISPUTES IN COURTS OF APPEALS’ DECLARATORY JUDGMENT PROCEEDINGS**

PREDICTOR VARIABLES	“No Occurrence” Defense and Its Effect. On State Appellate Courts’ Declarations Viewed From Insureds’ Perspectives			“No Occurrence” Defense and Its Federal Courts of Appeals’ Declarations Viewed From Insureds’ Perspectives			
	Favorable	Unfavorable	TOTAL	Favorable	Unfavorable	TOTAL	
Courts of Appeals’ Locations:	Percent	Percent	Number	Percent	Percent	Number	
	Eastern Courts	67.6	32.4	(N = 34) *	68.0	32.0	(N = 25) ***
	Midwestern Courts	46.5	53.5	(N = 43) *	61.7	38.3	(N = 60) ***
	Southern Courts	60.0	40.0	(N = 10)	59.1	40.9	(N = 22) ***
	Southwestern Courts	85.7	14.3	(N = 7)	35.5	64.5	(N = 31) ***
Western Courts	39.1	60.9	(N = 23) *	33.3	66.7	(N = 33) ***	
Types of Traditional Insurance Contracts:							
Comprehensive General Liability (CGL)	50.3	49.7	(N = 175)	48.5	51.5	(N = 167) **	
Other “Hybrid” & Third-Party Insurance	60.8	39.2	(N = 102)	61.0	39.0	(N = 100) **	

\*\*\* Chi square test statistically significant at  $p \leq .01$

\*\* Chi square test statistically significant at  $p \leq .05$

\* Chi square test statistically significant at  $p \leq .07$

whether insureds had purchased “CGL” or “*hybrid*” liability insurance contracts. The percentages are **50.3%** and **60.8%**—respectively. *Federal appellate courts* also are more likely (**61.0%**) to find a duty to defend—dismissing underwriters’ no-occurrence argument under “*hybrid*” insurance agreements. On the other hand, *federal courts of appeals* are less likely (**51.5%**) to compel a legal defense—when “CGL” underwriters raise a “*no-occurrence defense*.”

Finally, several important facts were highlighted in PART IV.B.1 of this article: millions of professionals and businesses advertise goods and services on the Web.<sup>641</sup> Consumers and allegedly third-party victims are increasingly filing personal-injury lawsuits against cyberspace advertisers, retailers and marketers who publish or share purportedly offensive information.<sup>642</sup> Cyber advertising torts can be deceptive trade practices,<sup>643</sup> intentional torts,<sup>644</sup> or violations of intellectual property rights.<sup>645</sup> More importantly, state and federal courts are divided over whether CGL insurers in particular must defend insured professionals and businesses against all types of “personal and advertising injury” claims.

TABLE 4 displays the last cluster of bivariate and statistically significant relationship between third parties’ “personal and advertising injury” claims and duty-to-defend outcomes— among persons who purchased comprehensive or commercial general liability insurance contracts.

Focus on the two left columns of data that appear under the heading, THE EFFECTS OF “PERSONAL & ADVERTISING INJURY” CLAIMS ON APPELLATE COURTS’ RULINGS —WITHOUT CONTROLLING FOR THE AMBIGUITY DOCTRINE’S EFFECTS. From insureds’ perspectives, the findings are less than ideal. Appellate courts are significantly more likely to force commercial general liability insurers to defend insureds *only when* third parties file “*negligence*,” “*breach-of-warranty*” and “*conversion/misappropriation*” lawsuits against insureds. The respective percentages are **54.8%**, **63.6%** and **63.6%**.

Now consider the two right columns of data under the title, THE EFFECTS OF “PERSONAL & ADVERTISING INJURY” CLAIMS ON APPELLATE COURTS’ RULINGS — MEASURING THE AMBIGUITY DOCTRINE’S EFFECTS. Again, from various insureds’ points of views, the findings are disappointing for similar reasons. *Courts of appeals* are more likely to force CGL-Coverage-B insurers to provide a legal defend *only when* third parties file “*negligence*,” “*breach-of-warranty*,” “*conversion/misappropriation*,” and “*defamation*” claims against insureds. The reported percentages are **56.1%**, **63.6%**, **63.6%** and **60.0%**.

641. See, e.g., Press Release, Interactive Advertising Bureau, *supra* note 335.

642. Bialek & Smedresman, *supra* note 338, at 1.

643. Bonner, *supra* note 338 (“[A]n online ad might violate federal fair trade laws [and states’ deceptive trade practices statutes]... [T]hese laws are designed to protect the public from [businesses’] unfair, deceptive or fraudulent practices...”).

644. Bonner, *supra* note 338 (“Errors in advertising [are] torts like defamation, invasion of privacy, improper use of someone’s advertising idea, or violation of someone else’s advertising idea”).

645. Bonner, *supra* note 338 (“Intellectual property includes copyrights, patents, trademarks, service marks, trade dress and trade secrets. Federal law bars the use of this property without the permission of the creator”).

**TABLE 4. COMPREHENSIVE GENERAL LIABILITY INSURANCE CONTRACTS AND THE EFFECTS OF THIRD-PARTY COMPLAINANTS' "PERSONAL AND ADVERTISING INJURY" CLAIMS ON THE DISPOSITION OF DUTY-TO-DEFEND CONTROVERSIES IN APPELLATE COURTS' DECLARATORY JUDGMENT PROCEEDINGS**

Third-Party Complainants' Alleged "Personal and Advertising Injury" Claims	The Effects of "Personal & Advertising Injury" Claims on Appellate Courts' Rulings – Without Controlling for the Ambiguity Doctrine's Effects			The Effects of "Personal & Advertising Injury" Claims on Appellate Courts' Declarations – Measuring the Ambiguity Doctrine's		
	Favorable	Unfavorable	TOTAL	Favorable	Unfavorable	TOTAL
	Percent	Percent	Number	Percent	Percent	Number
"Negligence" Claims	54.8	45.2	(N = 126) *	56.1	43.9	(N = 114) **
"Breach of Contract"	33.3	66.7	(N = 6)	33.3	66.7	(N = 6)
"Breach of Warranty"	63.6	36.4	(N = 11) *	63.6	36.4	(N = 11) **
"Trespass & Invasion"	38.2	61.8	(N = 34) *	35.7	64.3	(N = 28) **
"Fraud/Misrepresentation"	31.2	68.8	(N = 16)	33.3	66.7	(N = 15)
"Conversion/Misappropriation"	63.6	36.4	(N = 11) *	63.6	36.4	(N = 11) **
"Intentional Infliction-Emotional Distress"	17.1	82.9	(N = 35)	20.0	80.0	(N = 25)
"Defamation—Libel & Slander"	42.9	57.1	(N = 7)	60.0	40.0	(N = 5) **
Mixed-Claims Complaints	48.6	51.4	(N = 35)	46.7	53.3	(N = 30)
Statutory Tort-Based Claims	35.4	64.6	(N = 130) *	35.3	64.7	(N = 116) **

\*\* Chi square test statistically significant at  $p \leq .009$

\* Chi square test statistically significant at  $p \leq .002$

Unquestionably, professionals and businesspersons should be somewhat concerned and cautious, 1) if they use the Web, social media or other cyber-communication platforms to advertise and sell goods or services, and 2) if they plan to purchase CyberFirst, WebXtend, or cyber-liability insurance—which essentially mirrors traditional CGL-Coverage-B insurance.<sup>646</sup> Business entities and professionals must also exercise prudence for another important reason. The overwhelmingly majority of pro-insurer findings in TABLE 4 *strongly suggest* that under CGL-Coverage-B insurance contracts, “personal and advertising injury” provisions provide *only* an “illusion of coverage.”<sup>647</sup> Why?

The doctrine of ambiguity is quite clear: As a matter of law, ambiguous duty-to-defend terms are construed in favor of insureds—triggering liability insurers’ duty to defend.<sup>648</sup> Yet, as revealed in TABLE 4, appellate courts declare quite often: Comprehensive general liability insurance contracts do not cover the overwhelming majority of third-party “personal and advertising injury” claims. Even more significant, state and federal courts of appeals are *particularly less likely* to find a duty to defend—when they *apply or refuse to apply* the pro-insured ambiguity doctrine. Therefore, a commonsensical question arises: What are insureds’ billions of dollars purchasing each year?<sup>649</sup> Again, is not coverage illusory when an insurance contract promises to cover “personal and advertising injury” claims, and an unambiguous exclusion clause precludes coverage for large categories of “personal and advertising injury” claims?<sup>650</sup>

D. A TWO-STAGE MULTIVARIATE PROBIT ANALYSIS OF APPELLATE COURTS’ DUTY-TO-DEFEND DECISIONS INVOLVING TRADITIONAL-LIABILITY INSURANCE CONTRACTS AND SOME CYBER-LIABILITY INSURANCE ENDORSEMENTS

Thus far, we have explored several bivariate and statistically significant relationships between duty-to-defend dispositions and certain predictors. Arguably, the findings provide *plausible* explanations of several previously judicial splits. Again, the findings are derived from a stratified sample of traditional-liability and some cyber-liability insurance cases.<sup>651</sup> Therefore, a

646. See *supra* notes 167-174 and accompanying text.

647. See *supra* notes 362-365 and accompanying text.

648. See, e.g., *Woo v. Fireman’s Fund Ins. Co.*, 161 Wash. 2d 43, 52-53 (2007).

649. Cf. *Cyber Insurance Market Is Anticipated to Attain Around \$19.2 Billion by 2025* | CAGR:25.6%, WEB NEWSWIRE (July 4, 2019), <https://www.webnewswire.com/2019/07/04/cyber-insurance-market-is-anticipated-to-attain-around-19-2-billion-by-2025-cagr-25-6/> [<https://perma.cc/NH9V-EYMX>] (“The global cyber insurance market size is expected to reach USD 19.2 billion by 2025. . . Cyber insurance covers the liability of a business for breach of data, comprising sensitive customer information such as credit card details, social security numbers, drivers’ license numbers, account details, and health records”).

