WAVE OF THE FUTURE: THREE EMERGING TECHNOLOGIES AND THEIR IMPACT ON INSURANCE COVERAGE

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I. INTRODUCTION

The ability to harness and monetize technological innovation is valued in the business world. Companies who are successful at doing so are described as "agile," "forward-looking," and "flexible." However, there are pitfalls for businesses who adopt new technologies without having the foresight to re-examine their existing insurance coverage.

This paper focuses on three new technologies – drones, the "sharing" economy, and social media – and the accompanying liability exposure for businesses using these technologies. Drones are no longer a child's toy. Instead, drones are being utilized in the business world for a multitude of innovative applications. Next, the "sharing" economy created by companies like Uber, Lyft, and AirBNB has created entirely new business models, which can cause insurance coverage dilemmas. Finally, the use of social media by business, once a rarity but now ubiquitous, brings the specter of potentially significant excluded costs for many policyholders.

This paper discusses the insurance coverage available (or not available, as the case may be) for the liabilities that may be incurred with the use of these technologies under the standard commercial general liability policies.[1]

II. COVERAGE FOR DRONES

One of the fastest growing technologies for many companies are unmanned aerial vehicles ("UAVs"), popularly known as drones. UAVs are

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[1] Although each of the technologies discussed in this paper have their own specialized policy forms, those forms are not the focus of this paper.

multi-purpose tools that can be adapted to a variety of tasks. Consider, for example:

- Amazon has received permission to test UAVs for home delivery[2]
- Dozens of corporations have used UAVs to film commercials[3]
- Mining corporations have used UAVs to map mines[4]
- Farmers and farming corporations have used UAVs to better monitor crop growth and soil moisture[5]
- Hunters and ranches have used UAVs to scout game paths and monitor game populations[6]
- Utility companies have used UAVs to expedite network restoration in the aftermath of natural disasters[7]
- Medical companies have used UAVs to deliver medical supplies[8]

In fact, drones are used for such varied tasks as aerial surveys, monitoring environmental regulation compliance, low-altitude banner advertising, pipeline and electrical line inspection, railroad track inspection, real estate marketing, vacation resort advertising, search and rescue, sports videography, structural inspection, construction site data collection, the prevention of wildlife poaching, environmental regulation compliance,

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[2] Nick Lavars, *Amazon can now test its drone delivery system in the US – for real, this time,* QUARTZ, (April 12, 2015), https://qz.com/381546/amazon-can-now-test-its-drone-delivery-system-in-the-us-for-real-this-time/.
[3] Jack Nicas, *Drone Ban? Corporations Skirt Rules*, WALL ST. J., Feb. 19, 2015, https://www.wsj.com/articles/drone-ban-corporations-skirt-rules-1424373939.
[4] *How Drones Are Changing Mining,* BHP, https://www.bhp.com/media-and-insights/prospects/2017/04/how-drones-are-changing-mining (last visited October 24, 2019).
[5] Taylor Dobbs, *Farms of the Future Will Run on Robots and Drones,* PUB. BROADCAST SERV. (July 9, 2013), http://www.pbs.org/wgbh/nova/next/tech/farming-with-robotics-automation-and-sensors/.
[6] Michael Shea, *The Drone Report: Do Unmanned Aerial Systems Have a Place in Hunting and Fishing?* FIELD & STREAM (March 25, 2014), http://www.fieldandstream.com/articles/hunting/2014/03/drone-report-do-unmanned-aerial-systems-have-place-hunting-and-fishing.
[7] Alan Phillips, *Cable & Wireless Pioneers Drone Technology for Post Hurricane Surveillance in the Region,* DRONELIFE (May 26, 2015), https://dronelife.com/2015/05/26/cable-wireless-pioneers-drone-technology-for-post-hurricane-surveillance-in-the-region/.
[8] Jennifer Smith, *UPS Strikes Agreement to Use Drones to Deliver Medical Supplies*, WALL ST. J. (October 1, 2019), https://www.wsj.com/articles/ups-strikes-agreements-to-use-drones-to-deliver-medical-supplies-11571689248.

security, surveillance and private investigation.[9] UAVs are also used to gather competitive intelligence, such as the size and capacity of manufacturing facilities, numbers of employees, business expansions and the development of on-site infrastructure, the existence (or lack of) of inventory, as well as other bits of practical intelligence.[10] All of this information can now be obtained using discreet and low-cost UAVs, as compared to the otherwise expensive, and obtrusive, proposition of using piloted commercial aircraft like helicopters.[11] Indeed, the Federal Aviation Administration (FAA) anticipates that there will be more than 30,000 registered UAVs in commercial use before 2025.[12]

With the swift rise in usage, the FAA and several states have attempted to introduce regulations. The FAA not only requires authorization for commercial use, but has also issued key definitions that have implications for insurance coverage. Most notably, the FAA defines the term "unmanned aircraft" as "an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft."[13] UAV legislation by the states has been highly varied. For example, some states, including Michigan, prohibit the use of UAVs for hunting and fishing.[14] Florida's statute provides for a civil cause of action if a drone is used to observe persons not visible at ground level.[15] Nevada prohibits the attachment of weapons to UAVs, and Arkansas makes illegal the use of UAVs for video voyeurism.[16]

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[9] L. Scott Harrell, *20 Ways Entrepreneurs Are Making Money With Drone Video*, VIDEO ENTREPRENEURSHIP http://vtrep.com/20-ways-entrepreneurs-using-drone-video-making-money/ (last visited October 24, 2019).

[10] *Id.*

[11] *Id.*

[12] Josh Soloman, *Uncertainties Remain As FAA Integrates Drones Into American Skies*, MIAMI HERALD, April 29, 2003.

[13] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 331, 126 Stat. 11, 72 (codified at 49 U.S.C. §40101).

[14] See, e.g., MICH. COMP. LAWS § 324.40111c(2), 24.401112.(2)(c) (2017) ("An individual shall not take game or fish using an unmanned vehicle or unmanned device ...."); N.C. GEN. STAT. § 14-401.24(b) (2014) ("It shall be a Class 1 misdemeanor for any person to fish or to hunt using an unmanned aircraft system."); IND. CODE § 14-22-6-16(c) (2017) ("[A] person may not knowingly use an unmanned aerial vehicle ... to search for, scout, locate, or detect a wild animal to which the hunting season applies as an aid to take the wild animal.").

