14th Annual New Jersey

POLICYHOLDER ADVISOR CONFERENCE

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The views expressed by the participants in this program are not those of the participants' employers, their clients, or any other organization. The opinions expressed do not constitute legal advice, or risk management advice. The views discussed are for educational purposes only and provided only for use during this session.

If You Broke(r) It, Do You Buy It? A Discussion on Broker Liability

Christina Yousef
John Lacey
Adam Cantor

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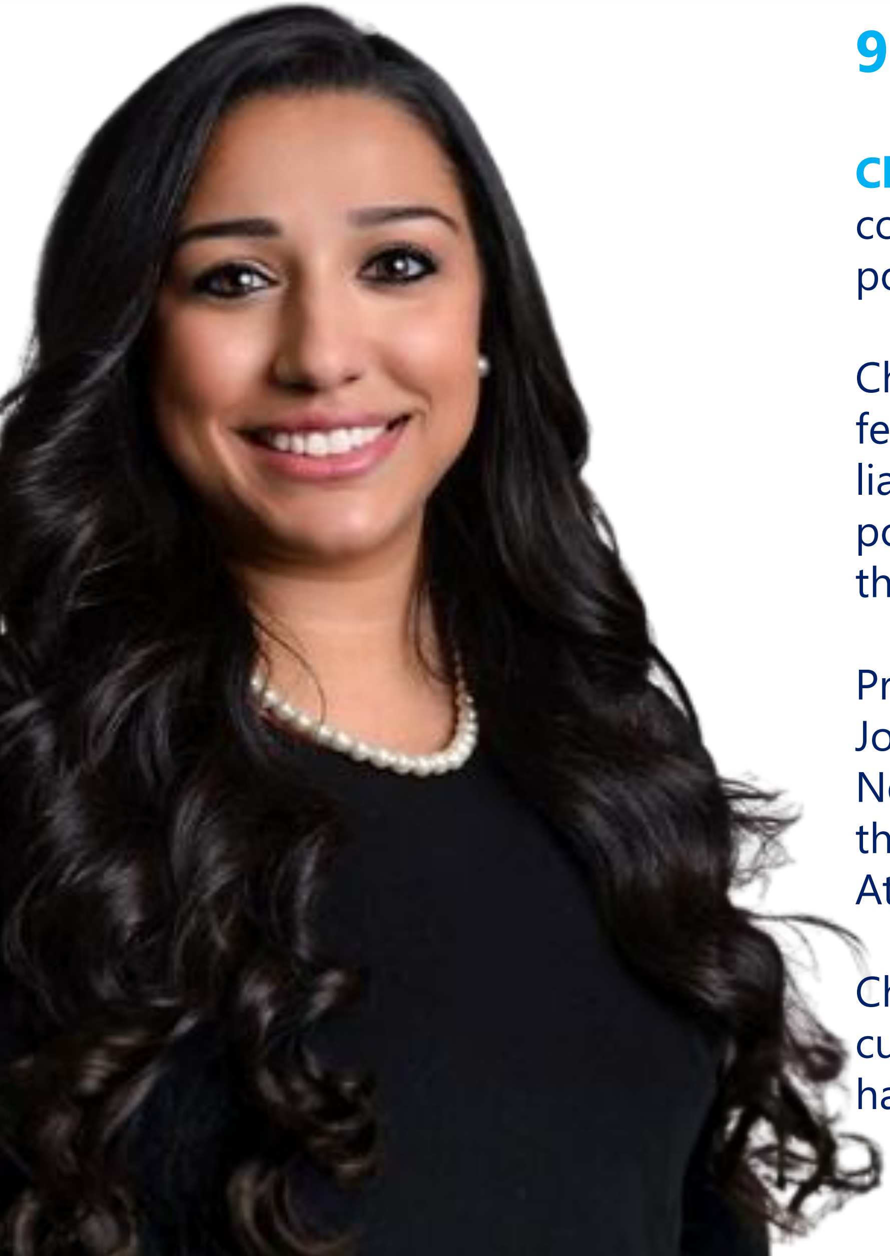
Christina Yousef



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Christina Yousef is a shareholder in Anderson Kill's New Jersey office. She concentrates her practice in insurance recovery, exclusively on behalf of policyholders.

Christina has represented policyholders in high-stakes insurance recoveries in federal and state courts around the country, litigating and negotiating claims for liabilities stemming from D&O liability, food contamination, environmental pollution, and construction losses and defects. Her clients include companies in the hospitality, food service, manufacturing and construction industries.

Prior to joining Anderson Kill, Christina was a Law Clerk for the Honorable Joseph A. Dickson, U.S.M.J., at the United States District Court for the District of New Jersey. She was also a Judicial Extern for the Honorable Leo M. Gordon at the United States Court of International Trade and an intern at the New Jersey Attorney General's Office.

Christina holds a J.D. from Seton Hall University School of Law, where she currently coaches the National Health Law Moot Court Competition teams, having won an array of moot court recognitions while in law school.

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John P. Lacey Jr.

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John Lacey is an attorney in Anderson Kill's Newark office and a member of the firm's Insurance Recovery and Corporate & Commercial Practice groups. As a member of Anderson Kill's Insurance Recovery Group, John counsels individual and corporate policyholders on a wide variety of coverage disputes, including matters that involve first-party property damage, business interruption losses, trade credit losses, the rights of loss payees and additional insureds, cyber-crimes, criminal acts, professional liability, directors and officers liability, intellectual property, environmental liability, and general liability – namely, disputes involving alleged abuse, emotional distress, and other personal injuries. John routinely represents individual and corporate policyholders in state and federal courts across the country.

In 2024, John was named to Best Lawyers' Ones to Watch list.

As a member of Anderson Kill's Corporate and Commercial Litigation Group, John also represents individuals and businesses in commercial contract disputes, shareholder disputes, broker malpractice litigation, employment disputes, and disputes involving product liability.

Prior to joining Anderson Kill, John was an associate in a New Jersey law firm, where he regularly represented public entities, made court appearances, and served as a Municipal Public Defender.

Adam Cantor

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Adam Cantor is the Senior VP/Senior Director of Claims Advocacy in Willis' FINEX Claims & Legal Group, based in Short Hills, NJ.

As a Claims Advocate in Willis' Financial & Executive Risks ("FINEX") Practice, Adam provides advice to both external and internal clients on all facets of complex claims, legal and broking issues. He has extensive claims advocacy experience in all FINEX coverage lines including D&O, E&O, Cyber, Employment Practices Liability (EPL), Crime/Fidelity and Fiduciary Liability insurance. An attorney by training and with 30+ years in the insurance industry, Adam also has prior experience as both a commercial E&O/D&O underwriter, and as policyholder coverage counsel for a New Jersey law firm.

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INTRODUCTION

- Why does broker liability matter?
- Common scenario:
  - "I thought I had coverage… until I didn't."
  - Policyholder → Insurance Company → Insurance Broker
- What happens next?

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The Role of an Insurance Broker

- Understanding the client’s risks and needs.
- Understanding the market.
- Obtaining the coverage the client requests.
- Exercising skill and diligence.

The Expectations of a Policyholder

- The policyholder is often not an expert and relies on its insurance broker.
- The policyholder expects its insurance broker to obtain the coverage requested.
- The policyholder expects its broker to exercise skill and diligence, including keeping the policyholder informed.
- The policyholder expects its insurance broker to advise it on the availability of coverage that meets the policyholder's needs.