650. Cf. Streim, *supra* note 59 (“There has been . . . high-profile cyberattacks and data breaches leaving businesses with millions of dollars in losses. Don’t worry . . . [Insurers] offer coverage [to] help mitigate your risk . . . So, you finally bought cyber insurance. Now you’re fully protected, right? Not so fast . . . As a general matter, companies’ purchasing cyber coverage *should not place blind faith in the insurers’ assurances*. . . [Companies] must be very careful [when] determining which cyber coverage is right . . . and [do] not allow an insurer to sell . . . only the *illusion of coverage*.”) (emphasis added).

651. See, e.g., Parts IV and V *supra* notes 628-639 and accompanying text.

variety of third-party, tort-based claims appear in the study, including cyber-related and technology-specific negligence,<sup>652</sup> conversion,<sup>653</sup> trespass<sup>654</sup> and breach-of-warranty<sup>655</sup> claims.

Still, an even more important point needs stressing: categorically, bivariate-relationships do not prove that judicial splits evolve from courts' allegedly pro-insured or pro-insurer "biases." As explained elsewhere, to increase the validity as well as the predictive, inferential and explanatory power of one's survey-research findings, two important questions must be answered:

652. Compare *Salem Group v. Oliver*, 607 A.2d 138, 140 (N.J. 1992) (holding that the insurer had a duty to defend the insured against underlying negligence and gross negligence claims associated with a minor's using an *all-terrain vehicle*), and *North Star Mutual Insurance Co. v. Johnson*, 352 N.W.2d 791, 794 (Minn. Ct. App. 1984) (holding that the insurer had a duty to defend an insured farmer against a negligence action after a chemical sprayer on the *farmer's pickup truck* malfunctioned and smashed into the windshield of an oncoming car), and *Simon v. Maryland Cas. Co.*, 353 F.2d 608, 613-614 (5th Cir. 1965) (declaring that the general liability insurer had a duty to defend contractor against negligence claims after the latter's *faulty technology*—converting an *electrical system from low to a higher voltage*—caused a fire and damaged a third party's property), and *Danek v. Hommer*, 100 A.2d 198, 205 (N.J. Super. A.D. 1953) (holding that the insurer had a duty defend against an underlying negligence action in which an employer failed to distribute necessary *protective guards and devices* to an employee whose hand *was amputated by the employer's machine*), with *North Star Mut. Ins. Co. v. Holty*, 402 N.W.2d 452, 457 (Iowa 1987) (declaring that the insurer had no duty to defend an insured farmer against a negligence action after an allegedly *protruding and swerving auger* caused third-party injuries), and *Atlantic Mut. Ins. Co. v. Judd Co.*, 380 N.W.2d 122, 126 (Minn. 1986) (declaring that the comprehensive general liability insurer had a duty to defend an insured wholesaler against third-party negligence, claims after a contractor purchase *defective underground sewage system technology* from the vendor).

653. Compare *John Deere Ins. Co. v. Shamrock Industries, Inc.*, 929 F.2d 413, 418 (8th Cir. 1991) (declaring that the insurer was obligated to defend the employer against underlying misappropriation of trade secrets claims surrounding an employee-inventor's "*improved machine for filling ice cream containers*") (emphasis added), and *Zurich Ins. Co. (U.S. Branch) v. Killer Music, Inc.*, 998 F.2d 674, 678-79 (9th Cir. 1993) (declaring that a CGL insurer had a duty to defend the insured against a copyright-infringement claim involving *digital television and radio music jingles*, because the contract covered damages for "*personal injury*" or "*advertising injury*"), with *Konami (America) Inc. v. Hartford Ins. Co. of Ill.*, 761 N.E.2d 1277, 1285 (Ill. Ct. App. 2002) (declaring that a CGL insurer had no duty to defend a *video game manufacturer* who allegedly infringed on a third party's patents for *digital circuitry for television gaming apparatuses*), and *A. Kush & Associates, Ltd. v. American States Ins. Co.*, 927 F.2d 929, 932-36 (7th Cir. 1991) (concluding that the liability insurer had no duty to pay defense costs on behalf of an insured who was sued for copyright infringement, trademark infringement and false advertising surrounding the *sale of pendants*), and *Alliance Ins. Co. v. Colella*, 995 F.2d 944, 946 (9th Cir. 1993) (declaring that the insurer had no duty to defend because the third-party unfair competition claim did not fall under the policy's "advertising injury" clause).

654. Compare *Titan Holdings Syndicate, Inc. v. City of Keene, N.H.*, 898 F.2d 265, 274 (1st Cir. 1990) (declaring that the insurer had a duty to defend the city against homeowners' trespass and nuisance complaint—after the city continuously bombarded and exposed *homeowners to putrid odors, gases and particulates* emanating from the city's sewage treatment plant), and *Scottish Guarantee Ins. Co., Ltd. v. Dwyer*, 19 F.3d 307, 312 (7th Cir. 1994) (declaring that the insurer had to defend the insured against third parties' negligent *chemical trespass* after the insured allegedly *released chemicals into the ground* and damage third parties' property), with *E & L Chipping Co., Inc. v. Hanover Ins. Co.*, 962 S.W.2d 272, 278 (Tex. Ct. App.-Beaumont 1998) (concluding that the insurer had no duty to defend the company who allegedly sprayed water on an onsite fire—causing a run-off of *contaminated water* which polluted streams on landowners' property), and *Indiana Lumbermens Mut. Ins. Co. v. West Oregon Wood Products, Inc.*, 268 F.3d 639, 646 (9th Cir. 2001) (declaring that a commercial general liability insurer had no duty to defend a manufacturing plant against third-party trespass to land and personal injury claims—resulting from a manufacturing plant's *pollution emissions*).

655. Compare *St. Paul Fire & Marine Ins. Co. v. National Computer Systems, Inc.*, 490 N.W.2d 626, 632 (Minn. App. Ct. 1992) (declaring that CGL insurer had a duty to defend insured against a third party's *computer-based* and "misappropriation of confidential proprietary information" claims), and *Retail Sys., Inc. v. CNA Ins. Cos.*, 469 N.W.2d 735, 736-37 (Minn. App. 1991) (declaring that a general liability insurer had a duty to defend the insured who allegedly lost a third party's *computer tape* that contained voter-preference survey data), with *Magnetic Data, Inc. v. St. Paul Fire & Marine Ins. Co.*, 442 N.W.2d 153, 154-56 (Minn. 1989) (declaring that the CGL insurer had no duty to defend insured who allegedly and mistakenly erased *magnetically encoded data* on a customer's cartridges).

1) whether the published judicial cases in law reporters mirror factually and completely appellate courts' propensity to grant or deny relief<sup>656</sup>; and 2) whether appellate courts intentionally or unintentionally allow *legal* as well as *extrajudicial factors* to determine the outcome legal disputes.<sup>657</sup> Historically, survey findings are more likely to be valid and predictive when researchers 1) test for "selectivity bias" in the sample data,<sup>658</sup> 2) use more "powerful" inferential statistics, and 3) measure the individual, combined and concurrent effects of multiple legal and extrajudicial variables on the dispositions of legal disputes.

A test for "selectivity bias" is important for several reasons. Appellate courts, rather than state and federal lower courts, are likely to pen and publish a "final" decision.<sup>659</sup> After receiving an adverse ruling in a trial or federal district court, some litigants accept the decision and decide not to seek appellate review. Other litigants, however, refuse to accept the lower courts' adverse ruling and challenge the unfavorable outcome in a state or federal appellate court.