[15] FLA. STAT. §934.50 (3)(b)(2015), (5)(b) ("A person … may not use a drone equipped with an imaging device to record an image of privately owned real property or of the owner, tenant, [or] occupant …without his or her written consent…. The owner, tenant, [or] occupant… may initiate a civil action for compensatory damages for violations of this section….").

[16] NEV. REV. STAT. §493.106 (2015) ("A person shall not weaponize an unmanned aerial vehicle or operate a weaponized unmanned aerial vehicle."); ARK. CODE ANN. § 5-60-103 (b) ("A person commits the offense of unlawful use of an unmanned aircraft system if he or she knowingly uses an unmanned aircraft system to conduct surveillance of, gather evidence or collect information about, or photographically or electronically record critical infrastructure without the prior written consent of the owner of the critical infrastructure.").

Texas has opted for broad regulation through its introduction of the Texas Privacy Act (Tex. Gov't Code §423.001, *et seq*). The act appears designed to combat the frequent invasion of privacy claims caused by UAV use, but does recognize that there are many lawful uses. Those lawful uses are defined in §423.002 of the Act.[17] The criminal offense created by the statute makes it illegal for a person "to capture an image of an individual or privately owned real property in this state with the intent to conduct surveillance on the individual or property captured in the image."[18] The Act also includes a civil right to relief that allows for recovery of actual damages and up to a $10,000 fine.[19]

A. *Coverage Issues*

As an initial matter, the definition of the insured vehicle will be key to coverage. Historically, the standard Commercial General Liability ("CGL") policy excluded coverage for "'bodily injury' and 'property damage' arising out of ownership, maintenance, use or entrustment to others of any aircraft … owned or operated by or rented or loaned to any insured. Use includes operation and 'loading or unloading.'"[20]

While common sense would dictate that UAVs are clearly "aircraft," and thereby excluded from coverage, the FAA's definitional distinction of "unmanned aircraft" arguably creates an ambiguity. To address any arguable ambiguity, the Insurance Services Office Inc. ("ISO"), an organization that develops standard policy forms, has issued several new forms applicable to the standard CGL policy.

The most prominent of ISO's revisions are three exclusionary endorsements that apply to: both coverages A and B (CG 21 09 06 15), Coverage A only (CG 21 10 06 15), and Coverage B only (CG 21 11 06 15). The Coverage A exclusion precludes coverage for aircraft, auto, and watercraft. The exclusion extends to unmanned aircraft. It states:

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[17] TEX. GOV'T. CODE §423.002.
[18] *Id.* at §423.002(a). From a coverage perspective, this limitation is notable since it requires the individual to have acted with intent – something which would be excluded under the standard CGL policy. CGL policies cover "occurrences" which is a defined term meaning "accident…".
[19] *Id.* at §423.006.
[20] *See, e.g.,* ISO CG 00 01 04 13.

> This insurance does not apply to:
>
> (1) Unmanned Aircraft
>
> Bodily injury or property damage arising out of the ownership, maintenance, use or entrustment to others of any aircraft that is an "unmanned aircraft." Use includes operation and loading or unloading….
>
> This Paragraph [(1)] applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the occurrence which caused the bodily injury or property damage involved the ownership, maintenance, use or entrustment to others of any aircraft that is an unmanned aircraft.
>
> (2) Aircraft (Other Than Unmanned Aircraft), Auto Or Watercraft
>
> Bodily injury or property damage arising out of the ownership, maintenance, use or entrustment to others of any aircraft (other than unmanned aircraft), auto or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and loading or unloading.

Along with the new exclusions, the endorsement also defines "unmanned aircraft" as aircraft that is (1) designed, (2) manufactured, (3) or modified after manufacture to be controlled directly by a person from within or on the aircraft. This definition remains the same across the rest of ISO's new endorsements.[21]

The notable aspect of the Coverage A exclusion is that it applies to a much broader category of UAVs than the usual automobile exclusion. The usual automobile exclusion applies only to those aircraft owned, operated, rented by or loaned to any insured. In contrast, the UAV exclusion applies to any aircraft that is an "unmanned aircraft." Although the distinction may appear to split hairs, the unique ways in which UAVs are being used have the potential to make the issue germane to certain coverage questions.

Given the popularity of photographic and videographic uses for UAVs, the Coverage B exclusion is also important. It provides that insurance does not apply to:

> Personal and advertising injury arising out of the ownership, maintenance, use or entrustment to others of any aircraft that is an

[21] It is noteworthy that this definition tracks the FAA's definition of "unmanned aircraft" found in Pub. L. No. 112-95, §331, 126 Sta. 11, 72 (codified at 49 U.S.C. §40101). *See supra* note 12.

> unmanned aircraft. Use includes operation and loading or unloading.
>
> This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the offense which caused the personal and advertising injury involved the ownership, maintenance, use or entrustment to others of any aircraft that is an unmanned aircraft.

As with the Coverage A exclusion, the Coverage B exclusion is quite broad.

"Personal and advertising injury" is a defined term in commercial general liability policies, and is defined to mean "injury, including consequential 'bodily injury', arising out of … [the] oral or written publication, in any manner, of material that violates a person's right of privacy." From a coverage perspective, the interaction of this exclusion and the Coverage B insuring agreement is notable. Coverage B's insuring clause typically provides that the insurer "will pay those sums that the insured becomes legally obligated to pay as damages because of 'personal and advertising injury' to which this insurance applies." Thus, although a lawsuit alleging a violation of the right to privacy may trigger coverage under Coverage B, it seems likely that t would also implicate other exclusions. In particular, the "Knowing Violation of Rights of Another" exclusion in Coverage B, which precludes advertising injury caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury," would be triggered. The "Criminal Acts" exclusion (which excludes "Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured) would also likely be triggered under these facts.

The development of forms, however, has not been limited to exclusions. Insurance Services Office, Inc., along with other entities, have also created coverage forms for UAV use. The ISO endorsements (CG 24 51 06 15 and CG 24 52 06 15) do not function as stand-alone coverage grants, but rather operate as exceptions to the exclusions described above. The endorsements include a schedule of UAVs, and provide "this [exclusion] does not apply to "unmanned aircraft" described in the Schedule, but only with respect to the operation(s) or project(s) described in the Schedule."