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Legal Framework in New Jersey

- Brokers…
  - Owe a duty to exercise reasonable skill, care, and diligence; and
  - Are expected to possess reasonable knowledge of the types of policies, their different terms, and the coverage available.
- If…
  - A broker fails to procure the requested insurance; or
  - The policy is void or materially deficient or does not provide the coverage the broker undertook to supply, the broker becomes liable.
- ***Rider v. Lynch*, 42 N.J. 465 (1964)** – seminal case in New Jersey regarding duties of an insurance broker.
  - ***Bates v. Gambino*, 72 N.J. 219, 225, n.2 (1977)** (duties established in *Rider* are the floor, not the ceiling).

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Scenario 1

- Policyholder purchases condominium.
- Prior to closing, policyholders contact insurance broker to request coverage for new condominium.
- Insurance broker had been providing other coverages to policyholders for many years.
- Policyholder requests coverage that would cover any losses to condominium.
- Policyholder signs insurance application and purchases coverage for condominium.
- Subsequently, a fire damaged the condominium.
- Due to a limitation in the policy, the policyholder made repairs out of pocket.

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SCENARIO 1: Poll and Results

- Is the Broker:
  - ✓ Liable
  - ✓ Not Liable

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Aden v. Fortsch, 169 N.J. 64 (2001)

- The Court held the homeowner was entitled to rely on insurance broker and assume the broker had performed his or her fiduciary duty. The Court also explained that duty is not diminished when a policyholder fails to detect the broker's breach of that duty.
- No Comparative Negligence in Insurance Broker Malpractice cases.

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Scenario 2

- Policyholder obtains medical malpractice coverage under an occurrence policy.
- Policy is cancelled due to failure to pay premiums.
- Policyholder discusses replacement coverage with insurance broker.
- Policyholder completes insurance application but does not answer certain questions, including requested effective date, insurance history for the previous three years, and whether current coverage was "claims made."
- Policyholder obtained replacement coverage on a claims-made basis.
- Subsequently, policyholder is sued for malpractice.
- Coverage was denied by insurance company because incident occurred before retroactive date.

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SCENARIO 2: Poll and Results

- Is the Broker:
  - ✓ Liable
  - ✓ Not Liable

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President v. Jenkins, 180 N.J. 550 (2004)

- Holding: Insurance brokers do not owe duty to advise about retroactive date in insurance policy and insurance broker's actions based on information provided was consistent with custom and practice.
- Key Takeaways: Policyholders must provide accurate information to their insurance brokers.
- Insurance broker's duties are not unlimited.

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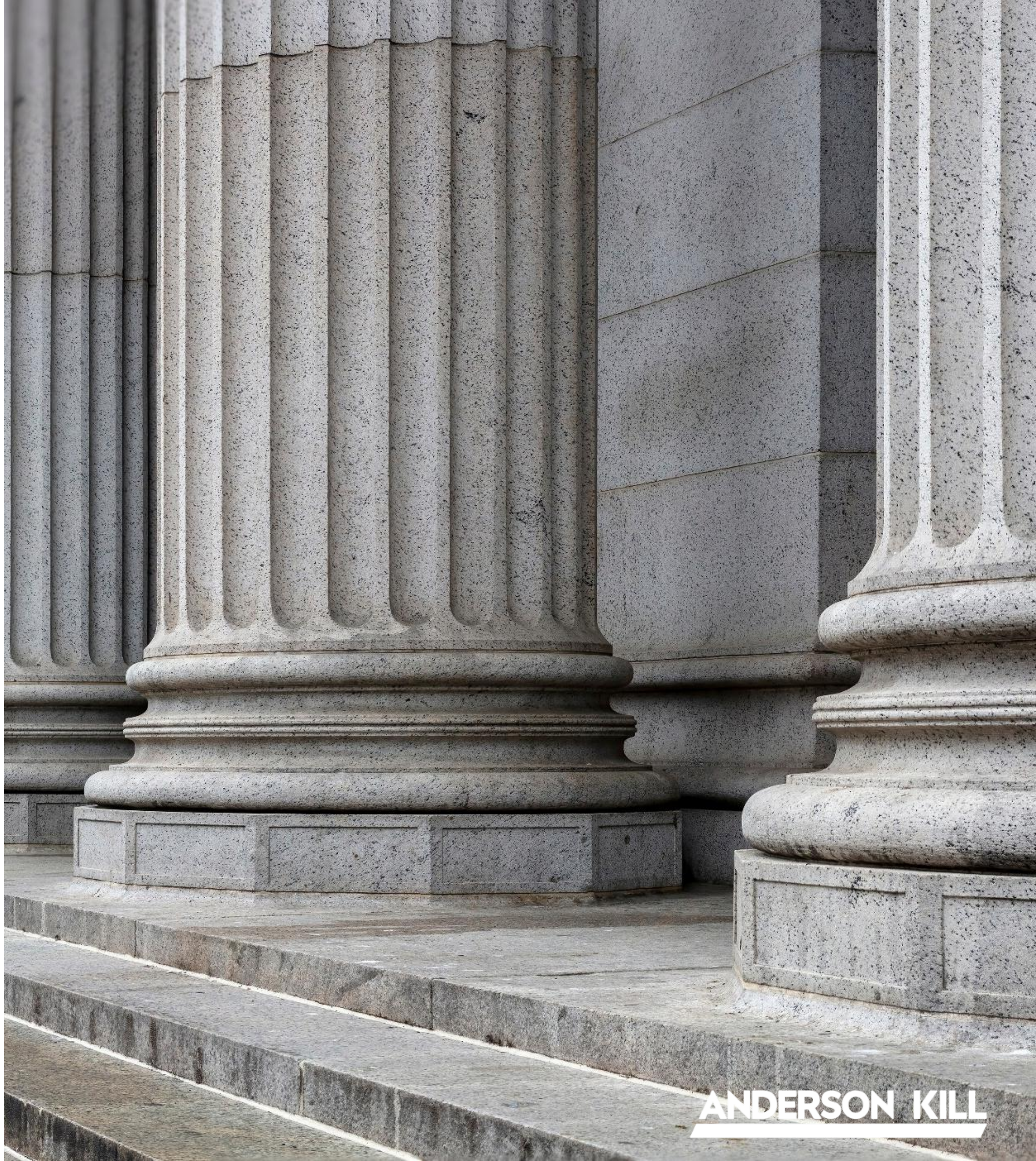
The Special Relationship

- Some courts require there be a "special relationship" between the policyholder and its broker before liability can be imposed for failure to obtain adequate insurance.
- A special relationship between the broker and policyholder might arise when the broker agrees, explicitly or implicitly, to go beyond these general duties and accept greater responsibilities.
- In New Jersey, courts have held that a special relationship between broker and policyholder can arise when the broker contracts to assume additional duties, or there is some custom or course of dealing between broker and policyholder that goes beyond the ordinary relationship.



Where Brokers Can Get into Trouble…

- Failure to procure coverage.
- Misrepresentation of coverage.
- Not understanding the policyholder's risks.
- Documentation Failures:
  - Lack of written confirmations.
  - Ambiguous communications.