Thus, the "selectivity bias" question becomes whether a statistically significant difference exists between litigants who "*decide to appeal*" and those who "*decide not to appeal*." If a statistically significant difference is discovered, self-selection bias or the groups' diverse characteristics—rather than "biased courts"—*probably* explain appellants' propensity to win or lose controversies in courts of appeals. As disclosed earlier, the present sample contains some background information about the litigants who appealed adverse duty-to-defend rulings. Therefore, the author performed a multivariate, Search Term End two-staged probit analysis.<sup>660</sup> The procedure tests for "selectivity

656. See Willy E. Rice, *Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments 1900-1997*, 47 AM. U.L. REV. 1131, 1208-09 (1998) (explaining why rational inferences are precluded when researchers use simple percentages—based solely on published cases in law reporters—and stressing that retrieving and examining unreported cases in online electronic databases might increase a researcher's ability to make sound statistical inferences); and Willy E. Rice, *Insurance Contracts and Judicial Decisions over Whether Insurers Must Defend Insureds that Violate Constitutional and Civil Rights: An Historical and Empirical Review of Federal and State Court Declaratory Judgments 1900-2000*, 35 TORT & INS. L.J. 995, 1088-89 nn.431-32 (2000).

657. *Id.*

658. See G.S. MADDALA, LIMITED-DEPENDENT AND QUALITATIVE VARIABLES IN ECONOMETRICS, 257-271, 278-283 (1983) (discussing "self-selectivity bias" and "other-selectivity bias" in various settings); Willy E. Rice, *Unconscionable Judicial Disdain for Unsophisticated Consumers and Employees' Contractual Rights?—Legal and Empirical Analyses of Courts' Mandatory Arbitration Rulings and the Systematic Erosion of Procedural and Substantive Unconscionability Defenses Under the Federal Arbitration Act, 1800-2015*, 25 B.U. PUB. INT. L.J. 143, 229 nn.560 (2016); Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts' Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration and Insolvency Statutes with the McCarran-Ferguson Act-1941-1993*, 43 CATH. U. L. REV. 399, 445- 49 nn.213-19 (1994).

659. See, e.g., *Meraz v. State*, 785 S.W.2d 146, 152-54 (Tex. Crim. App. 1990) (declaring that courts of appeals are the final arbiters of fact questions); *Costantino v. Filson*, No. 3:15-cv-00570-RCJ-VPC, 2018 WL 2337294, at \*3 (D. Nev. May 23, 2018) (declaring that "Nevada state appellate courts are the final arbiters of Nevada state law"); *Mariemont Corp. v. White City Water Improvement Dist.*, 958 P.2d 222, 223 (Utah 1998) (reaffirming that appellate courts are the final arbiters of legal disputes).

660. See Willy E. Rice, *Insurance Contracts and Judicial Decisions over Whether Insurers Must Defend Insureds that Violate Constitutional and Civil Rights*, 35 TORT & INS. L.J. 995, 1088-94 nn.431-32 (2000); Willy E. Rice, *Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct*, 47 AM. U.L. REV. 1131, 1208-14 nn.386-87 (1998); Willy E. Rice, *Judicial and*

**TABLE 5. THE SIMULTANEOUS EFFECTS OF PREDICTORS ON APPELLATE COURTS' LIKELIHOOD OF COMPELLING INSURERS TO DEFEND INSUREDS AGAINST THIRD-PARTY CLAIMS UNDER TRADITIONAL LIABILITY INSURANCE CONTRACTS AND UNDER SOME CYBER-LIABILITY INSURANCE ENDORSEMENTS (N = 1, 840)**

MODEL A	Results After Controlling the Effects of the "No Occurrence" & "Exclusion" Affirmative Defenses on Duty-to-Defend Outcomes Under Insurance Contracts and Endorsements				Results Among Appellate Cases in Which the Doctrine of Ambiguity Was Applied to Determine Insurer's Duty-to-Defend Under Insurance Contracts and Endorsements			
	Decisions to Appeal Adverse. Declaratory Judgment Rulings to State & Federal Courts of Appeal (N = 1473)	Dispositions of Declaratory Judgment Actions in State & Federal Courts of Appeals (N = 1473)	Decisions to Appeal Adverse. Declaratory Judgment Rulings to State & Federal Courts of Appeal (N = 1261)	Dispositions of Declaratory Judgment Actions in State & Federal Courts of Appeals (N = 1261)	Decisions to Appeal Adverse. Declaratory Judgment Rulings to State & Federal Courts of Appeals (N = 1261)	Dispositions of Declaratory Judgment Actions in State & Federal Courts of Appeals (N = 1261)	Decisions to Appeal Adverse. Declaratory Judgment Rulings to State & Federal Courts of Appeals (N = 1261)	Dispositions of Declaratory Judgment Actions in State & Federal Courts of Appeals (N = 1261)
Selected Predictor Variables	Probit Values	Robust Std. Errors	Probit Values	Robust Std. Errors	Probit Values	Robust Std. Errors	Probit Values	Robust Std. Errors
<b>COURTS' LOCATIONS:</b>								
Eastern Courts	-.0037	.1360	-.0623	.0775	-.0392	.1788	-.0250	.1003
Southern Courts	-.0783	.1275	-.1474	.0747 **	-.2567	.3539	.5344	.1298 ***
Southwestern Courts	.0733	.2323	.3093	.1050 ***	-.0703	.4789	-.1145	.3042
Western Courts	-.1837	.3221	.0678	.1720	2.6531	.2086 ****	.0601	.3090
State Courts, Only	2.4130	.1501 ***	-.0850	.1994				
<b>CIRCUITS:</b>								
Second Circuit	-.0993	.1775	-.0113	.1038	-.1178	.2127	.0858	.1187
Fifth Circuit	-.5015	.2590 **	-.0511	.1263	-.0080	.3634	-.3380	.1760 **
Ninth Circuit	-.1099	.3432	-.0955	.1888	-.0813	.1763	.0651	.1022
Tenth Circuit	.3851	.2437	-.3579	.1431 ***	-.2824	.5023	.0666	.3247
					-.0541	.4108	-.2224	.2839
<b>TRADITIONAL INSURANCE CONTRACTS &amp; SOME CYBER-LIABILITY ENDORSEMENTS:</b>								
Comprehensive General Liability	.2873	.1455 **	.0257	.0868	.2318	.1552	-.1318	.0913
Business Owner's Liability Insurance	.1830	.2615	.1754	.1661	.3193	.2970	-.5903	.1492 ****
Commercial Property Insurance	-.2093	.2539	-.2019	.1594	-.1496	.2067	-.0804	.1214
Residential Property Insurance	.1261	.1730	.0940	.0944				
Vehicle & Automobile Insurance	-.0720	.1315	-.0118	.0730				
<b>INSUREDS AND THIRD-PARTY CLAIMS:</b>								
Individually Insured Persons	.3224	.1288 **	.0099	.0782	.4738	.1697 ***	-.0467	.1032
Residential Property Owners, Only	-.2994	.4229	.1772	.3264	-.0485	.1245	.3204	.1508 ***
"Trespass/Invasions Claims"	-.3687	.2264 *	-.2723	.1625 *	-.6938	.3551	.0725	.2173
					.0693	.4367	-.1793	.1987
							.0518	.2412
CONSTANT	-2.665	.2060 ***	.5307	.2431 **	2.7545	.2700 ****	.4736	.3683

Wald test for independent equations ("selectivity bias"): Chi square = 1.59, p-value = .2071

Wald test for independent equations ("selectivity bias"): Chi square = 1.550, p-value = .2130

\*\*\* Absolute value of the z statistic is significant at  $p < .001$

\*\* Absolute value of the z statistic is significant at  $p < .05$

\* Absolute value of the z statistic is significant at  $p = .09$

bias” and measures *the unique, combined and concurrent effects of multiple extrajudicial and legal factors* on the dispositions of duty-to-defend disputes in state and federal appellate court.<sup>661</sup>

To begin the brief discussion, consider the information in TABLE 5. It presents the results of two multivariate-probit analyses—MODEL A and MODEL B.

The findings in TABLE 5 are based on an analysis—using all 1,840 cases in the sample.<sup>662</sup> This number comprised both duty-to-defend and some duty-to-indemnify cases—1,520 and 320, respectively. Of the 1,520 duty-to-defend cases which were initiated in lower courts, litigants appealed 1,473 adverse rulings to federal and state appellate courts. However, of the 1,473 appealed cases, some legal and extrajudicial variables had missing data. In addition, the two models in TABLE 5 contain a different mix of predictors or “dummy” variables. Thus, one or a combination of these data-management issues explain the different sample sizes for MODEL A and MODEL B — $n = 1,473$  and  $n = 1,261$ , respectively.

In light of these additional disclosures, consider MODEL A in TABLE 5. It comprises four predictor variables—along with their subcategories. “*Courts’ Locations*” has five categories; “*Circuits*” has four categories; “*Traditional Insurance Contracts & Some Cyber-Liability Endorsements*” has five categories, and, three subcategories appear under “*Insureds and Third-Party Claims*.”

MODEL A presents two distributions of probit values—along with their respective robust standard errors. The asterisks describe the probit values’ levels of statistical significance.<sup>663</sup> The probit values appearing under the caption DECISIONS TO APPEAL ADVERSE DECLARATORY JUDGMENT RULINGS TO STATE AND FEDERAL COURTS OF APPEALS ( $n = 1473$ ) answer the question: whether or not the multiple and simultaneous effects of the four clusters of predictors significantly influenced litigants’ decisions to appeal their adverse duty-to-defend rulings.