Interestingly, some insurers, including AIG, have begun offering a new line of Unmanned Aircraft Insurance.[22] The product is advertised as responding specifically to the exposures of unmanned aircraft. Zurich

[22] *See, e.g.,* http://www.aig.com/business/insurance/specialty/unmanned-aircraft-solutions.

Canada has also announced that it is also offering UAV insurance policies as an alternative to "specialist aviation insurers."[23] Notably, both AIG and Zurich have advertised that their policies will offer both first-party coverage and third-party liability coverage.[24]

B. *Observations*

Courts have not yet interpreted either of these endorsements, but coverage scenarios are not difficult to imagine. Take, for example, the case of a Kentucky man who shot down a UAV that he believed was lingering over his daughters to take their picture. He shot the drone out of the air with a shotgun and is now seeking a ruling that the flight constituted a trespass.[25] Depending on the facts he chooses to allege, a standard CGL policy may at least provide a defense. Conversely, there are questions as to whether the UAV owner could pursue his own liability claim against the shooter for destroying his drone (*i.e,* property damage). A similar scenario is currently pending in the Western District of Kentucky.[26] Either way, UAVs certainly appear to be future drivers of coverage litigation.

Not to be overlooked, the insurance industry's own use of UAVs is also interesting. A number of news articles reveal that several carriers are considering the use of UAVs to assist with property claim adjustment.[27] The reasons for doing so are obvious. After all, a UAV can ascend a tall roof with less risk than an adjuster on an extension ladder. On the other hand, whether the technology is sufficient for those uses and whether human interaction is necessary are also important questions.

III. SHARING: UBER, LYFT, AND OTHER CONCERNS

The "sharing economy" has boomed since its inception only a handful of years ago. According to eMarketer's latest estimates, over a quarter (26.0%) of US adult internet users – or 56.5 million people – used a sharing

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[23] *See,* http://www.insurancejournal.com/news/international/2015/04/02/363162.htm.

[24] First-party insurance is covers the named policy holder ("insured") against damages or losses suffered by the policy holder to his person or property. Third-party insurance protects the named policy holder against liability for damages or losses caused by the named insured to another's person or their property.

[25] Cypress Farivar, *After neighbor shot down his drone, Kentucky man files federal lawsuit,* ARS TECHNICA (2016, January 6) http://arstechnica.com/tech-policy/2016/01/man-whose-drone-was-shot-down-sues-shotgun-wielding-neighbor-for-1500/.

[26] Civil Action No. 3:16-cv-00006-DJH; *John David Boggs v. William H. Meredith*; In the United States District Court for the Western District of Kentucky, Louisville Division.

[27] Denise Johnson, *The Future of Drones in the Insurance Industry*, INSURANCE JOURNAL (March 4, 2017) http://www.insurancejournal.com/news/national/2014/03/07/322658.htm.

economy service at least once in 2017.[28] Companies such as Uber and Lyft offer an alternative to traditional taxi and shuttle services, while AirBNB offers travelers cheaper lodging options than hotels. The problem with these types of services from an insurance coverage perspective is that they are not run like traditional businesses. Whereas a new taxi or hotel company would setup "normal" operations, "sharing" companies exist more like dating websites, *i.e*., they simply connect two mutually interested parties. Although courts have not yet addressed these coverage issues in a meaningful way, state legislatures have already impacted the coverage issues in an effort to make them more predictable.

A. *Taken for a Ride? Transportation Network Companies*

To understand insurance coverage concerns with Uber, Lyft, and other rideshare companies requires understanding how the systems operate. Both companies function through smart phone applications that allow potential customers to create profiles and then "hail" rides from drivers who agree to take the customers to their chosen destination. The driver receives a percentage of the ultimate fare, as does Uber and Lyft. This system differs from normal taxi service because a driver no longer simply turns on their "available" light on top of the car. Given the differences from normal taxi or rental services, companies such as Uber and Lyft have generally become known as Transportation Network Companies, or TNCs.

Commentators have identified four key periods for coverage when dealing with TNC's:

- Period 0: The driver has the particular app installed on their smartphone, but does not have it on and is simply driving.
- Period 1: The driver has the app turned on, but has not yet accepted a ride request. Notably, some drivers have more than one app turned on at time as they drive for different companies.
- Period 2: The driver has accepted a ride request and is in route to pick-up the passenger.
- Period 3: The passenger is in the driver's car and headed to their destination.

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[28] Enberg, Jasmine, *Uber, Airbnb Lead the Way as Sharing Economy Expands*, eMARKETER, (June 30, 2017), https://www.emarketer.com/Article/Uber-Airbnb-Lead-Way-Sharing-Economy-Expands/1016109.

Each has the potential to trigger either personal auto or business coverage depending on how courts may view the role of the driver. Moreover, questions about which insurer should cover any "gap" between the ultimate liability and the amount of available coverage could be a sticky situation.

Uber and Lyft have reacted somewhat quickly to these situations. While neither company originally seemed to have entertained the idea of blanket commercial coverage, they now offer coverage depending on the period in which the driver is operating. First, while the driver has the app turned on, but has not accepted a ride request, both Uber and Lyft limit coverage to that provided by the driver's personal auto policy.[29] Specifically, Uber only provides coverage if the driver's personal auto policy denies a claim. However, this causes problems in light of the livery exclusion found in most personal auto policies.[30] That problem is magnified, at least in Texas, by unclear case law.

The Texas Supreme Court has not exactly defined when an auto is being used in a commercial capacity, and only one case appears to have addressed a similar issue.[31] In *Canal Ins. Co. v. Gensco., Inc.*, the San Antonio Court of Appeals considered whether a truck used by a lessor to haul products was being used as "livery."[32] The test, according the Court, was whether or not the insured vehicle was "held out to the general public for carrying passengers, and at the time of the accident was actually so used."[33] Thus, the Court held that a standard livery exclusion was not triggered because the allegedly commercial vehicle at issue was leased exclusively to one party and was not carrying passengers.[34] This holding is curious when applied to Uber and Lyft, since both companies require membership to "hail" a ride. The ease with which a person can become a member may, however, weaken this argument.

As with drones, ISO has apparently identified the potential ambiguity and addressed it in a new filing. Paragraph 5 of the newly formed PP 23 40 10 15 clarifies the previous livery exclusion by adding the italicized language:

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[29] Hilary Rowen, Kara DiBiasio, *The Insurance Coverage Implications of Using a Cell Phone App to Hail a Ride.* The Brief, American Bar Association, Tort Trial & Insurance Practice Section. Summer 2015, Vol. 44, No. 4.