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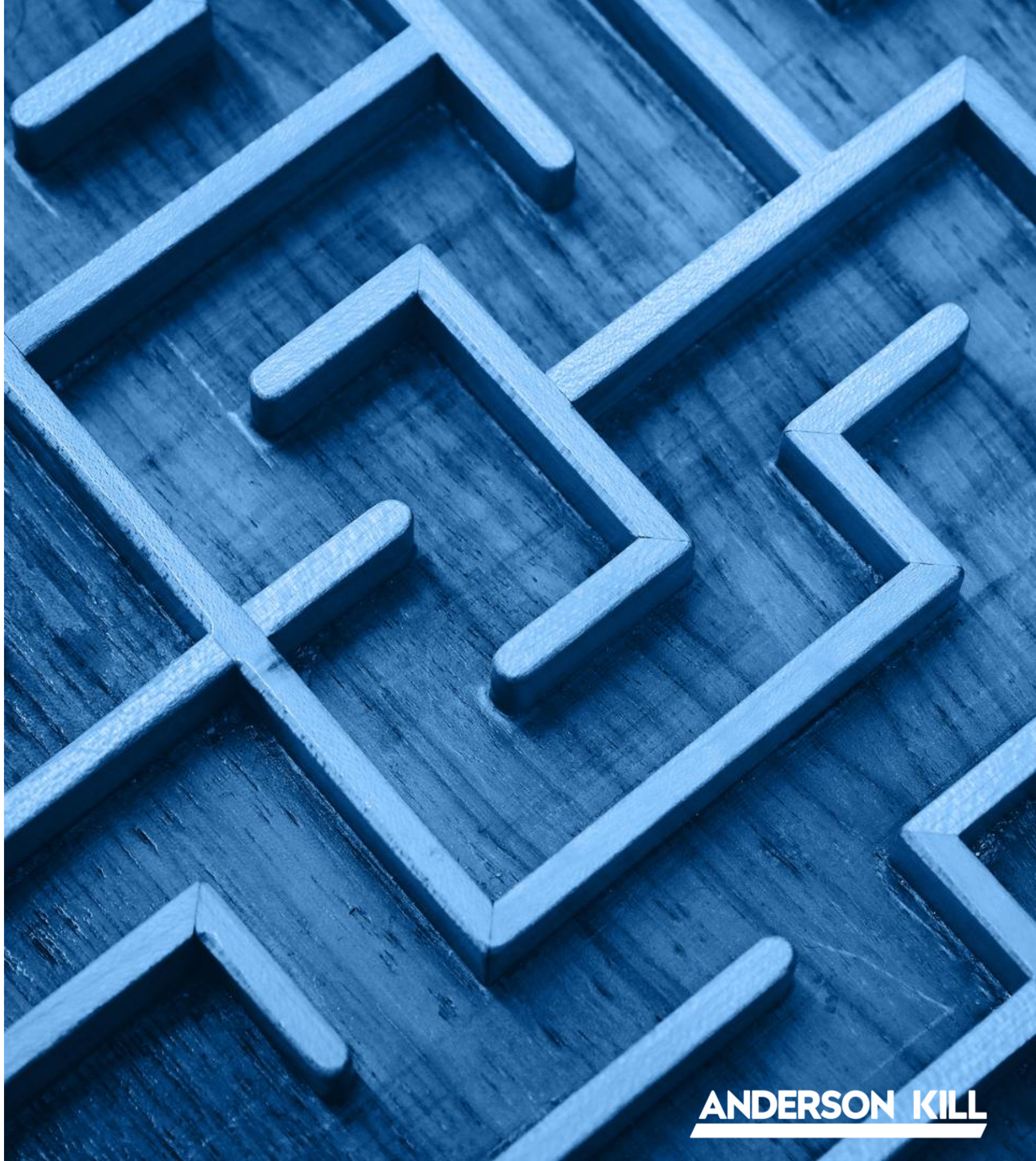
… And How to Avoid It

- ➢ Confirm all coverage requests in writing.
- ➢ Avoid vague terms like “full coverage.”
- ➢ Keep records.
- ➢ Don’t act like a lawyer (even if you are one).
  - Be an advocate, but don’t opine on legal issues.
- ➢ Know when to consult coverage counsel.



PRACTICAL GUIDANCE FOR POLICYHOLDERS

- ✓ Understand your needs as best you can.
- ✓ Reassess risks annually.
- ✓ Be aware of changes in business or potential new exposures.
- ✓ Make specific, written requests for coverage.
- ✓ Ask the right questions.
- ✓ Communication is key.

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Questions

Thank You

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"AI is changing the world (right?), is it changing the insurance world?"

Marshall Gilinsky
Jamie O'Neill
Thomas D. Rosaschi

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Marshall Gilinsky

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Marshall Gilinsky is a shareholder in Anderson Kill's Boston office and practices in the firm's Insurance Recovery and Commercial Litigation groups. During his nearly 30-year career representing policyholders, Marshall has recovered hundreds of millions of dollars for his clients, successfully litigating disputed property claims, and resolving many more without the need for litigation.

Marshall has represented clients on numerous high-stakes, complex insurance claims arising out of prominent losses such as 9/11, Hurricane Katrina, Superstorm Sandy, the "Big Dig" in Boston and COVID-related business interruption losses.

Marshall frequently writes and lectures on a variety of topics of interest to professionals and practitioners in the insurance arena, and is frequently quoted in the press, including appearances in The New York Times, The Wall Street Journal, National Law Review, CNN and Business Insurance, among others.

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Jamie O’Neill

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Jamie O’Neill is an attorney in Anderson Kill’s New York office. She focuses her practice on insurance recovery, exclusively representing policyholders, with a developing specialty in artificial intelligence and emerging technology risks.

Before entering law school, Jamie earned her Bachelor of Science in Computational and Statistical Methodologies in Political Science from The Ohio State University, where she concentrated on machine learning, data visualization, and the algorithmic analysis of political systems. Her research involved developing models to analyze the formation of ideological groups and the breakdown of democratic systems in Latin and South America. This work emphasized the experiences of marginalized political communities and demonstrated how quantitative tools can reveal systemic patterns in governance and repression.

Jamie continued this focus at Fordham University School of Law, where she was named a Crowley Scholar in International Human Rights and served as a research assistant at the Leitner Center for International Law and Justice. While at Fordham, she was also the Online Editor of the Fordham Intellectual Property, Media & Entertainment Law Journal, a participant in the Mediation Clinic, and a mentor through the school’s International Student Program.

She co-authored “A Primer on AI’s Technical Foundations, Legal Implications, and Insurance Coverage” for LexisNexis - Lexis’s first insurance-focused generative AI publication - written in collaboration with a technical expert in the field. The primer offers foundational guidance for attorneys and risk professionals navigating the evolving legal and liability landscape surrounding AI.

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Thomas D. Rosaschi

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Tom Rosaschi is an independent risk management consultant at ICA Risk and a licensed attorney in the State of Florida. He advises private equity funds, hedge funds, real estate sponsors, and hospitality operators on complex risk matters associated with mergers, acquisitions, divestitures, and restructuring. Beyond his transactional practice, Tom assists clients with complex first and third-party claims, and is practice leader of ICA's Claims Audit Consulting Practice Group.

Tom received his Bachelor of Arts degree from Princeton University where he studied economics with a concentration in financial markets. He received his Juris Doctorate from Ave Maria School of Law in Florida and clerked in the United States District Court for the Middle District of Florida. Tom earned the Associate in Risk Management (ARM) designation in 2017, the Enterprise Risk Management (ARM-E) designation in 2019 and the Chartered Property Casualty Underwriter (CPCU) designation in 2018. In 2021 Tom also earned the prestigious Registered Professional Liability Underwriters (RPLU) designation from the Professional Liability Underwriting Society (PLUS).

Tom is the immediate Past President of the Society of Risk Management Consultants, the premier global professional association for independent risk managers, and, outside of the office, enjoys traveling, exploring and hiking the globe.