Some of the probit values are statistically significant—strongly indicating that some of the factors influenced litigants’ “*decisions to appeal unfavorable lower-court rulings*” to state and federal courts. Similarly, in MODEL B, many of the same variables influenced litigants’ “*decisions to appeal*” state trial courts’ and federal district courts’ adverse rulings. Thus, in MODEL A or B, litigants’ “*decision to appeal or not appeal*” can be explained by knowing one or a combination of facts: 1) the appellate courts’ geographic locations, 2) litigants appealed *only* to state courts, and 3) litigants appealed to the Fifth Circuit rather than to the other federal circuits, 4) the complainants were insured under comprehensive general liability insurance contracts and under some cyber-insurance endorsements, 5) the insurance contract insured a single person, and 6)

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661. *Id.*

662. *See* TABLE 1 at the bottom.

663. *See, e.g.,* Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 100 n.144 (2011) (reporting probit estimates, the marginal effects of all variables—including control variables—on the probability of voting, t-statistics, standard errors and the corresponding symbols which represent the 1%, 5%, and 10% levels of statistical significance).

insureds or underlying third parties filed trespass and/or invasion of privacy claims.

Perhaps, viewed individually, these initial statistically significant “*decision-to-appeal-or-not-to-appeal*” findings are interesting. However, there is an overriding question: whether or not “selectivity bias” appears in the sample data. Or, stated another way, are there meaningful differences between litigants who decided to appeal and litigants those who decided not to appeal adverse rulings? To find an answer for MODEL A, a “test” for similarities between two equations — the *two distributions of probit values* — is required. An identical test is required for MODEL B.

At the bottom of each model in TABLE 5, a Wald test for independent equations appears. The respective Chi-square values are *not statistically significant* and they suggest: no meaningful self-selection or other-selection bias exists in the sample data. Now, consider the ultimate or more compelling question: whether the multiple, independent, concurrent and simultaneous effects of the respective predictors in MODEL A and MODEL B are *significantly more or less likely* to influence appellate courts’ dispositions of duty-to-defend disputes. The answer is, yes.

Reconsider MODEL A and examine the probit values under the heading DISPOSITIONS OF DECLARATORY JUDGMENTS ACTIONS IN STATE AND FEDERAL COURTS OF APPEALS. Four predictors have corresponding statistically significant probit values. The “*Southern-Courts*” and “*Southwestern-Courts*” variables have positive **.1474** and **.3093** probit value, respectively. And the interpretations are straightforward: insureds generally are *substantially more likely to prevail* in both state and federal appellate courts which are located in southern and southwestern states. Moreover, insureds are still more likely to prevail even when those courts weigh insurers’ usually effective “*exclusion*” and/or “*no-occurrence*” affirmative defenses.<sup>664</sup>

On the other hand, the next two statistically significant probit values in MODEL A are negative. The negative **-.3579** coefficient indicates that in the *Court of Appeals for the Tenth Circuit*, insureds are *significantly less likely to win* duty-to-defend disputes. Similarly, the negative **-.2723** probit coefficient means insureds are *significantly less likely to win* when third parties sue insureds and raise “*trespass-to-property*” and “*invasion-of-privacy*” claims.

The probit values in MODEL B answer the general question: whether *extrajudicial variables* are more likely to influence the outcomes of duty-to-defend disputes when appellate courts *only* apply the supposedly pro-insureds doctrine of ambiguity. Again, the answer is, yes. Four statistically significant probit coefficients appear under the caption, DISPOSITIONS OF

664. See, e.g., *Maryland Casualty Company v. Integration Concepts, Inc.*, 119 F. Supp. 3d 1322, 1324 (S.D. Fla. 2015) (embracing the comprehensive general liability insurer’s argument and reaffirming that the policy’s “computer software,” “electronic data processing services and computer consulting or programming services” and “professional services” exclusions *generally* preclude coverage for claims based on bodily injury which arise from the insured companies’ “professional services as computer consultants, programmers or advisors”); *Hoosier Ins. Co. v. Audiology Found. of Am.*, 745 N.E.2d 300, 309 (Ind. Ct. App. 2001) (stressing a coverage exclusion is *usually* an effective affirmative defense, “an unambiguous exclusionary clause is *ordinarily* entitled to enforcement,” and “generally, insurers are allowed to limit liability *in any manner* which is not inconsistent with public policy”) (emphasis added).

DECLARATORY JUDGMENT ACTIONS IN STATE AND FEDERAL COURTS OF APPEALS. The positive **.5344** probit value in MODEL B mirrors a similar finding in MODEL A: Generally, when adverse duty-to-defend rulings are appealed to state and federal appellate courts in the “*Southwest*,” insureds are *significantly more likely to prevail*.

Conversely, when insureds appeal *specifically* to the Fifth Circuit Court of Appeals, they are *substantially less likely to prevail*. The corresponding negative and statistically significant probit value is **-.3540**. Why are insureds more likely to lose—even when the Fifth Circuit applies the purportedly pro-insured ambiguity doctrine? Among other plausible explanations, the Fifth Circuit decides insurance-defense controversies which arise in Mississippi, Louisiana and Texas.<sup>665</sup> The largest percentage of duty to-defend disputes originate in Texas<sup>666</sup>—forcing the Fifth Circuit to apply Texas’s draconian and decidedly pro-insurer doctrine of ambiguity more frequently. Put simply, Texas’s multi-pronged doctrine states that conflicting expectations and disputes do not automatically or necessarily create an ambiguity.<sup>667</sup> Texas Supreme Court embraces the position: since insureds and insurers are likely to adopt conflicting views, every competing interpretation of an insurance contract is not an ambiguity.<sup>668</sup> Therefore, under Texas law, courts are precluded from construing duty-to-defend provisions against insurers *merely* because an insurer and its insured have conflicting views.<sup>669</sup>

Refocusing on MODEL B, the remaining two extrajudicial and statistically significant variables also produced different outcomes—even though appellate courts applied the doctrine of ambiguity. Consider the three categories under the heading *Traditional Insurance Contracts and Cyber-Liability Endorsements*. The binary variable—“commercial property insurance”—has a corresponding negative **-.5903** probit value. It strongly suggests: Insureds generally are *substantially less likely* to prevail when they sue *commercial-property* insurers who offered third-party coverage under a cyber-liability endorsement or under a traditional insurance contract. By comparison, *residential-property owners* are *exceedingly more likely* to prevail against *any* insurer on appeal. Near the bottom of TABLE 5, the corresponding probit value **.5204** is positive and statistically significant.

Therefore, what is the practical importance of these statistically significant bivariate and multivariate findings? Arguably, when third parties file traditional tort-based allegations or cyber-technology claims against businesses and professionals, those insured entities understand, accept or contemplate two possibilities: 1) their liability insurers might refuse to provide a

665. See generally Willy E. Rice, *The Court of Appeals for the Fifth Circuit: A Legal Analysis and Statistical Review of 2005-2006 Insurance Decisions*, 39 TEX. TECH L. REV. 843, 846 n.1 (2007).

666. Consider the query: sy(duty /5 defend). On July 10, 2019, the query was executed in three WESTLAW databases: LA (State & Federal), MS (State & Federal) and TX (State & Federal). Respectively, the search retrieved 406, 262, and 581 duty-to-defend cases—a total of 1,249 decisions. The respective percentage are 32.5%, 21.0% and 46.5%.

667. *Forbau v. Aetna Life Ins.*, 876 S.W.2d 132, 134 (Tex. 1994).

668. *Id.*

669. *State Farm Life Ins. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995).

legal defense against traditional- and/or cyber-technology claims; and, 2) a series of lawsuits might be necessary—which hopefully, will force insurers to honor their contractual duty. And, if duty-to-defend litigation commences, insureds as well as other reasonable minds expect appellate courts to apply consistently and commonsensically settled legal principles.<sup>670</sup> Also, insured businesspersons and professionals expect courts to decide controversies “judiciously, expeditiously and fairly.”<sup>671</sup> Any serious weighing of extrajudicial factors—wittingly, unwittingly or systematically—is a totally unexpected event.<sup>672</sup>

Yet, the multivariate and statistically significant findings in this study reveal insured businesses, professionals and others are more or less likely to win duty-to-defend disputes depending on several extralegal factors: 1) the “*geographic locations*” of appellate courts, 2) whether the tribunal is a *state or federal* court of appeals, and 3) whether insureds accuse insurers of breaching a *liability provision* in “*commercial- or residential-property*” insurance contracts.

However, should courts’ geographic locations—rather than insurers’ “*affirmative exclusionary defenses*”—influence insureds’ likelihood of winning or losing duty-to-defend controversies? Does case law predict that insurers should have a greater likelihood of winning duty-to-defend disputes when courts of appeals apply the doctrine of ambiguity? Moreover, should insured businesspersons and professionals reasonably expect to lose in the Fifth and Tenth Circuits—even after removing the influence of insurers’ “no-occurrence and exclusion” defenses? Or, asked globally, should rational jurists expect *any* of the extrajudicial predictors in TABLE 5 to influence the outcomes of insurance-defense controversies in state and federal courts of appeals? The commonsensical answer to each question is no.