[30] The livery exclusion provides, "We will not pay for: 1. Loss to your covered auto or any non-owned auto which occurs while it is being used as a public or livery conveyance. This exclusion (1.) does not apply to a share-the-expense car pool."

[31] *See,* Ramsay v. Maryland Am. Gen. Ins. Co., 533 S.W.2d 344, 349 (Tex. 1976) (noting lack of Texas caselaw defining "commercial vehicle").

[32] 404 S.W.2d 908 (Tex. Civ. App. – San Antonio 1966, no writ).

[33] *Id.* at 909.

[34] *Id.* at 910.

> We do not provide Liability Coverage for any "insured": For that "insured's" liability arising out of the ownership or operation of a vehicle while it is being used as a public or livery conveyance. *This includes but is not limited to any period of time that "insured" is logged into a 'transportation network platform' as a driver, whether or not a passenger is "occupying" the vehicle*.[35]

The endorsement also defines "transportation network platform" as "an online-enabled application or digital network used to connect passengers with drivers using vehicles for the purpose of providing prearranged transportation services for compensation."[36] One notable aspect of the clarified exclusion is that it requires a driver to merely be "logged in" to the application at the time of the accident. This means that a driver who inadvertently leaves the app turned on may run the risk of being uninsured.

Despite the confusion with Period 1, coverage during Periods 2 and 3 is clearer as both Uber and Lyft provide some form of commercial coverage. In Texas, Uber has made the decision to use Progressive to provide commercial coverage to its drivers.[37] Uber has generally used James River to provide coverage in other states.[38] The coverage provided normally includes limits of $1 million in liability coverage per ride, along with $1 million for underinsured or uninsured motorist coverage. ISO has also issued two new endorsements that provide limited coverage and appear to be on the rise with various auto insurers.[39] One coverage option applies from the time the drivers log in to the TNC platform via a mobile device until they've accepted a ride request.[40] The other applies from the time the driver logs in to the TNC platform up until a passenger occupies their vehicle.[41]

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[35] Bill Wilson, *What Do You Know About ISO's PAP Ridesharing Endorsements?*, BIG I, (JUNE 12, 2015) https://www.iamagazine.com/news/read/2015/06/12/iso-files-new-pap-ridesharing-endorsements.
[36] *Id.*
[37] White, Joseph, *Exclusive: Uber will use Progressive Insurance to cover Texas drivers,* REUTERS, (March 31, 2016), http://www.reuters.com/article/us-uber-tech-progressive-exclusive-idUSKCN0WX29B.
[38] Sabah Karimi, *How is Uber Impacting the Insurance Industry*, GREAT INSURANCE JOBS, (July 31, 2017), https://www.greatinsurancejobs.com/article/how-is-uber-impacting-the-insurance-industry/.
[39] Guiseppe Barone, *ISO Introduces New Coverage Options for Ridesharing Drivers,* VERISK, (April 2, 2015), https://www.verisk.com/archived/2015/april/iso-introduces-new-coverage-options-for-ridesharing-drivers/.
[40] *Id.*
[41] *Id.*

B. *Overstaying One's Welcome: Coverage Problems with Home Sharing*

Like TNC companies, several entities have been created to help travelers and property owners create unique vacation experiences. The most prominent, AirBNB, is a large technology company that allows property owners to offer either personal or rental residences to other travelers looking for unique or thrifty accommodations. The company has now grown to serve 34,000 cities in 190 countries, including 600 castles.[42] VRBO is another company that has also taken off in recent years.[43] Although it functions similarly to AirBNB, VRBO uses primarily rental, as opposed to personal, homes. Yet another company, Rent Like a Champion, channels the AirBNB concept to focus on college towns during sports seasons, particularly football.[44]

Despite the popularity of home sharing companies, insurance coverage problems abound. In 2011, an AirBNB host identified only as "EJ" arrived home to find that her AirBNB "guests" had completely trashed and ransacked her apartment.[45] The "guests" destroyed almost all of her furniture, used her credit cards, stolen her electronics and burned her possessions in the fireplace. They also stole her passport and heirloom jewelry. To make matters worse, "EJ" was essentially on her own when it came to repairing the damage since her homeowners' policy did not cover "business uses" and AirBNB had made no provision for its users to have access to insurance. Thanks in large part to public pressure brought to bear when EJ's story went viral, AirBNB did ultimately assist "EJ" in repairing the home.[46]

Homeowners' policies do not cover business operations. Indeed, some AirBNB forum users have reported not only having to purchase commercial policies, but also having their homeowners' policies cancelled when their insurer learned of their participation in AirBNB. Others have begun to rely on a Host Guarantee Program offered by AirBNB, which promises "Property damage protection of up to $1 million USD for every host and every listing –

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[42] Danielle Braff. *An Intro To Vacation Rental Sites*, BOSTON GLOBE, June 21, 2015, https://www.bostonglobe.com/lifestyle/travel/2015/06/21/intro-vacation-rental-sites/MiNOTdR2xyvYXH527b57kI/story.html.

[43] *See,* https://www.vrbo.com/.

[44] *See,* https://rentlikeachampion.com/.

[45] Michael Arrington, *The Moment of Truth For Airbnb As User's Home Is Utterly Trashed,* TECH CRUNCH, (July 27, 2011), http://techcrunch.com/2011/07/27/the-moment-of-truth-for-airbnb-as-users-home-is-utterly-trashed/.