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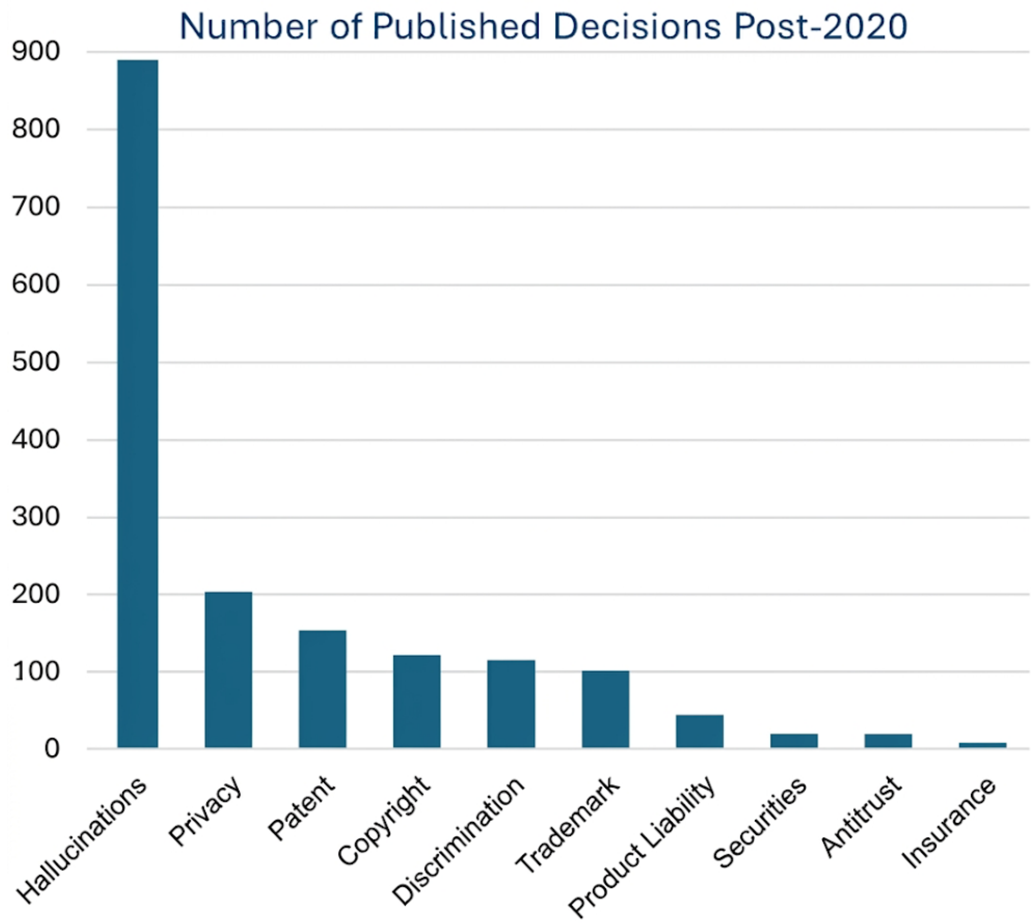
Increasing Litigation Risks

- Published cases involving “hallucinations” have increased from 35 (on September 1, 2025) to 859 (on April 1, 2026).
- Published cases involving “copyright” have increased from 68 to 166 in the same time frame.
- Published cases involving “products liability” have increased from 4 to 38 in the same time frame.



Litigation Risks (Cont'd)

Largest Categories of AI Litigation

- Antitrust (Sections 1 & 2 of the Sherman)
- Breach of Contract
- Copyright (Copyright Act and DMCA)
- Defamation
- Discrimination (ECOA, FHA, Title VII, ADEA, ADAAA)
- Privacy (BIPA, CIPA, CPA)
- Product Liability
- Securities

JD Supra

Groundbreaking Lawsuit Tests Whether AI Hiring Tools Trigger FCRA Compliance

A proposed class action alleges that a widely-used AI-powered tool violates the federal FCRA and California's ICRAA by compiling sensitive,...

Fake AI, real lawsuits: The market's newest bubble meets the courthouse

AI hype boosted markets, but "AI washing" -- exaggerated or false claims about artificial intelligence -- is now triggering SEC actions and...

Massachusetts Lawyers Weekly

AI fuels rise in pro se employment lawsuits, report finds

AI fuels rise in pro se employment lawsuits, report finds · A Lex Machina report found over 16% of federal employment lawsuits in 2025 were...

Website Tracking, Data Breaches, and AI Class Actions: Managing Escalating Technology Litigation Risk

Routine digital practices such as cookies, tracking pixels, session replay tools, cybersecurity controls, AI-driven marketing, and pricing...

Antitrust & Algorithmic Collusion

***Gibson v. Cendyn Group LLC*,** No. 2:23-CV-00140-MMD-DJA, No. 24-3576 (D. Nev., 9th Cir.)

Plaintiffs alleged that hotel operators engaged in a price fixing conspiracy by using the same software provider's product/algorithm for hotel room pricing recommendations in violation of Section 1 of the Sherman Act. The case was dismissed by the District Court because Plaintiffs failed to plausibly allege agreement between hotel defendants and algorithm provider.

The question presented to the Ninth Circuit: **Does it violate Section 1 for competing hotels to purchase a license to use the same price-recommendation software?**

"[A]n agreement between competitors to obtain and use Cendyn's software products [to] stifle competition does not render the individual Hotel Defendants' independent choices to use Cendyn's software products anticompetitive. "

"Competitors engage in what antitrust law calls 'parallel conduct' when they make the same independent business decisions as each other. But allegations of parallel conduct [...] are 'insufficient to state a claim' under Section 1."

"Why don't the independent choices of Hotel Defendants to obtain pricing advice from the same company harm competition, as alleged here? Because here, obtaining information from the same source does not reduce the incentive to compete."

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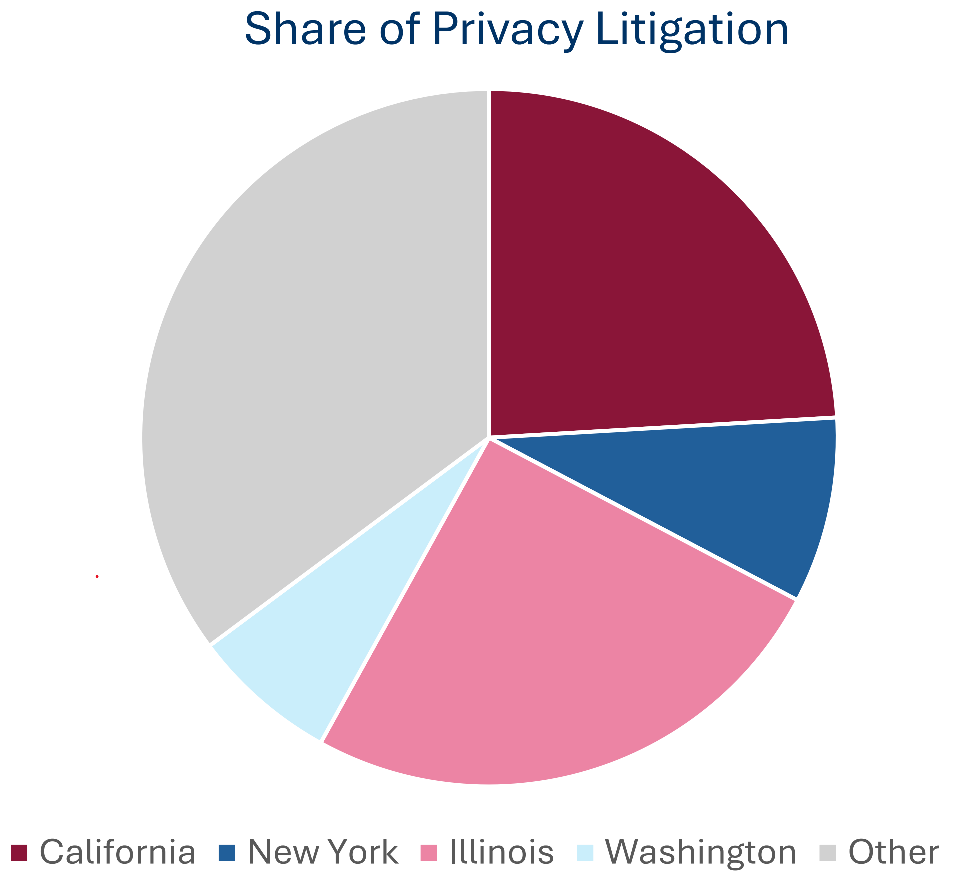
Privacy