670. Cf. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1739-41 (2019) (Sotomayor, J., dissenting) (“Perhaps the majority is worried that statements... can be easy to allege and hard to disprove. Such concerns... are insufficient reason... to change the burden of proof for an entire category of claims... [M]ore than ever before, an audiovisual record of key events is now often obtainable... Smartphones that become video cameras... are ubiquitous... [T]he majority’s approach will yield arbitrary results and shield willful misconduct from accountability... What exactly the Court means by ‘objective evidence’... is far from clear. I hope that courts approach this new standard *commonsensically*”) (emphasis added); *Obama v. Klayman*, 800 F.3d 559, 564 (D.C. Cir. 2015) (“[Plaintiffs have presented] specific evidence showing that the government operates a bulk-telephony metadata program that collects subscriber information from domestic telecommunications providers, including Verizon Business Network Services... [W]hile *post hoc* obstacles may undermine a program’s efficacy, they do not alter its intended objective, which remains... *commonsensically*... the comprehensive collection of telephonic metadata”) (emphasis added); *Czekalski v. LaHood*, 589 F.3d 449, 453-54 (D.C. Cir. 2009) (“Czekalski contends that the magistrate judge improperly instructed the jury on... the applicable legal principles and standards... But we believe this perceived defect is simply the result of faulty punctuation... [W]e therefore decline to read the instruction in such a manner as to give it a *commonsensically* false meaning”) (emphasis added); *Cheryl B. v. Berryhill*, No. 417CV00035SEBTAB, 2018 WL 4691081, at \*5 (S.D. Ind. Sept. 30, 2018) (“In his report and recommendation, the magistrate judge read the ALJ’s decision... as a whole and *commonsensically*—concluding that the ALJ’s discussion... was substantively sufficient”) (emphasis added).

671. Cf. *Werner v. Bd. of Educ. of Pope Cty. Cmty. Unit Sch. Dist. No. 1*, No. 3:11-CV-01095-JPG, 2012 WL 1134006, at \*2 (S.D. Ill. Apr. 4, 2012) (“[T]he court finds it would impede judicial economy and resources to vacate the state court’s order... [I]t is in the interest of justice to resolve this case judiciously and expeditiously”); *Alberti v. Sheriff of Harris County, Texas*, 406 F. Supp. 649, 659 (S.D. Tex. 1975) (“[C]ases are disposed of within 69 days... [which] is very close to the 60-day minimum amount of time necessary to process a... case judiciously and *fairly*...”) (emphasis added).

672. *Id.*

## VII. SUMMARY-CONCLUSION

In the 1940s, technological innovations grew rapidly, explaining at least eighty percent of America's economic growth.<sup>673</sup> In turn, the use and application of those "modern technologies" generated various types of "novel" personal injuries, as well as property losses and destruction.<sup>674</sup> As a consequence, new technology-based claims evolved, and tort-based litigation increased.<sup>675</sup>

During the 1940s, recognizing excellent opportunities to make reasonable and legitimate profits, insurers began selling so-called third-party liability insurance contracts.<sup>676</sup> Today's widely marketed and purchased standard CGL originated in the 1940s.<sup>677</sup> CGL and other liability insurers promise to defend insured industrial entities against third parties' tort-based claims, if the entities' "twentieth-century technologies" caused bodily injuries or property damage.<sup>678</sup> And, believing that CGL insurers would actually defend against *all* "covered" third-party claims, designers, manufacturers, marketers, suppliers as well as professionals and sellers of goods and services paid billions of dollars for liability insurance coverage.<sup>679</sup>

673. See, e.g., Hannibal Travis, *Patent Alienability and Its Discontents*, 17 TUL. J. TECH. & INTELL. PROP. 109, 119 (2014) (reporting that technological innovation explains at least 80% of the economic growth in the U.S during the first half of the twentieth century and advances in scientific knowledge explain approximately half of the per capita income growth during the 1940s in the U.S.); Jim Chen, *Standing in The Shadows of Giants: The Role of Intergenerational Equity in Telecommunications Reform*, 71 U. COLO. L. REV. 921, 952 (2000) (reporting AT&T's growth expanded tremendously in the 1940s—creating microwave transmission which became a viable alternative to copper-wire long-distance service, and producing coaxial cable to enhance the reach of broadcast television).

674. See, e.g., Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1819-21, 1826-28 (2010) (describing late-nineteenth-century origins of technology-based invasion of privacy torts and suggesting that modern website and database technologies generate similar torts); Ryan Calo, *Robotics and the Lessons of Cyberlaw*, 103 CALIF. L. REV. 513, 515, 534, 558 (2015) (arguing that robotics technology is transformative, causes physical injuries, and will probably generate some frequently litigated common-law torts—since robots have the potential to physically harm individuals and/or their property); Ken Oliphant, *Tort Law, Risk, and Technological Innovation in England*, 59 MCGILL L.J. 819, 821-24 (2014) (discussing the Industrial Revolution, subsequent and substantial increases in the number of personal-injury and property-damage lawsuits, and the relationship between 1800s' technological advances and English tort law).

675. *Id.*

676. See *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 573-74 (Wis. 1990) (reporting that the insurance industry trade associations comprise nearly every major American insurance company and stressing the association developed the standard comprehensive general liability (CGL) contract in the 1940s).

677. *Id.*

678. *Gelman Sciences, Inc. v. Fidelity and Cas. Co. of New York*, 572 N.W.2d 617, 620 (Mich. 1998) ("Comprehensive general liability policies insure against liabilities to third parties... Since the early 1940s, the insurance industry has drafted and periodically revised the standard CGL policy... The standard CGL policy provides] coverage for an 'occurrence,' defined typically as 'an accident [which causes] bodily injury or property damage, neither expected nor intended from the standpoint of the insured'").

679. Cf. Robert Hartwig, *Have Insurers Lost the Capacity to Run an Underwriting Profit?*, INSURANCE JOURNAL (February 9, 2012), <https://www.insurancejournal.com/news/national/2012/02/09/234828.htm> [<https://perma.cc/EA5T-XXDJ>] ("In the decade of the 1930s, although the country was caught in the midst of the Great Depression, there were seven years with underwriting profits... [I]n the 1940s, including the war years, all 10 years were profitable... [In the 1950s, eight years were profitable] and nine... [during] the 1960s and 1970s also recorded underwriting profits").

In the 1980s, personal-computing hardware and software technologies evolved, creating the necessary foundation for the Internet<sup>680</sup> and the Web.<sup>681</sup> According to world-renowned experts, approximately “450 billion daily transactions” will occur over the Internet by 2020.”<sup>682</sup> Like the mid-twentieth-century groundbreaking technologies, cyber-technologies have, and will continue to produce a smorgasbord of personal-injury and property-damage claims.<sup>683</sup>

On the other hand, although novel cyber-specific *allegations* have evolved, courts have not created cyber-specific *causes of action*.<sup>684</sup> Most cyber-related *claims* are actionable under one or more common-law theories of recovery that law students read and analyze during the first year of law school.<sup>685</sup> In fact, many of today’s cyber-technology *claims* are actionable under the very tort theories which appear in celebrated first-year-law cases like *Katko v. Briney*,<sup>686</sup> *Vaughan v. Menlove*,<sup>687</sup> and *Lubitz v. Wells*.<sup>688</sup> Many other cyber-related *claims* are actionable under numerous state or federal statutes that also sound in tort.<sup>689</sup>

680. Cf. Michael W. Carroll, *Whose Music Is It Anyway?: How We Came To View Musical Expression As A Form Of Property*, 72 U. CIN. L. REV. 1405, 1405 n.1 (2004) (discussing the expansion of digital and cyber-technology and stressing that digital technology—which spawned the explosive growth of the Internet—originated in the 1930s and computing technology evolved the 1940s).

681. *Id.*

682. See D. Bruce Johnston, *Internet Business Transactions Near 450 Billion a Day*, WLDJ (May 21, 2010, 5:40 PM), <http://weblogic.sys-con.com/node/1404879> [<https://perma.cc/8TRU-KS95>] (last visited July 14, 2019) (“[IDC’s more than 1000 analysts] provide global, regional, and local expertise on technology and industry opportunities and trends in over 110 countries worldwide” (citing International Data Corporation’s report which estimates that the number online business-to-business and business-to-consumer transactions will reach 450 billion per day by 2020)).

683. See *supra* Part II, note 139 and accompanying text.

684. See generally Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145, 1147 (2000) (citing historical evidence, supporting the view that very technologies define a specific body of law or theories of recovery and observing correctly that “modern informatics technology,” the Internet and other cyber-related technologies will not foster technology-specific causes of action or legal theories of recovery).