[46] Farhad Manjoo, *Renters from Hell: Airbnb and the limits of trust online,* (August 2, 2011), SLATE, https://slate.com/technology/2011/08/airbnb-horror-stories-the-vacation-rental-site-reveals-the-limits-of-trust-online.html.

at no additional cost." [47] AirBNB's website includes detailed terms and conditions, including definitions of "covered property" and "excluded property."[48] The website notes that AirBNB provides "Up to $1 million USD of property damage protection if you ever need it," however, it also states that "The Host Guarantee is not an insurance policy."[49] Although the program is described as "caring and comprehensive," coverage may be more limited than some hosts think.[50]

First, before contacting AirBNB for reimbursement, the homeowner is required to contact the "guest" and attempt to resolve the property damage issue.[51] Potentially conflicting with this requirement is the fact that the homeowner must also report the loss within thirty days, a narrow window of time.[52] Additionally, loss calculations are based on actual cash value, which often approximates garage sale value.[53] It does not appear that a replacement cost option is available.[54] Also, coverage for cash, securities, pets, landscaping, pavement and common areas is excluded.[55] The guarantee also does not cover acts of nature, loss of use, contraband, disappearance of inventory, identity theft, and neither the excessive use of, nor the lack of electricity, utilities or sewerage. Finally, coverage is limited to an actual stay, not a booking.[56]

These exclusions do not appear to have been litigated yet, but given their stringent nature, it seems a safe bet that a court challenge will come. One potential hurdle to such a challenge will be the detailed dispute resolution procedures included in the Host Guarantee, which applies to all U.S. residents and non-residents who bring claims against AirBNB in U.S. courts.[57] Other issues which may apply, particularly in Texas, include whether the reporting conditions may require a showing of prejudice. Additionally, agents may face liability for failing to advise about the potential need for business interruption coverage since the Host Guarantee Program only covers actual stays. And while a short trip may, at first glance, give rise to what seems like only a trifling amount of damages, consider the

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[47] *See,* https://www.airbnb.com/guarantee.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *See,* https://www.airbnb.com/terms/host_guarantee.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* ("You and Airbnb mutually agree that any dispute … will be settled by binding arbitration (the "Arbitration Agreement"). If there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that the arbitrator will decide that issue.").

prices frequently charged in college towns for premier football games and the requirement of multiple night stays. The same is also true of cities hosting the Olympics, Super Bowl, World Series, World Cup, Ryder Cup, or any number of other sporting activities. Like so many aspects of the "sharing" economy, the home sharing economy appears to be an area ripe for coverage issues and potential litigation.

AirBNB also provides Host Protection Insurance, which offers all Airbnb hosts "the protection of liability insurance of up to $1 million USD to protect against third party claims for personal injury or property damage."[58] Coverage under the HPI Program is primary, meaning hosts do not have make claims against their homeowner's or rental insurance before obtaining coverage for a claim under the HPI Program.[59] The HPI covers hosts only if the incident that results in legal liability for either bodily injury or property damage arises during a guest's stay at the host's Airbnb accommodation, arranged using Airbnb's platform, and which occurred during the rental period.[60] As you might expect, there are numerous exclusions, including assault and battery, communicable diseases, electronic data, expected or intended injuries, fungi or bacteria, pollution, liquor liability, sexual assault, punitive damages, product recall, and exposure to silica, lead and asbestos.[61]

IV. SOCIAL MEDIA AND CYBER LIABILITY

One of the most active trends in insurance coverage litigation relates to cyber liability. Although the concept of internet liability is not new, the speed at which technology develops often outpaces the development of insurance forms. The development of insurance forms, in turn, often outpaces interpretive rulings from courts. To understand this evolving world, one must first understand the potential problems posed by cyber liability. Many policyholders fail to understand these risks, and as a result, are left trying to shoehorn cyber liability claims into ill-fitting CGL coverage. Meanwhile, the insurance industry has recognized these risks and is rapidly attempting to shift these losses into a specialized form of coverage. The discrepancy has resulted in many mixed decisions from courts.

A. *Don't Tag Me! The Problems of Ever-Present Media*

Virtually every part of our lives is affected by the internet or cyber technology. The potential liability created by the use of credit and debit cards

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[58] *See,* https://www.airbnb.com/host-protection-insurance.
[59] *Id.*
[60] *See,* https://www.airbnb.com/users/hpi_program_summary_pdf.
[61] *Id.*

is well understood, but even simply walking into a store can create liability concerns. For example, suppose a celebrity visits one of their favorite businesses and is captured by paparazzi or other photographers leaving the business. Assume the business then Tweets the picture with an advertisement that says "Even celebrities can't resist shopping at our store." The celebrity may then sue the store for misuse and misappropriation of their image. Would there be coverage under a standard CGL policy for the celebrity's damages? Several insurers may have already made that determination since that exact scenario recently has played out between Katherine Heigl and Walgreen's, as well as Kim Kardashian and the Gap.[62] Unfortunately, the cases settled without a definitive coverage determination.

Still more problems are created when a person actually uses a credit or debit card to complete a purchase. Millions have discovered just how vulnerable those transactions can be. Perhaps the most famous example is Target, which in 2013 suffered one of the largest security breaches in history. The breach compromised over 40 million credit and debit card numbers (the estimated population of the State of Texas is only approximately 28 million) and the personal information of 70 million customers.[63] The Home Depot, P.F. Chang's, Neiman Marcus, Staples, and many other large companies have also suffered similar breaches.

But these problems are not limited to the companies themselves. Many breaches are the result of subcontractors' failure to safeguard client information. The Target breach came about not through its own employees, but through a third-party HVAC subcontractor that had performed work at a handful of Target locations.[64] Home Depot suffered a similar fate caused by a third-party contractor. It resulted in a loss of approximately $43 million in one fiscal quarter alone.[65] Even small businesses, such as local medical clinics, have also had to deal with security breaches caused by subcontractors or third-party agents.[66] This liability often results in indemnity issues.

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[62] Daniel Fisher, *Can Katherine Heigl Win Lawsuit Over Unauthorized Tweet Of Her Face? Probably.*, FORBES, April 5, 2014. http://www.forbes.com/sites/danielfisher/2014/04/15/can-katherine-heigl-win-for-unauthorized-use-of-her-face-probably/#48638b503ac7.

[63] Jia Lynn Yang, *Target Says Up To 70 Million More Customers Were Hit By December Data Breach,* WASHINGTON POST, (January 10, 2014), https://www.washingtonpost.com/business/economy/target-says-70-million-customers-were-hit-by-dec-data-breach-more-than-first-reported/2014/01/10/0ada1026-79fe-11e3-8963-b4b654bcc9b2_story.html.

[64] Brian Krebs, *Target Hackers Broke in Via HVAC Company*, KREBS ON SECURITY, (Feb. 5, 2015), http://krebsonsecurity.com/2014/02/target-hackers-broke-in-via-hvac-company.

[65] Shelly Banjo. *Home Depot Hackers Exposed 53 Million Email Addresses*, WALL STREET J., (Nov. 6, 2014). http://www.wsj.com/articles/home-depot-hackers-used-password-stolen-from-vendor-1415309282.