Plaintiffs have brought suits under numerous causes of action, including:

- Illinois Biometric Information Privacy Act
- California Unfair Competition Law
- Colorado Privacy Act
- Texas Capture or Use of Biometric Identifier
- Washington’s My Health My Data Act
- And/or the traditional privacy torts…

BIPA Litigation Examples

- ***Deyerler v. Hirevue Inc.*** (settled)
- ***In re Clearview AI, Inc.*** (settled)
- ***In re Otter.AI Privacy Litigation***
- ***Cruz v. Fireflies.AI Corp.***
- ***Lewis v. Lytx Inc.***



Privacy: Licensor and Licensee Suits

In re Otter.AI Privacy Litigation,
No. 5:25-cv-06911 (N.D. Cal.)

Plaintiffs allege that Otter.ai's note taking tools record private conversations without the consent of all parties and then those notes are used to train its AI models without adequate disclosure. One of the main complaints is that once the AI has been added to the user's calendar it will join *any meeting*. Causes of action include: (1) Federal Wiretap Act; (2) Computer Fraud and Abuse Act; (3) Intrusion Upon Seclusion; (4) CIPA; (5) California Unfair Competition Law; (6) BIPA; (7) Washington Wiretapping Law.

Washington v. Sutter Health,
No. 4:26-cv-03012 (N.D. Cal.)

Plaintiffs allege healthcare organizations used AI tool to record confidential conversations between patients and doctors for transcription without meaningful notice to the patients. Cause of action include: (1) CIPA; (2) California Confidentiality of Medical Information Act; (3) California Unfair Competition Law; (4) Federal Wiretap Act; and common law privacy torts. *They did not bring suit against the provider of the AI tool.*

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Product Liability

➢ The first wave of product liability artificial intelligence cases have centered on self-harm due to, or following interactions with, artificial intelligence chatbots. Plaintiffs allege that family members engaged in conversations with chatbots who either supported or did not alert to suicidal ideation.

Raine v. OpenAI, Inc., No. CGC-25-628528 (Cal. Super. Ct. San Francisco Cnty.)
First County Bank v. OpenAI, Inc., No. CGC-25-631477 (Cal. Super. Ct. S.F. Cnty.)
Fox v. OpenAI, Inc., No. 25STCV32379 (Cal. Super. Ct. L.A. Cnty.)
Shamblin v. OpenAI, Inc., No. 25STCV32382 (Cal. Super. Ct. L.A. Cnty.)
Madden v. OpenAI, Inc., No. 25STCV32383 (Cal. Super. Ct. L.A. Cnty.)
Brooks v. OpenAI, Inc., No. 25STCV32386 (Cal. Super. Ct. L.A. Cnty.)
DeCruise v. OpenAI, Inc., No. 26CU003118C (Cal. Super. Ct. San Deigo Cnty.)
Jacquez v. OpenAI, Inc., No. 26CV165635 (Cal. Super. Ct. Alameda Cnty.)
Gray v. OpenAI, Inc., No. 26STCV00988 (Cal. Super. Ct. L.A. Cnty.)
Garcia v. Character Technologies, Inc., No. 6:24-cv-01903 (M.D. Fla.)
A.F. v. Character Technologies, No. 2:24-cv-01014 (E.D. Tex.)
Gavalas v. Google LLC, No. 5:26-cv-1849 (N.D. Cal.)

➢ **But beyond chatbots, how will strict liability theories be applied to AI-based wrongs?** What if an AI-powered diagnostic tool misdiagnoses a patient? What if an autonomous vehicle hits a pedestrian? What if an AI smart meter fails to detect a fire? What if an AI insurance claim handling tool automatically denies a claim that should have been approved leading to a claimant's death?

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AI Risks and Insurance Markets

- **The History of Tools and Risk**
  - The Wheel
  - Fire
  - Banana Peels
- **Tools and Risks that Led to Change**
  - Automobiles
  - Asbestos
  - Pollution
  - Y2K
  - Terrorism
  - Virus
  - Cyber
- **Where will AI fit in?**

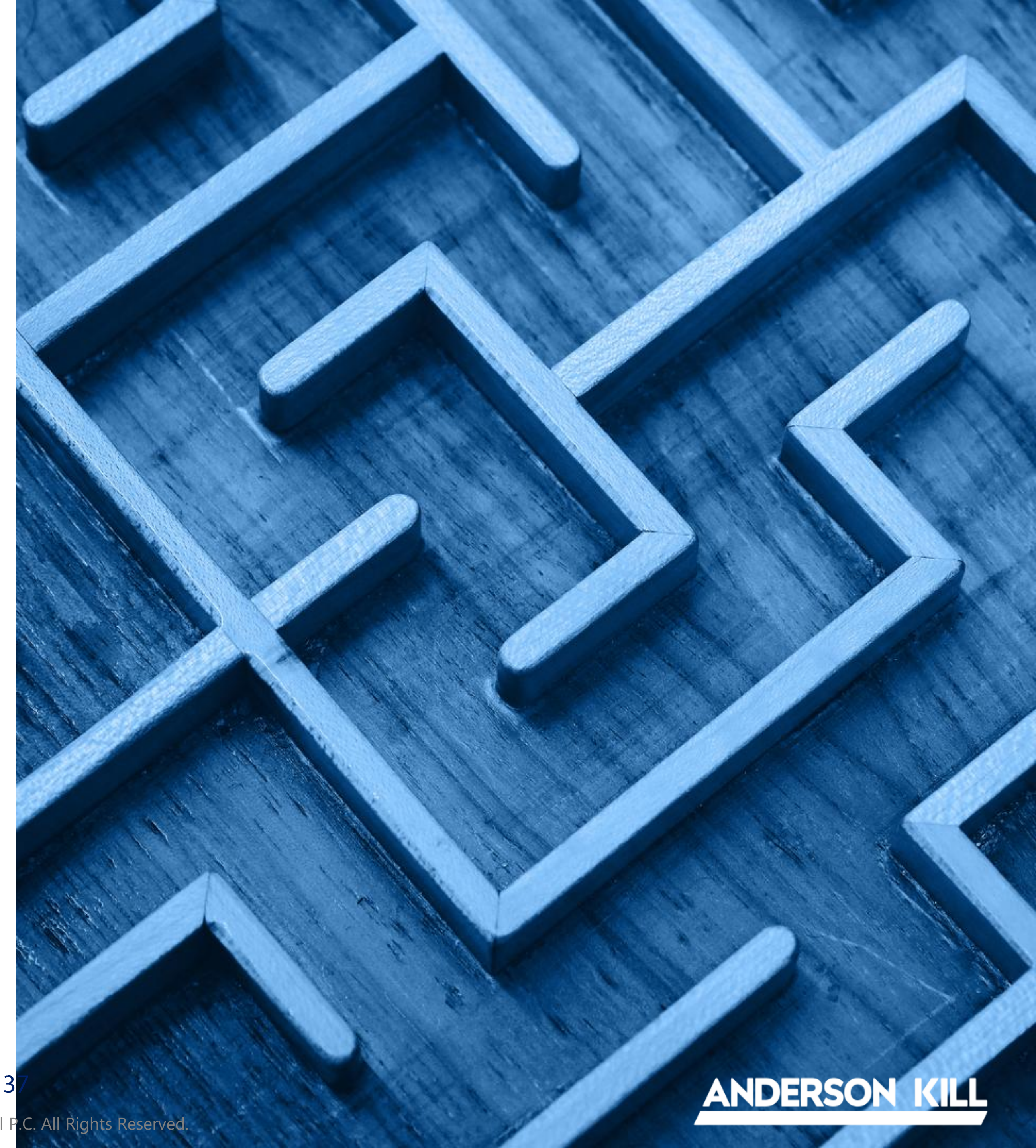
Are AI Exclusions Coming?