685. See, e.g., *Lopez v. Pena*, No. 2-12-CV-165-J, 2012 WL 6200223, at \*2 (N.D. Tex. Dec. 12, 2012) (stressing that civil actions—under Texas Breach of Computer Security Act, Tex. Penal Code § 33.02—sound in tort, require plaintiffs to prove that a defendant knowingly or intentionally accessed a computer, computer network, or computer system without the owner’s consent, and confirming that Texas statutory cybertechnology tort is akin to the common-law torts of “cyber” trespass to chattels and “cyber” intrusion on seclusion). See also John W. Cooley, *New Challenges for Customers and Businesses in the Cyber-Frontier: E-Contracts, E-Torts, and E-Dispute Resolution*, 13 LOY. CONSUMER L. REV. 102, 114-15 (2001) (listing several cybertechnology torts: hackers’ invading businesses’ websites and stealing consumers’ personal information, businesses’ defaming their competitors by posting libelous information about the competitors on various websites, and data-destroying computer viruses commercial entities’ websites unwittingly or wittingly invading online consumers’ computers).

686. *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971).

687. *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837).

688. *Lubitz v. Wells*, 113 A.2d 147 (Conn. 1955).

689. See RICE, *supra* note 148 (devoting five chapters for an analysis of various and many state and federal cyber-technology statutes and litigated statutory claims).

Without a doubt, most “cyber professionals”<sup>690</sup> and “cyber merchants”<sup>691</sup> are highly resourceful and savvy entrepreneurs who know how to use websites, as well as other cyber platforms, to sell and advertise goods and services. Moreover, the overwhelming majority of entrepreneurs understand cyber-technology and cyberspace risks.<sup>692</sup> On the other hand, most cyber professionals and businesspersons are arguably *unsophisticated insurance* consumers—relying primarily on experienced insurance lawyers or on insurers’ highly aggressive marketing campaigns for guidance or advice.<sup>693</sup>

Therefore, what should savvy, reasonable and practical businesspersons and professionals take away from all of this? Presently, only a few insurers are selling “true,” standalone and cyber-specific insurance contracts.<sup>694</sup> Most twenty-first-century cyber-insurers are pitching essentially 1940s-vintage CGL liability insurance contracts with a one- or two-page endorsement. Most endorsements, however, typically contain exclusions for cyber-related events or losses.<sup>695</sup> Yet, the contracts strongly imply that cyber-insurers will defend professionals and merchants against numerous cyber-technology claims.<sup>696</sup>

690. See, e.g., Michael Sean Quinn, *The Cyber-World and Insurance: An Introduction to a New Insurance*, 12 J. TEX. INS. L. 20, 21 (2013) (reporting that a “whole range” of new errors and omissions policies are being fashioned and pitched to *cyber-professionals*—architecture designers, code construction contractors, platform engineers, digital asset monitors, security risk inspectors and analysts—and traditional professional liability policies are covering lawyers’ and accountants’ *cyber-related* professional work) (emphasis added).

691. See, e.g., *Ford Motor Co. v. GreatDomains.com, Inc.*, 177 F. Supp. 2d 635, 639-40 (E.D. Mich. 2001) (“Great Domains operates a website on the Internet at [www.greatdomains.com](http://www.greatdomains.com)—an auction site that operates in a manner similar to... [ebay.com](http://ebay.com). Rather than offering a forum for whatever objects *cyber-merchants* might wish to sell, ...Great Domains specializes in auctioning Internet domain names. Thus, persons who have obtained rights to use a particular domain name... [may] sell those rights to a willing purchaser at market price through the [greatdomains.com](http://greatdomains.com) website”) (emphasis added).

692. Cf. Tom Donilon, Nat’l Sec. Advisor to President Barack Obama, Remarks at the Asia Society: The United States and the Asia-Pacific in 2013 (Mar. 11, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/03/11/remarks-tom-donilon-national-security-advisor-president-united-states-an> [<https://perma.cc/Z9L5-JHM2>] (“Increasingly, U.S. businesses are speaking out about their serious concerns about sophisticated, targeted theft of confidential business information and proprietary technologies through cyber intrusions... As the President said in the State of the Union, we will take action to protect our economy against cyber-threats”).

693. Cf. Quinn, *supra* note 690, at 21 (observing that even experienced coverage lawyers must read each cyber insurance policy extremely carefully and consult the following sources—“technical dictionaries, engineering textbooks, cyber-magazines and journals, and other sources”—in order to understand a cyber-liability insurance contract).

694. Cf. BLACK ET AL., *supra* note 149, at 2 (“Traditional insurance policies routinely exclude cyber claims... Cyber policy coverage is not standardized... [M]ost insurers continue to offer proprietary coverage forms. As more small- and mid-market organizations purchase cyber insurance, use of ISO forms will likely grow”).

695. Cf. BLACK ET AL., *supra* note 149, at 2 (“Organizations can insure against cyber risks in three ways: 1) endorsements to existing insurance policies; 2) specialized cyber insurance policies; or 3) manuscript insurance policies tailored to particular risks. Endorsements to existing policies provide the least coverage but offer the lowest premiums. Traditional insurance policies routinely exclude cyber claims. Exclusions... are broadly worded and bar coverage for the types of claims that generally arise from cyber events... The wider cyber insurance market provides far more coverage options than found in a single coverage extension or endorsement”).

696. Cf. Quinn, *supra* note 690, at 21 (citing experienced insurance lawyers’ litigation histories and asserting that cyber insurance policies resemble the insurance contracts of the past or existing commercial liability insurance contracts).

The author's legal and empirical research, however, uncovered several arguably newsworthy and disconcerting findings.<sup>697</sup> Liability insurers and their agents often make materially fraudulent misrepresentations about cyberinsurance coverage. Insurers insist that, 1) cyber-liability insurance is absolutely necessary, because "unrelenting" and intractable cyber-technology risks will constantly expose businesspersons to third-party lawsuits<sup>698</sup>; 2) cyber-liability insurance contracts supposedly provide *broad*er cyber-risk coverage than traditional CGL liability insurance contracts or Coverage-B endorsements<sup>699</sup>; and, 3) insurers' legal-defense obligations under evolving cyber-specific insurance contracts are purportedly *superior* to insurance-defense obligations under traditional CGL insurance contracts.<sup>700</sup>

697. Without a doubt, the meaning of the term "newsworthy" is debatable. In fact, after accessing the Lexis's U.S. Newspaper database on October 11, 2019, and submitting the query "newsworthy w/s definition," multiple definitions were uncovered. More relevant, the query "cyber w/p insurance" generated more than 10,000 articles. Among the latter, a sub-query "newsworthy" produced twenty-eight articles in which authors actually used the term "newsworthy" to underscore the public's and consumers' general concerns about cybertechnology losses and the role of cyberinsurers. See Gail Sullivan, *Sony Tries to Stop Reports About Hack*, WASH. POST, Dec. 16, 2014, at A14 ("When they deem it newsworthy, news organizations have long used [stolen] material... [N]ews outlets have published hundreds of stories about the personal e-mails and corporate documents—reporting on Sony executives' salaries, business dealings, and e-mail exchanges.... Sony might argue that its stolen information isn't newsworthy... [But, the] definition of 'newsworthy' isn't clear..."). See also Cunningham Lindsey France S.A., *Lessons Learnt from Dealing with Cyber Fraud*, NEWS BITES (Sept. 9, 2019) ("Cyber fraud is... a relatively new and emerging threat. Some [insurance brokers] have acknowledged they're not aware of all the risks... For the majority of the British public, exposure to cyber fraud issues has been around hacking... There are plenty [examples]. some more newsworthy than others. However, most cyber insurance policies are bought by business consumers rather than individuals... So, getting the right cover matters to business consumers."); National Underwriter, *Around the P&C Insurance Industry*, PROPERTY CASUALTY 360 (July 19, 2017) ("[The] Global Insurance Industry Group has launched *Insurtech*, a website dedicated to providing timely, newsworthy developments and content focusing on the convergence of traditional insurance and technology").

698. Cf. GARETH WHARTON, HISCOX, 2018 HISCOX CYBER READINESS REPORT 1 (2018), <https://www.hiscox.com/sites/default/files/content/2018-Hiscox-Cyber-Readiness-Report.pdf> [<https://perma.cc/8893-RXEF>] ("Cyber security poses a challenge *unlike any other*. Businesses large and small [face an unseen, largely unknown, and utterly unrelenting enemy]... This is an enemy that can be confronted but *never quite defeated*... For an increasing number of organisations, a key part of the solution is to *transfer some or all of the risk to an insurer*. Hiscox [sells] cyber and data risk insurance—providing *standalone cover* to more than 20,000 firms...") (emphasis added); Gregory Gidus & John C. Pitblado, *Failure to Procure Cyber Insurance Could Haunt Your Company*, PROPERTY CASUALTY FOCUS (Oct. 29, 2018), <https://propertycasualtyfocus.com/failure-to-procure-cyber-insurance-could-haunt-your-company/> [<https://perma.cc/ZT3Z-BEFL>] ("[A federal court embraced the well-developed consensus: Data-breach] losses are *not covered* under standard commercial general liability policies... This case stands as... *another stark warning that companies... must address exposure to hacking and other data breach events before they occur*... [So companies should inquire] about *standalone cyber products*... [S]uch *coverage is critical*."") (emphasis added and in the original).