[66] Patrick Ouellette, *Cleaning Service Employee Causes Data Breach,* AMERICAN SHREDDING, (FEB. 5, 2013), http://americanshredding.com/102/.

B. *Statutory Response*

What many people fail to understand about these scenarios is the enormous size of the potential exposure. Forty-seven states[67] have enacted data-notification laws that require breached companies to engage in some sort of reporting after a breach.[68] These statutes require everything from simply notifying those whose information may have been stolen, to conducting nationwide searches for potential victims, and even voluntary reporting to the media. Texas has passed the Identity Theft Enforcement and Protection Act that includes such a requirement and provides:

> (b) A person who conducts business in this state and owns or licenses computerized data that includes sensitive personal information[69] shall disclose any breach of system security, after discovering or receiving notification of the breach, to any individual whose sensitive personal information was, or is reasonably believed to have been, acquired by an unauthorized person. The disclosure shall be made as quickly as possible, except as provided by Subsection (d) or as necessary to determine the scope of the breach and restore the reasonable integrity of the data system.
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> (b-1) If the individual whose sensitive personal information was or is reasonably believed to have been acquired by an unauthorized person is a resident of a state that requires a person described by Subsection (b) to provide notice of a breach of system security, the notice of the breach of system security required under Subsection (b) may be provided under that state's law or under Subsection (b).[70]

Notification must be made in writing to the last known address of the person affected unless the person has previously agreed to electronic notification pursuant to 15 U.S.C. § 7001 *et sec*.[71] But, if the cost of providing notice exceeds $250,000, the number of affected individuals

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[67] All but Alabama, New Mexico, and North Dakota.

[68] Pam Greenberg, *Security Breach Notification Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, (Jan. 4, 2016), http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx.

[69] "Sensitive personal information" includes: (1) a person's name; (2) social security number; (3) driver's license or identification number; (4) account, debit, or credit card number; and (4) other health information. Tex. Bus. & Com. Code Ann. § 521.002(a)(2) (West).

[70] Tex. Bus. & Com. Code Ann. § 521.053 (West).

[71] Tex. Bus. & Com. Code § 521.053(e). 15 U.S.C. § 7001 is titled "Electronic Signatures and Global and National Commerce."

exceeds 500,000, or the person does not have sufficient contact information, then notice may be provided by e-mail, conspicuous posting on the company's website, or publication or broadcast in a major statewide media.[72] Violations can result in fines of at least $2,000, but not more than $50,000 per violation.[73] Additionally, the business is liable to the state for a civil penalty of not more than $100 per violated person per day, not to exceed $250,000 total.[74] Notably, the act also authorizes civil actions under the Deceptive Trade Practices Act.[75] Of course, the Deceptive Trade Practices Act includes the threat of treble damages and the recovery of attorney's fees for knowing and intentional violations.[76]

Statutory damages are not the end of potential liability. Breached companies also suffer millions in lost profits and damaged goodwill. Customers have also launched multiple class action suits with surprising speed. To date, data breaches have resulted in the exposure of the personal information of approximately 552 million identities.[77] One commentator has estimated that the average cost of a single data breach in the United States totals $7,155,402. Needless to say, breached companies look to their insurers to offset these losses.

C. *Coverage Concerns*

Many breached companies have no idea that their CGL policy may provide little, if any, insurance coverage for these losses. But that does not mean businesses have not tried to push the issue. Several high profile cases have resulted in mixed rulings that can generally be divided into claims under Coverage A and claims under Coverage B.

1. Coverage A – "Property Damage"

The traditional wording of Coverage A under CGL policies requires an "occurrence" that must result in "bodily injury" or "property damage." Cyber losses, by and large, do not result in "bodily injury." However, "property damage" claims are a different matter entirely. The analysis of cyber liability is essentially the same as any other Coverage A claim. Is the claim for physical injury to tangible property? Is the claim for the loss of use of

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[72] Tex. Bus. & Com. Code § 521.053(f).
[73] Tex. Bus. & Com. Code § 521.151(a).
[74] Tex. Bus. & Com. Code § 521.151(a-1).
[75] Tex. Bus. & Com. Code § 521.152.
[76] Tex. Bus. & Com. Code § 17.50.
[77] Gregory D. Podolak, *Insurance for Cyber Risks: A Comprehensive Analysis of the Evolving Exposure, Today's Litigation, and Tomorrow's Challenges*, 33 QUINNIPIAC L. REV. 369, 372 (2015).

tangible property that is not physically injured? Unfortunately, courts cannot agree on the answers, and ruling have been divergent.

One point of divergence appears to have been ISO's quick reaction to the early rise of electronic data. The 2001 ISO CGL form specifically modifies the definition of "property damage" to exclude "electronic data":

> For the purposes of this insurance, electronic data is not tangible property. As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other medial which area used with electronically controlled equipment.

Thus, some cases that originally found "electronic data" to constitute "tangible property" subject to coverage-triggering "property damage" are most likely outdated.[78] Since the 2001 revision, most courts have had little difficulty finding that "electronic data" does not constitute "tangible property."[79]

The only middle ground appears to be a recognition by several courts that electronic data can actually have an impact on the physical hard drive of a particular computer or mainframe. For example, in *America Online v. St. Paul Mercury Ins. Co*., users complained that new software from AOL made their computer systems inoperable.[80] AOL tendered the claim to its CGL carrier, which promptly refused coverage on the basis that the customers had not alleged "property damage" or "bodily injury." AOL responded that because the loss involved physical components of the computer, i.e., "cobalt, iron, and other magnetic material," the loss was actually "property damage." The Fourth Circuit agreed with this definition and ruled that "physical magnetic material on the hard drive is tangible."[81] Other courts have reached

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[78] *See, e.g.,* State Auto. Prop. & Cas. Ins. Co. v. Midwest Computers & More, 147 F.Supp.2d 1113 (W.D. Okla. 2011) (computer data has no physical substance); Seagate Tech., Inc. v. St. Paul Fire & Marine Ins. Co., 11 F.Supp.2d 1150 (N.D. Cal. 1998); Rockport Pharmacy, Inc. v. Digital Simplistics, Inc., 53 F.3d 195 (8th Cir. 1995); Magnetic Data, Inc. v. St. Paul Fire and Marine Ins. Co., 442 N.W.2d 153, 156, 85 A.L.R.4th 1095 (Minn. 1989) (Liability policy did not apply to an insured's erasure of a customer's computer disk cartridges).