- Much talk about AI exclusions, BUT no reports of actual use outside of Tech E&O context

- Use in traditional products would drive business to competitors

Using AI in Insurance Operations What Could Go Right?

- ➢ Accuracy in pricing
- ➢ Efficiency in placements
- ➢ Efficiency in claims
- ➢ Cost savings all around



37

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Using AI in Insurance Operations What Could Go Wrong? A Look Back

- **Colossus – McKinsey and Allstate**
  - Credit to David Berardinelli – "From Good Hands to Boxing Gloves"
  - Consumer Federation of America – "The 'Good Hands" Company or a Leader in Anti-Consumer Practices" July 18, 2007
  - Treated claims & insurance company performance as a "zero-sum game"
  - Tuned Colossus down by 20%
  - 90% of policyholders took a quick low-ball payment ("good hands")
  - Other 10% subjected to hard ball tactics and litigation ("boxing gloves")
  - Profits soared

Using AI in Insurance Operations
What Could Go Wrong? A Look Ahead

- **Medicaid advantage problems**
- Whistleblowers, Investigations and Litigation
- Algorithm used to assess extent of healthcare coverage
- Humans were a check, but seemingly an inadequate one
- STAT News Report – "How UnitedHealth's acquisition of a popular Medicare Advantage algorithm sparked internal dissent over denied care" July 11, 2023, *https://www.statnews.com/2023/07/11/medicare-advantage-algorithm-navihealth-unitedhealth-insurance-coverage/*

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"Defense Costs Coverage: Everything You Didn't Know You Needed to Know"

Dennis J. Artese
Salvatore A. Salerno

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Dennis J. Artese

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Dennis Artese is an Equity Shareholder in Anderson Kill's New York office and is co-chair of the firm's Climate Change and Disaster Recovery practice group. He is also co-chair of the firm's Construction Industry group. Dennis's national practice concentrates on all types of insurance recovery litigation, with an emphasis on securing insurance coverage for property and business interruption losses stemming from natural disasters and other perils as well as for construction-related first-party property losses and third-party liability claims. Dennis has substantial experience in all phases of litigation, arbitration and property insurance appraisals, and has recovered hundreds of millions of dollars of insurance proceeds on behalf of policyholders in connection with a variety of property, builder's risk, commercial general liability, umbrella and excess liability, EPLI, D&O, E&O, crime, and political risk insurance claims. Dennis also has extensive experience in litigating workers' compensation collateral disputes, insurance broker malpractice cases and other general commercial litigation disputes, including construction-related disputes.

Dennis is the General and Climate Change Insurance Editor of the Journal of Emerging Issues in Litigation. He has been recognized by Super Lawyers for Insurance Coverage since 2012. He also has been recognized by Legal 500 for Insurance Advice to Policyholders and singled out as being a "superb lawyer and subject-matter expert." Clients reporting to Chambers USA attest that Dennis's client service, level of sophistication and commercial vision are very strong, and that "Dennis does an amazing job guiding us with difficult claims."

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Salvatore A. Salerno is an attorney in Anderson Kill's New York office and a member of the firm's Insurance Recovery and Bankruptcy and Restructuring Groups.

Prior to returning to Anderson Kill, Sal served as a Judicial Law Clerk to the Honorable Alan S. Trust, Chief Bankruptcy Judge of the U.S. Bankruptcy Court for the Eastern District of New York. While attending St. John's University School of Law, Sal was the Editor-in-Chief of the American Bankruptcy Institute Law Review and was awarded the American Bankruptcy Institute Medal for Excellence in Bankruptcy Studies. He also earned the Dean's Award for Excellence in Consumer Bankruptcy, Criminal Law, and Scholarly Research and Writing.

During law school, Sal externed twice for Chief Judge Trust, was a Judicial Intern to the Honorable James P. McCormack in the New York State Supreme Court, Nassau County, was a Summer Associate at Anderson Kill, and student-taught a "street-law" course at a public high school in Queens.

In his personal time, Sal volunteers as a big brother through Bigs & Littles NYC Mentoring and as a financial literacy facilitator for Catholic Charities Housing Preservation Program.

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AGENDA

- Importance of Defense Costs Coverage
- Duty to Defend v. Duty to Indemnify
- Trigger
- Scope
- Allocation
- Termination
- Duty to Defend vs. Duty to Reimburse
- Independent Counsel
- Remedies for Breach

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Importance of Defense Costs Coverage (aka Litigation Insurance)

- Don't let the headlines fool you – defense costs can often be just as expensive or more expensive than a judgment or settlement.
- This is particularly true in cases involving mass torts:
  - A 1978 Report by the RAND Institute for Civil Justice indicated that asbestos cases, per claim, averaged $60,000 in compensation and an additional $35,000 in defense litigation expenses.
  - Lawsuits against 3M Technologies alleging defects and personal injury related to Combat Arms Earplugs. Coverage dispute included $370 million in defense costs.
  - Vanderbilt Minerals, LLC. Bankruptcy filings reveal that it faced over $117.2 million in talc lawsuits and had spent $50 million defending those claims, including $8 million in the last year.