699. See, e.g., *Cyber Liability Insurance*, ARNOLD INSURANCE AGENCY, INC., <https://www.arnoldinsuranceagency.com/cyber-security> [<https://perma.cc/Q2DJ-GD3D>] (last visited July 16, 2019) ("[C]yber insurance... is designed to cover data, privacy, and network exposures... [B]oth cyber novices [as well as] smart and tech-savvy business owners [will be protected] against data breaches, hacks, and other types of cyber security events... Cyber insurance offers *broad coverage*..." (emphasis added)).

700. See, e.g., Press Release, AT&T, AT&T, Lockton Affinity and CNA Team Up to Arm Small and Midsize Businesses with Cybersecurity Insurance (October 8, 2018), [https://about.att.com/story/2018/cybersecurity\\_insurance.html](https://about.att.com/story/2018/cybersecurity_insurance.html) [<https://perma.cc/47BF-HLY9>] ("AT&T Managed Cybersecurity Solutions provide *superior* cyber protection [and offer its customers] cybersecurity technologies and access to *broad* cyber insurance through CNA... [The policy may cover expenses associated with] network security liability [and] privacy injury liability") (emphasis added); *A Closer Look Into The Top Cyber Liability Exposures*, U.S. PRO. INSURANCE SERVICES, <http://usproins.com/a-closer-look-into-the-top-cyber-liability-exposures/> [<https://perma.cc/Y32F-JW4G>] (last visited July 20, 2019) ("[We are] one of America's top insurance brokers... We represent the broadest and most competitive markets... and we proudly offer... *superior service*... [E]very business... has a real and evident exposure... Consider US Pro as your source for cyber insurance").

The author's findings, however, reveal that cyber-liability insurance has real limitations.<sup>701</sup> Cyber-insurance coverage is exceedingly more expensive than traditional liability insurance.<sup>702</sup> Despite the fact that cyber-insurance is more expensive, there is little credible evidence suggesting that cyber-liability insurers' legal-defense obligations are greater than traditional insurers' obligations.<sup>703</sup> Arguably, traditional and less-expensive CGL insurance is superior. Why? Cyber-insurance contracts contain *broad* exclusion provisions.<sup>704</sup> Additionally, an aggressive legal defense under a CGL policy *does not erode* the policy limits.<sup>705</sup> In contrast, an aggressive legal defense can erode all proceeds under a cyber-liability insurance agreement.<sup>706</sup>

Again, professionals and businesspersons are executing billions of daily transactions over the Internet.<sup>707</sup> It is commendable that the American Bar Association,<sup>708</sup> the American Medical Association,<sup>709</sup> the American Institute of Architects<sup>710</sup> as well as other business, professional and trade

701. Cf. Todd Beekley, *The Value and Limits of Cyber Insurance*, EDUCAUSE REVIEW (Apr. 23, 2018), <https://er.educause.edu/articles/2018/4/the-value-and-limits-of-cyber-insurance> [<https://perma.cc/Q4TT-VPF4>] ("While important, cyber-risk insurance policies should be considered a last resort and are not a stand-alone remedy to address data-security issues").

702. See, e.g., Richard Laycock, *Why Is Cyber Liability Insurance So Expensive?*, CSO (Oct. 30, 2017, 8:25 AM), <https://www.csoonline.com/article/3503157/why-is-cyber-liability-insurance-so-expensive.html> [<https://perma.cc/48Q8-8LH7>] (confirming that business insurance generally is not cheap and cyber-liability insurance in particular is very expensive).

703. *Id.*

704. See, e.g., *Cyber Insurance Checklist*, GANNON ASSOCIATES (Jan. 19, 2019), <https://gannonassociates.com/2019/01/19/cyber-insurance-checklist/> [<https://perma.cc/CF9P-ZSYY>] ("Beware of broad exclusions. [Insurance consumers] should read the fine print and [become] aware of any exclusions in a [cyber-liability insurance] policy. [One might] think that a policy provides broad coverage... [T]he fine print proves otherwise") (emphasis added).

705. See, e.g., Craig R. Blackman, *Cyber Insurance and the Defense Conundrum*, STRADLEY RONON (Aug. 7, 2017), <https://www.stradley.com/-/media/files/publications/2017/08/blackman---updated---cyber-insurance-and-the-defense-conundrum.pdf> [<https://perma.cc/BT3Z-299Q>] (stressing that 1) comprehensive general liability (CGL) insurers hired attorney to represent insureds; and 2) CGL insurers pay defenses costs which typically exceeds the policy's limits. However, under cyber-liability insurance contracts, insurers typically control the legal defense while the defense costs simultaneity erode the insured's policy limits. Therefore, an aggressive legal defense—under the insurer's control—may erode all insurance proceeds).

706. *Id.*

707. See *supra* notes 333-36, 681-82 and accompanying text.

708. See also Lowell Brown, *Texas Supreme Court Addresses Attorneys' Tech Competence in Amended Comment to Disciplinary Rule*, TEXAS BAR BLOG (Mar. 1, 2019), <https://blog.texasbar.com/2019/03/articles/texas-supreme-court/texas-supreme-court-addresses-attorneys-tech-competence-in-amended-comment-to-disciplinary-rule/> [<https://perma.cc/35EE-82MW>] (Texas Supreme Court amended the Texas Disciplinary Rules of Professional Conduct § 1.01, Comment 8—which requires attorneys to be competent and know the benefits and risks associated with relevant technology).

709. See *In Age of Digital Crime, Old Motto Applies: Be Prepared*, AMERICAN MEDICAL ASSOCIATION (Mar. 16, 2018) <https://www.ama-assn.org/practice-management/sustainability/age-digital-crime-old-motto-applies-be-prepared> [<https://perma.cc/NB9L-76W4>] ("[T]he near inevitability of a cyberattack is a message that the AMA has been spreading... Eight in 10 physicians [have] experienced a cyberattack... The AMA [offers webinars and other resources on its website—explaining how] to prevent attacks... The Health Insurance Portability and Accountability Act (HIPAA) sets stringent rules and potentially staggering fines, which apply only to patient health information").

710. *Cyber Liability Insurance*, THE AIA TRUST, <https://www.theaiatrust.com/cyber-liability-insurance/> [<https://perma.cc/MAH9-CFUV>] (last visited July 17, 2019) ("Architects can now develop a robust risk management procedure for their firm by turning to their insurance professionals. The AIA Trust—through their partnership with [an insurer]—has developed a Cyber Risk Kit—[which explains architects' cyber exposures and provides]... comprehensive cyber solutions").

associations<sup>711</sup> are encouraging, and even *requiring* their respective members to assess and appreciate the risks that are associated with using cyber-technologies. It is admirable that business, professional and trade associations are helping their members to understand, and purchase cyber-insurance.<sup>712</sup>

Nevertheless, statistical and legal analyses of state and federal courts' declaratory judgments strongly suggest that professionals, and businesspersons, as well as their respective associations, do not fully appreciate the concomitant risks associated with purchasing categorically more expensive, and, arguably, inferior cyber-liability insurance coverage. Consider the following findings: when insured businesses advertise certain products or services, promise to deliver the advertised goods or services to consumers for a certain price, and then deliver completely different products or services to unsuspecting customers, the conduct is called baiting and switching.<sup>713</sup> Significantly, when consumers commence lawsuits against errant businesses who employ bait-and-switch schemes, liability insurers customarily refuse to defend the merchants. And an *overwhelming* majority of courts support insurers' decisions.<sup>714</sup>

Now, consider the *liability insurers' deceptive practices*. Quite often, and being fully cognizant of insured professionals and business entities' advertising activities, cyber-risk insurers contractually promise to defend the entities

711. Cf. Aubrey Gene, *Cyber Insurance Update 2019*, NAT'L UNDERWRITER PROP.CASUALTY360 (July 9, 2019), <https://www.profundunderwriters.com/cyber-insurance-update-2019/> [https://perma.cc/27XJ-RC6Q] ("Historically, buyers of cyber coverage have been large organizations... like health care, finance and retail... But, in 2019, small to midsize businesses... are increasingly [exploring]... cyber coverage... [I]nsurers note that... no organization is safe from a cyber event.").

712. See, e.g., *ABA Begins Offering Cyber Liability Insurance to Lawyers, Law Firms of All Sizes*, AM. BAR ASSN. (Feb. 28, 2017), [https://www.americanbar.org/news/abanews/aba-news-archives/2017/02/aba\\_begins\\_offering/](https://www.americanbar.org/news/abanews/aba-news-archives/2017/02/aba_begins_offering/) [https://perma.cc/SQV3-9EVK] ("The ABA has expanded its insurance offerings to include cyber insurance... The innovative insurance... includes cyber coverage... for liability protection and defense costs... ABA Insurance is available through USI Affinity... that has teamed with the ABA to create a new insurance program specially designed for America's lawyers."); James F. Sweeney, *What Physicians Need to Know About Cyber Insurance*, Med. Econ. (July 3, 2018), <https://www.medicaleconomics.com/business/what-physicians-need-know-about-cyber-insurance> [https://perma.cc/ZK24-HKHS] ("[M]ore primary care physicians [are buying cyber insurance... A complete policy includes [third-party coverage—covering the legal costs associated with defending against patients' lawsuits]... Healthcare data breaches are rampant... Cyber criminals target healthcare organizations [databases and their patients'] names, birthdates, addresses, social security numbers, credit card numbers, and health insurance information").