[79] *See, e.g.,* RVST Holdings, LLC v. Main St. Am. Assur. Co., 136 A.D.3d 1196, 1198, 25 N.Y.S.3d 712, 714 (N.Y. App. Div. 2016); Liberty Corporate Capital, Ltd. v. Security Safe Outlet, Inc., 937 F.Supp.2d 891 (E.D. Ky. 2013).

[80] 347 F.3d 89 (4th Cir. 2003).

[81] *Id.* at 95.

similar conclusions, but each ruling appears to be fairly restrained to the particular facts of each case.[82]

Texas courts do not appear to have weighed-in on the dispute, but some predictions can be made about how the Texas Courts may rule. First, several Texas courts interpreting CGL policies have held that the term "tangible property" "is commonly understood to be property that is capable of being handled or touched."[83] This definition has been applied in several oil patch cases.[84]

The Tyler Court of Appeals has also indirectly addressed the issue under a business owners' policy. In *Lambrecht & Assoc. Ins. v. State Farm Lloyds*, a staffing agency's computer system was hit by a virus that caused several computers "to have difficulty 'booting up,'" difficulty retrieving and storing information, and ultimately led to the complete loss of large amounts of data.[85] State Farm argued that the loss was not a "physical" loss because the lost electronic data did not exist in physical form. The insured, however, argued that coverage was available for the loss of use of: "(1) the server, (2) pre-packaged software for the server, (3) all information stored on the computer, and (4) business income during the time the computers and server were unusable based on the express language of the policy itself."

The Court first noted that other courts had addressed the issue of whether data and software constitute tangible property. But it chose not to confront the issue head-on due to the wording of the policy before it, which covered the loss of income from "electronic media and records."[86] That term included:

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[82] *Compare* Centillium Comm. v. Atl. Mut. Ins. Co., 528 F.Supp.2d 940 (N.D. Cal. 2007) (semiconductor chips alleged to have physically injured other router components), *with* Eyeblaster, Inc. v. Fed. Ins. Co., 613 F.3d 797 (8th Cir. 2010) (spyware that slowed computer and caused crashes not physical damage to tangible property). *See also* State Auto Property & Casualty Insurance Co. v. Midwest Computers & More, 47 F. Supp. 2d 1113, 1116 (W.D. Okla. 2001) (loss of use of computer software was physical loss under a business owner's policy).

[83] Mid-Continent Cas. Co. v. Camaley Energy Co., Inc., 364 F. Supp. 2d 600 (N.D. Tex. 2005), *citing* Lay v. Aetna Ins. Co., 599 S.W.2d 684, 686 (Tex. Civ. App. – Austin 1980, writ ref'd n.r.e.); PPI Tech. Services, LP v. Liberty Mut. Ins. Co., No. Civ. A. C-11-47, 2012 WL 130389, at *8 (S.D. Tex. Jan. 17, 2012).

[84] *E.g.,* Cook v. Admiral Ins. Co., 2:09-CV-0109-J, 2010 WL 2605256 (N.D. Tex. June 29, 2010), *aff'd on other grounds*, 438 Fed. Appx. 313 (5th Cir. 2011), citing Lay v. Aetna Insurance Company, 599 S.W.2d 684 (Tex.Civ.App.-Austin 1980); (Erwin v. Steele, 228 S.W.2d 882 (Tex.Civ.App. Dallas 1950, writ ref'd n.r.e.); Bismarck Tribune Co. v. Omdahl, 147 N.W.2d 903 (N.D.1966).

[85] 119 S.W.3d 16, 19 (Tex. App. – Tyler 2003, no pet.).

[86] *Id.* at 25.

a. electronic data processing, recording or storage media such as films, tapes, discs, drums or cells;

b. data stored on such media; or

c. programming records used for electronic data processing or electronically controlled equipment.[87]

Because the insured's affidavit indicated that a hard drive could no longer be used for "electronic data processing, recording, or storage," the Policy covered the loss.[88] Likewise, the data lost as a result of the virus would also be covered since it constituted "data stored on media."[89]

These decisions show that Texas law may be slightly more predictable than its counterparts. Fewer pre-2001 forms remain in the market, and the adoption of a workable definition for "tangible property" provides clear guidance missing in other states. As a result, it seems likely that if a Texas court were presented with the issue, the court would likely rule that a CGL policy would cover physical computer components, but not necessarily the data stored on them.

2. Coverage B – "Personal Injury" and "Publication"

Discerning a clear rule in cases interpreting Coverage B is no easier than under Coverage A. The cases do, however, focus on two prongs of coverage for "personal and advertising injury." First, several cases have dealt with the issue of whether a publication constitutes "personal injury." These cases focus largely on whether "personal" injury also includes an "organization." Most courts have concluded that it does not.[90] On the other hand, a myriad of cases have struggled with the concept of "publication" in increasingly unique cyber liability scenarios.

Perhaps the most prominent case dealing with Coverage B's "publication" requirement is *Recall Total Information Management v. Federal Insurance Co.* In that case the insured, Recall, contracted to transport and store computer tapes containing the personal information of

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[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *See, e.g.,* Nationwide Ins. Co. v. Lexington Relocation Servs, LLC, 2014 WL 1213805 (N.D. Miss. Mar. 24, 2014); Sportsfield Specialties, Inc. v. Twin City Fire Ins. Co., 116 A.D.3d 1270, 984 N.Y.S.2d 447 (N.Y. App. Div. 2014); Heritage Mut. Ins. Co. v. Advanced Polymer Tech., Inc., 97 F.Supp.2d 913 (S.D. Ind. 2000). *But See,* Sawyer v. West Bend Mut. Ins. Co., 821 N.W.2d 250 (Wis. Ct. App. 2012).

more than 500,000 past and present employees of IBM.[91] The data included names, social security numbers, birthdates, and other contact information. During one trip, 130 IBM tapes quite literally "fell out of the back of [a] van" while in transport to a storage facility.[92] IBM then sought reimbursement from Recall, which sought reimbursement, in turn, from the subcontractor that was hauling the tapes.[93] Those actions ultimately resulted in a six million dollar voluntary settlement agreement.[94]