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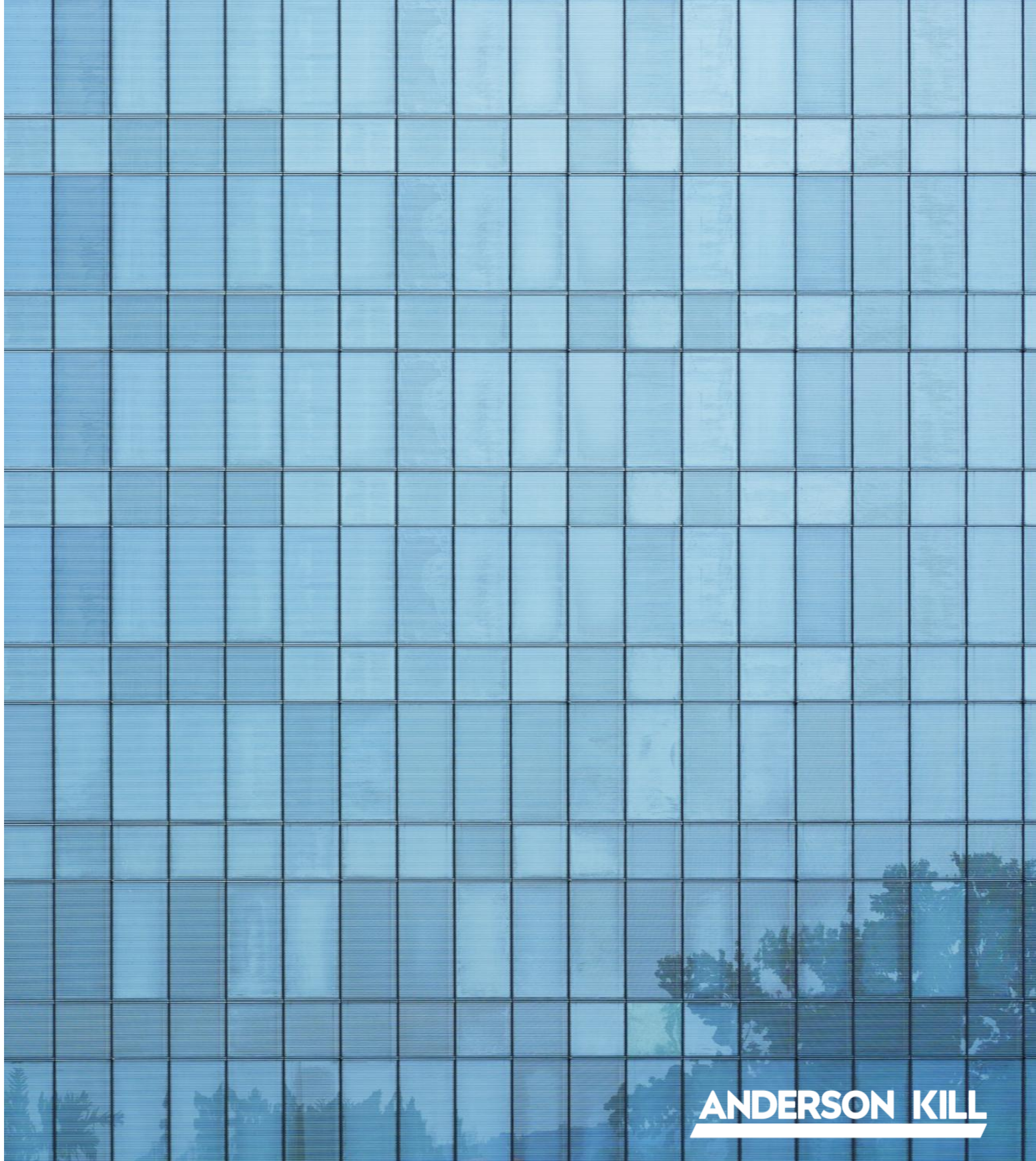
Types of Coverage Affording Litigation Insurance

- Essentially, all types of insurance that provide coverage for liability to third parties include a duty for the insurance company to defend claims or reimburse defense costs
- Commercial General Liability, Umbrella, Excess; Commercial Auto; Errors & Omissions; Directors & Officers; Employment Practices Liability, Crime, etc.



Duty to Defend vs. Duty to Indemnify

- The duty to defend ("litigation insurance") is the insurance company's obligation to defend any lawsuit brought against the policyholder that alleges a claim that is potentially covered by the policy.
    - The claim does not need to be likely to succeed or be well-pleaded, so long as the claim would be covered if ultimately successful.
    - Insurance company must defend claims even if they are groundless, false or fraudulent
- The duty to indemnify is the insurance company's obligation to pay all covered claims (as settlements or judgments) against the policyholder that are actually covered by the policy.

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Trigger/Extrinsic Evidence

- Four Corners and Extrinsic Evidence: Duty to defend exists if either:
  - Four corners of the complaint suggest a reasonable possibility of coverage, even if facts outside the complaint indicate that the claim may be meritless or not covered; or
  - Insurance company has actual knowledge of facts establishing a reasonable possibility of coverage, even if the allegations of the complaint do not allege a covered event.
  - Eight corners rule
- Extrinsic Evidence is admissible if:
  - It potentially brings the claims within the scope of coverage. ***Northville Indus. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.***, 657 N.Y.S.2d 564, 568-69 (1997); ***Fitzpatrick v. Am. Honda Motor Co.***, 571 N.Y.S.2d 672, 674-75 (1991); ***SL Indus., Inc. v. Am. Motorists Ins. Co.***, 128 N.J. 188, 198, 607 A.2d 1266, 1272 (1992).

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Trigger/Extrinsic Evidence (Cont'd)

- Can insurance companies use extrinsic evidence to negate coverage?
  - Most states plainly reject this. ***See, e.g., Fitzpatrick v. Am. Honda Motor Co.***, 571 N.Y.S.2d 672, 674-75 (1991).
  - New Jersey is more nuanced and permits extrinsic evidence where the duty to pay depends on a factual issue which will not be resolved by the third-party suit. ***Norman Int'l, Inc. v. Admiral Ins. Co.***, 251 N.J. 538, 551-52 (2022); ***Burd v. Sussex Mut. Ins. Co.***, 56 N.J. 383, 388 (1970).
  - Examples:
    - Complaint alleges injury from insured vehicle where, in fact, uninsured vehicle was involved in crash
    - Complaint alleges accident on date within policy period where, in fact, accident occurred on date outside policy period

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Trigger/Extrinsic Evidence (Cont'd)

- New Jersey has permitted a withdrawal from defense after extrinsic evidence discovered in an investigative period determined no coverage existed, provided insurance company promptly reserved rights. ***Polarome Int'l, Inc. v. Greenwich Ins. Co.***, 404 N.J. Super. 241, 277 (App. Div. 2008).
- Limited rule where allegations in complaint are not sufficient to determine coverage.
- Contrary to rules requiring that ambiguities be construed in favor of coverage, exclusions be strictly construed, and if any possibility of coverage exists, the insurance company must defend the entire suit until all potentially covered claims are resolved.
- Where allegations come within four corners of policy and underlying case will resolve fact issues needed to determine coverage, insurance company cannot use extrinsic evidence to defeat duty to defend.

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Scope of the Duty to Defend

- New Jersey law provides a narrower scope of the duty to defend compared to its sister states
  - For example, New York law does not parse the duty to defend.
  - If a single allegation or claim of an underlying action is potentially covered, an insurance company must defend the "entire action." ***See, e.g., Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.***, 91 N.Y.2d 169, 175 (1997) ("If any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action.").

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Scope of the Duty to Defend (Cont'd)

- New Jersey law requires only a defense of claims the insurance company would have to pay if the claimant prevailed in the action.
- Exception: "When the defense costs cannot be apportioned, the insurer must assume the cost of the defense for both covered and non-covered claims." ***SL Industries, Inc. v. American Motorists Ins. Co.***, 128 N.J. 188 (1992).
  - Per the New Jersey Supreme Court, presumption should be in favor of apportionment, even where it would not be with "scientific certainty."
  - Where apportionment may be a close call, often this can be negotiated.

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Allocation of Defense Costs for Long-Tail Claims

- Under New York law, an insurance company is not automatically entitled to allocate defense costs even if indemnity obligations may be allocated across policy periods. ***Cont'l Casualty Co. v. RapidAmerican Corp.***, 593 N.Y.S.2d 966, 974 (1993).
    - Insurer may later obtain contribution from other applicable policies
- New Jersey permits allocation of defense costs for long-tail claims, pro-rata by policy limits—the same allocation applied to indemnity amounts. ***IMO Indus. Inc. v. Transamerica Corp.***, 437 N.J. Super. 577, 606 (App. Div. 2014).