713. See, e.g., *Sting Sec., Inc. v. First Mercury Syndicate, Inc.*, 791 F. Supp. 555, 563 (D. Md. 1992) (finding that Sting developed a "patrol command" computer software and hardware system that purportedly "allowed security agencies to schedule guard assignments with greater efficiency," and declaring that the CGL insurer had no duty to defend the seller who fashioned a fraudulent *bait-and-switch* scheme by delivering a system to a customer which was wholly different from the marketed system); *Hartford Cas. Ins. v. Softwaremedia.com*, No. 2:10-CV-01098 BSJ, 2012 WL 965089, at \*1 (D. Utah Mar. 20, 2012) (embracing the CGL insurer's "*bait and switch*" argument and declaring *as a matter of law* that the insurer had no duty to defend SoftwareMedia against a lawsuit in which Microsoft Corporation alleged: SoftwareMedia engaged in a fraudulent "*bait and switch*" scheme by offering online consumers certain Microsoft products, but eventually selling a less valuable product; and the fraudulent *bait-and-switch* scheme caused unsuspecting buyers to use Microsoft's software without valid licenses, thereby infringing upon Microsoft's copyrights.).

714. *Id.* Also, on July 20, 2019, the author constructed the query—"*Insurance insurer /s (duty /2 defend)*"—and executed it in Westlaw's ALL STATE & FEDERAL database. More than 10,000 cases were retrieved. To narrow the scope of interest, a second query—"*Bait! /5 Switch!*"—was crafted and executed among the 10,000-plus cases. Ultimately, twenty "bait and switch" decisions were uncovered. In the latter cases, courts overwhelmingly embraced liability insurers' bait-and-switch defense.

against “advertising injury” claims.<sup>715</sup> In the course of events, the cyber merchants and professionals ask their insurers to provide a legal defense—citing a “personal and advertising injury” claim provisions. However, citing and relying on a cleverly worded exclusion provision, which precludes coverage for “*personal injury or advertising injury*” claims, the insurers refuse to defend their insureds. Although the practice is called illusory coverage,<sup>716</sup> it is essentially a bait-and-switch scheme. And, all too many state and federal courts allow cyber- and traditional-liability insurers to practice this highly deceptive marketing-and-sales tactic.<sup>717</sup>

Finally, some jurists have pondered whether it will be more difficult to predict courts’ dispositions of duty-to-defend disputes that arise under cyber-liability insurance contracts.<sup>718</sup> Although some cyber-related terms appear in modified vintage-1940s liability insurance contracts, and in a few “specialty” cyber-insurance contracts,<sup>719</sup> state and federal courts’ duty-to-defend

715. Compare *Princeton Express v. DM Ventures USA LLC*, 209 F. Supp. 3d 1252, 1258-59 (S.D. Fla. 2016) (finding that the insured used third parties’ photographs to promote his business via websites, social media, flyers and posters; finding that a CGL insurance contract promised to defend the bar owner against advertising-injury claims; finding that a “field of entertainment exclusion” precluded coverage all “advertising injury claims”, but declaring that coverage was illusory and forcing the insurer to defend the bar owner), and *Dish Network Corp. v. Arch Specialty Ins. Co.*, 989 F. Supp. 2d 1137, 1153-54 (D. Colo. 2013), *aff’d sub nom. Dish Network Corp. v. Arrowood Indem. Co.*, 772 F.3d 856 (10th Cir. 2014) (noting that the insured *owned, operated and used* satellites, finding that a satellite exclusion in the commercial general liability policy—excluded coverage for personal injury or advertising injury arising out of *ownership, operation, or use of satellite*, finding that the exclusion did not preclude coverage of an underlying third-party patent-infringement action, and stressing that the application of the exclusion would make coverage illusory under Colorado law), and *Landmark American Ins. Co. v. NIP Group, Inc.*, 962 N.E.2d 562, 580-81 (Ill. App. Ct. 2011) (finding that the insured corporation regularly distributed unsolicited facsimile advertisements, acknowledging without deciding the insured corporation’s illusory-coverage argument, and declaring that the professional liability insurer had a duty to defend the insured against an underlying class action—even though the policy excluded coverage for claims that arose from false or misleading advertising), and *Purrelli v. State Farm Fire and Cas. Co.*, 698 So. 2d 618, 620-21 (Fla. Dist. Ct. App. 1997) (reaffirming that insurance coverage is illusory when limitations or exclusions simultaneously contradict the insuring provisions, and stressing that liability insurance contracts are also completely nonsensical if the agreements purportedly cover specifically enumerated intentional torts, only if those torts are unintentional), and *Colony Ins. Co. v. Total Contracting & Roofing, Inc.*, No. 10-23091-CIV, 2011 WL 4962351, at \*5 (S.D. Fla. Oct. 18, 2011) (declaring that liability insurance coverage is illusory when limitations or exclusions provisions completely contradict insuring provisions), and *First Mercury Ins. Co. v. Sudderth*, 620 Fed. Appx. 826, 830 (11th Cir. 2015) (stressing that a coverage provision in an insurance policy is illusory when an exclusion clause completely nullifies the coverage provisions), and *Tire Kingdom v. First Southern Ins. Co.*, 573 So. 2d 885, 887 (Fla. Dist. Ct. App. 1990) (reaffirming that an insurance policy may not grant rights in a coverage clause and then retracts the very same right in an exclusion clause), *with See Resource Bankshares Corp. v. St. Paul Mercury Insurance Co.*, 407 F.3d 631, 640 (4th Cir. 2005) (declaring that an insured’s sending unsolicited fax advertisements was not covered under the insurance policies’ advertising injury provisions), and *American States Insurance Co. v. Capital Associates of Jackson County, Inc.*, 392 F.3d 939, 943 (7th Cir. 2004) (declaring that the CGL insurer did not have a duty to defend the insured because advertising injury provisions do not cover the normal consequences of “junk advertising faxes”).

716. *Id.*

717. *Id.*

718. Franklin, *supra* note 45, at 61 (suggesting that novel words and phrases in cyberinsurance contracts have generated “some” fear among small-to-large law firms, and predicting that insured professionals and insurers are “likely to ask courts to refine the meaning of non-standard policy terms”).

719. Compare *St. Paul Fire & Marine Ins. Co. v. Rosen Millennium Inc.*, 337 F. Supp. 3d 1176, 1183 (M.D. Fla. 2018) (finding no duty to defend under an evolving stand-alone cyber-risk policy), and *Innovak Int’l, Inc. v. Hanover Ins. Co.*, 280 F. Supp. 3d 1340, 1347-48 (M.D. Fla. 2017) (same), and *Zurich Am. Ins. Co. v. Sony Corp. of Am.*, 2014 N.Y. Misc. LEXIS 5141, at \*71 (N.Y. Sup. Ct. 2014) (same), *with Travelers Indem. Co. of Am. v. Portal Healthcare Sols., LLC*, 35 F. Supp. 3d 765, 768 (E.D. Va. 2014) (finding a duty to defend), *aff’d*, 644 F. Appx. 245 (4th Cir. 2016), and *Hartford Cas. Ins. v. Softwaremedia.com*, No. 2:10-CV-01098 BSJ, 2012 WL 965089, at \*1 (D. Utah Mar. 20, 2012) (same).

declarations have been quite predictable.<sup>720</sup> As disclosed earlier, statistical and legal analyses of 1,840 cases revealed that 1) federal and state courts are significantly more likely decide duty-to-defend controversies in favor of traditional- and cyber-liability insurers—who are likely to sell considerably more expensive insurance; and 2) courts are more likely to allow questionable *extralegal variables*,<sup>721</sup> rather than universal or settled legal doctrines, to influence litigants’ likelihood of winning or losing duty-to-defend controversies.<sup>722</sup>

Perhaps, in the end, the statistical findings as well as analysis of numerous cyber-liability controversies and conflicting judicial decisions will encourage otherwise knowledgeable “cyber” merchants and professionals to avoid multiple, substantial and documented risks: 1) the risks associated with using cyber technologies illegally and unethically, 2) the risks of defending against third parties’ cybertechnology claims, losing in court and paying substantial out-of-pocket damages, and 3) the devastating risk of purchasing a cyber-liability insurance contract which provides only an expensive illusion of coverage.

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720. See *supra* note 717 and accompanying text.721. See generally Part VI, *supra* notes 639-40 and accompanying discussion.722. See generally Part VI, *supra* notes 639-40 and accompanying discussion.