Recall ultimately sought reimbursement from Federal and Scottsdale under an assignment from its subcontractor. The carriers denied coverage because there was no evidence that the sensitive data had actually been accessed by anyone. Because the data had not been "accessed," it could not be considered to have been "published," and did, therefor, not result in damage.[95] Recall argued that simply having the information available constituted a covered "publication."[96]

The Connecticut Court of Appeals adopted the carriers' definition based, in part, on the cases from the defamation context, which required that material actually be accessed to constitute "publication."[97] The Court also noted that even were it to adopt the Webster's Third definition proposed by Recall that the result would not change.[98] That definition was "communication (as of news or information) to the public."[99] Because access is a prerequisite to communication or disclosure, the Court reasoned that coverage was not available.[100] Despite significant media pressure,[101] the Connecticut Supreme Court later affirmed the order as "well-reasoned."[102]

Some courts have utilized similar reasoning. For example, several cases have recognized that simply collecting or recording personal information is not a "publication," unless it is actually disseminated.[103] Another case held that even where a thief stole a doctor's computer, because the index card

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[91] *Recall Total Info. Mgmt., Inc. v. Fed. Ins. Co*., 147 Conn. App. 450, 453, 83 A.3d 664, 667 (2014), aff'd, 317 Conn. 46, 115 A.3d 458 (2015).
[92] *Id.* at 454.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 456.
[96] *Id.* at 462.
[97] *Id.* at 463, *citing* Springdale Donuts, Inc. v. Aetna Casualty & Surety Co. of Illinois, 247 Conn. 801, 810, 724 A.2d 1117 (1999).
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *See, e.g.,* Podolak, 33 Quinnipiac L. Rev. at 385.
[102] 317 Conn. 46, 51, 115 A.3d 458, 460 (2015).
[103] Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Coinstar, Inc., No. C13-1014-JCC, 2014 WL 3891275 at *7 (W.D. Wa. Aug. 7, 2014); Ananda Church of Self-Realization v. Everest Nat'l Ins. Co., 2003 WL 205144 at *5 (Cal. Ct. App. Jan. 31, 2003); MGM, Inc. v. Liberty Mut. Ins. Co., 855 P.2d 77 (Kan. 1993).

with the password could not be located, the "publication" requirement was not met where there was no evidence the information had actually been accessed.[104]

Nonetheless, other courts have rejected the *Recall* reasoning in favor of a broader definition. One court has indicated that "publication" can be as little as the simple act of "issuing or proclaiming."[105] The Northern District of California has also recognized that "publication" does not necessarily need to involve the public.[106] In that case, employees of an optometrist collected confidential information and provided it to a marketing professional for use in creating advertisements.[107] The Court held that it was not necessary for the marketing professional to disseminate the information to the public because it had already been "published" to him.[108] As a result, coverage was available. Still other courts have agreed with the broader definition of "publication."[109]

Once the issue of what constitutes a "publication" is resolved, the next grey area involves who must actually make the publication – the insured or some other third-party. Since hacking and holding information for ransom have become multi-million dollar industries, the answer is certainly important. Unfortunately, one of the leading cases to answer the question settled without a final ruling.

In *Zurich American Insurance Co. v. Sony Corp. of America*, Zurich sought a declaration that it did not owe coverage to Sony after hackers accessed and stole the personal information of over 100 million users.[110] The trial judge ruled from the bench that coverage was not triggered. First, while the Court held that access to the information constituted a publication, it recognized a distinction about who had actually performed the publication. The Judge's findings during his rendition of judgement included the following statements:[111]

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[104] Regents v. Platter, 220 Cal. App. 4th 549 (Cal. Ct. App. 2013).
[105] Melrose Hotel Co. v. St. Paul Fire & Marine Ins. Co. 432 F.Supp.2d 488, 503 (E.D. Pa. 2006).
[106] LensCrafters, Inc. v. Liberty Mut. Fire Ins. Co., C 04-1001 SBA, 2005 WL 146896 (N.D. Cal. Jan. 20, 2005).
[107] *Id.* at *8.
[108] *Id.* at *10.
[109] *See, e.g,* Travelers Indem. Co. of Am. v. Portal Healthcare Solutions, LLC, 35 F.Supp.3d 765, 771 (E.D. Va. 2014); Moore v. Hudson Ins. Co., B189810, 2007 WL 172119 (Cal. Ct. App. Jan. 24, 2007).
[110] Zurich Am. Ins. Co. v. Sony Corp. of Am., No. 651982/2011 (N.Y. Sup. Ct. Feb. 21, 2014).
[111] Young Ha, *N.Y. Court: Zurich Not Obligated to Defend Sony Units in Data Breach Litigation*, INSURANCE J., March 17, 2014, http://www.insurancejournal.com/news/east/2014/03/17/323551.htm.

- "This is a case where Sony tried or continued to maintain security for this information. It was to no avail. Hackers criminally got in. They opened it up and they took the information."
- "I am not convinced that that is oral or written publication in any manner done by Sony. That is an oral or written publication that was perpetrated by the hackers."
- "The third-party hackers took it. They breached the security. They have gotten through all of the security levels and they were able to get access to this." [The policy] requires the policyholder to perpetrate or commit the act. It cannot be expanded to include third-party acts."
- "Paragraph E (oral or written publication in any manner of the material that violates a person's right of privacy) requires an act by or some kind of act or conduct by the policyholder in order for coverage to be present."
- "In this case, my finding is that there was no act or conduct perpetrated by Sony, but it was done by third-party hackers illegally breaking into that security system. And that alone does not fall under paragraph E's coverage."

Although the case settled before an appellate ruling could be issued, the findings do provide some insight into the potential future of this area of coverage litigation.

V. CONCLUSION

New technology often spurs coverage litigation and uncertainty. Policyholders may not keep their coverage as up-to-date as they suspect, and may be unaware that various new technologies can result in insufficient coverage, and attendant financial risks, under standard CGL policies. Applying standard coverage terms to unique scenarios can be a difficult, but interesting endeavor. As with any coverage issue, one should be mindful of how new technologies are being utilized and the potential risks that are spawned by the use, so that coverage issues can be analyzed in light of existing policy language. In situations where technology is developing more quickly than insurers are developing new policy language, courts will interpret existing language using extrapolation and analogy where necessary. It is wise for companies to examine their use of technology and the accompanying risk exposures in light of their current insurance programs, and, if necessary, purchase additional specialized coverages or endorsements,

if necessary, to fill coverage gaps left by traditional commercial general liability policies.