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Key Defense Costs Coverage Differences – NY vs. NJ

- So what are the differences between New Jersey and New York?
  - Both states require defense of claims that are potentially covered, even if those claims are poorly pleaded or almost certain to fail.
  - New York requires defense of claims contained within the same lawsuit that would not be covered if brought separately. New Jersey typically does not.
  - NY does not allow extrinsic evidence to negate the duty to defend. NJ allows it under certain circumstances.
  - For long-tail claims, NY permits insurers to seek contribution of defense costs from other insurers. NJ requires allocation of defense costs.

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When the Duty to Defend Terminates

- Generally, the duty to defend terminates (1) when all potentially covered claims are disposed of or (2) the indemnity limits are paid out in a good faith settlement.
- So, if an insurance company acknowledges coverage, can it pre-pay or tender its indemnity policy limits in a quick settlement to terminate the duty to defend, i.e., “dump and run”?
- No–New Jersey protects the distinct nature of the duty to defend and duty to indemnify by prohibiting such tactics.

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Duty to Defend vs. Duty to Reimburse Defense Costs

- CGL policies typically provide for a “duty to defend”
- Other policies, like D&O, E&O, EPLI, crime, etc., typically provide for a duty to advance or reimburse defense costs
- Unless policy clearly says otherwise, the duty to reimburse defense costs is triggered under same circumstances as duty to defend – allegations establish the potential for coverage (eight corners rule – no extrinsic evidence allowed)
  - Where coverage applies until such time that it is determined that alleged acts falling within exclusion did in fact occur, then extrinsic evidence can be considered to defeat duty to reimburse defenses costs.

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Duty to Defend vs. Duty to Reimburse Defense Costs (Cont'd)

- Generally, insurance company must reimburse all defense costs in a "mixed action"
  - This is true even where policy has express allocation provision if allocation cannot reasonably be made under the circumstances, subject to later recoupment when liability is determined. ***Federal Insurance Co. v. Kozlowski***, 18 A.D.3d 33, 41–42 (N.Y. App. Div. 1st Dep't 2005).
  - *But see* ***Commercial Capital Bankcorp., Inc. v. St. Paul Mercury Ins. Co.***, 419 F. Supp. 2d 1173, 1182 (C.D. Cal. 2006) (requiring insurance company to advance only 50% of defense costs).

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Right to Independent Counsel

- New Jersey Courts have long recognized the “triadic relationship” among an insurance company, its appointed counsel, and its policyholder.
  - On one hand, there exists an attorney-client relationship between the appointed counsel and policyholder, and counsel must be loyal to the policyholder as if hired directly.
  - Theoretically, defense counsel owes the same loyalty to the policyholder as if counsel had been personally retained by the policyholder.
  - On the other, the insurance company hires its appointed counsel, and counsel’s future business is dependent on the insurance company.
- Where the policyholder and insurance company’s interests diverge in a way that creates a conflict for the attorney representing one party while being paid by the other, the policyholder is entitled to choose its own, independent counsel to be paid for by the insurance company.

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Right to Independent Counsel (Cont'd)

- Courts have found this relationship can create conflict where:
  - There are strategic differences among the policyholder and insurance company (e.g., whether to settle or litigate).
  - Where a policyholder has been accused of both intentional and negligent conduct, meaning the insurance company would benefit from a finding of intentional conduct and the policyholder from a finding of negligent conduct.
  - Co-defendants with diverging interests are covered by the same insurance company.
- The insurance company must pay fees as they are incurred.
- In New York, the failure of the insurance company to advise the policyholder of its right to independent counsel constitutes a deceptive act or practice within the meaning of New York General Business Law § 349. ***Elacqua v. Physicians' Reciprocal Insurers***, 52 A.D. 3d 886, 888 (N.Y. App. Div. 2008).

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Remedies for Breach of Duty to Defend

- Compensatory damages – out of pocket defense costs
- Pre-Judgment interest
- Attorneys' fees:

New Jersey, by Court Rule R. 4:42-9(a)(6).
New York: ***Mighty Midgets, Inc. v. Centennial Insurance Co.***, 47 N.Y.2d 12 (1979) and its progeny, including ***Houston Cas. Co. v. Prosight Specialty Ins. Co.***, 462 F. Supp. 3d 443 (S.D.N.Y. 2020).

Questions

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Thank You

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2026 Topics in D&O Liability and Insurance

William G. Passannante
Ann M. Longmore

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William G. Passannante is a nationally recognized authority on policyholder insurance recovery in D&O, E&O, asbestos, environmental, property, food-borne illness, and other insurance disputes, with an emphasis on insurance recovery for corporate policyholders and educational and governmental institutions.

According to clients quoted in Chambers USA, he is touted as, "A terrific policyholder lawyer" and "a tremendous tactician and an incredible trial lawyer." According to Chambers USA, he is the "go-to attorney for high-dollar insurance coverage litigation," and "knows the industry inside-out." "Mr. Passannante is well regarded for his client counseling and impressive advocacy, and has the perceptive ability to wade through legalese and identify the most salient and important issues. He relates to his clients with integrity, determination and devotion. He has a good sense of humor and is passionate about his work."

Mr. Passannante is co-chair of Anderson Kill's Insurance Recovery Group. He is also a member of Anderson Kill's Cyber Insurance Recovery Group and the COVID Task Group. He has represented policyholders in major precedent-setting cases argued in trial and appellate courts throughout the country. Law360 recognized Mr. Passannante as 2013 MVP in the Insurance category, and he has been recognized in Chambers USA in every year since 2006 as a leading insurance recovery attorney. The Legal 500 United States consistency includes him on their elite "Leading lawyers" list and he is recommended for Insurance - advice to policyholders. Since 2010, Mr. Passannante has been selected by his peers for listing in The Best Lawyers in America. He has also been rated "AV® Preeminent™ Peer Review Rated," the top rating, 5.0 out of 5.0, by his peers and was also designated a 2020 Top Rated Lawyer as listed in Martindale Hubbell.

Mr. Passannante was a drafter of the precedent-setting Weyerhaeuser case in the Supreme Court of the State of Washington, which held that no overt threat against a policyholder is required to trigger insurance policies. Mr. Passannante co-chaired the program "Current Issues in D&O and Professional Liability Insurance" sponsored by the ABCNY and the ABA, and chairs the firm's annual D&O Insurance Conference.

He has testified before the New York State Legislature regarding the insurance industry response to the victims of terrorist attacks. Mr. Passannante is an editor of the book, "The Policyholder Advisor," and has published widely including in "Risk Management," "The (ABA) Brief," "Corporate Counsel Magazine," "Policyholder Advisor," "Copyright World," "Healthcare Financial Management," "Insurance Litigation Reporter," and "Mealey's Insurance."

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Ann M. Longmore

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Ann Longmore Ann Longmore brings a distinguished career in financial services and insurance, marked by extensive experience in risk management, financial protection, and client advisory. Her professional journey is underpinned by a robust educational foundation, including a Doctor of Law (JD) from Brooklyn Law School, a Master of Business Administration (MBA), and a Bachelor of Science (BS) in Finance from LIU Brooklyn. As Managing Director for Multinational Finpro (North America) at Marsh McLennan, she was instrumental in managing complex financial and professional liability risks for multinational clients.

Before her tenure at Marsh McLennan, Ann served as Executive Vice President at Willis Re US, a prominent reinsurance brokerage company. During her extensive period with Willis Re, she developed deep expertise in the intricacies of the insurance market and risk transfer strategies. Her career also includes a significant role as Vice President at AIG, a global insurance leader, where she contributed to the company's comprehensive range of insurance products and services. Earlier in her career, Ann gained foundational experience through an internship at the New York Stock Exchange, providing exposure to capital markets operations.

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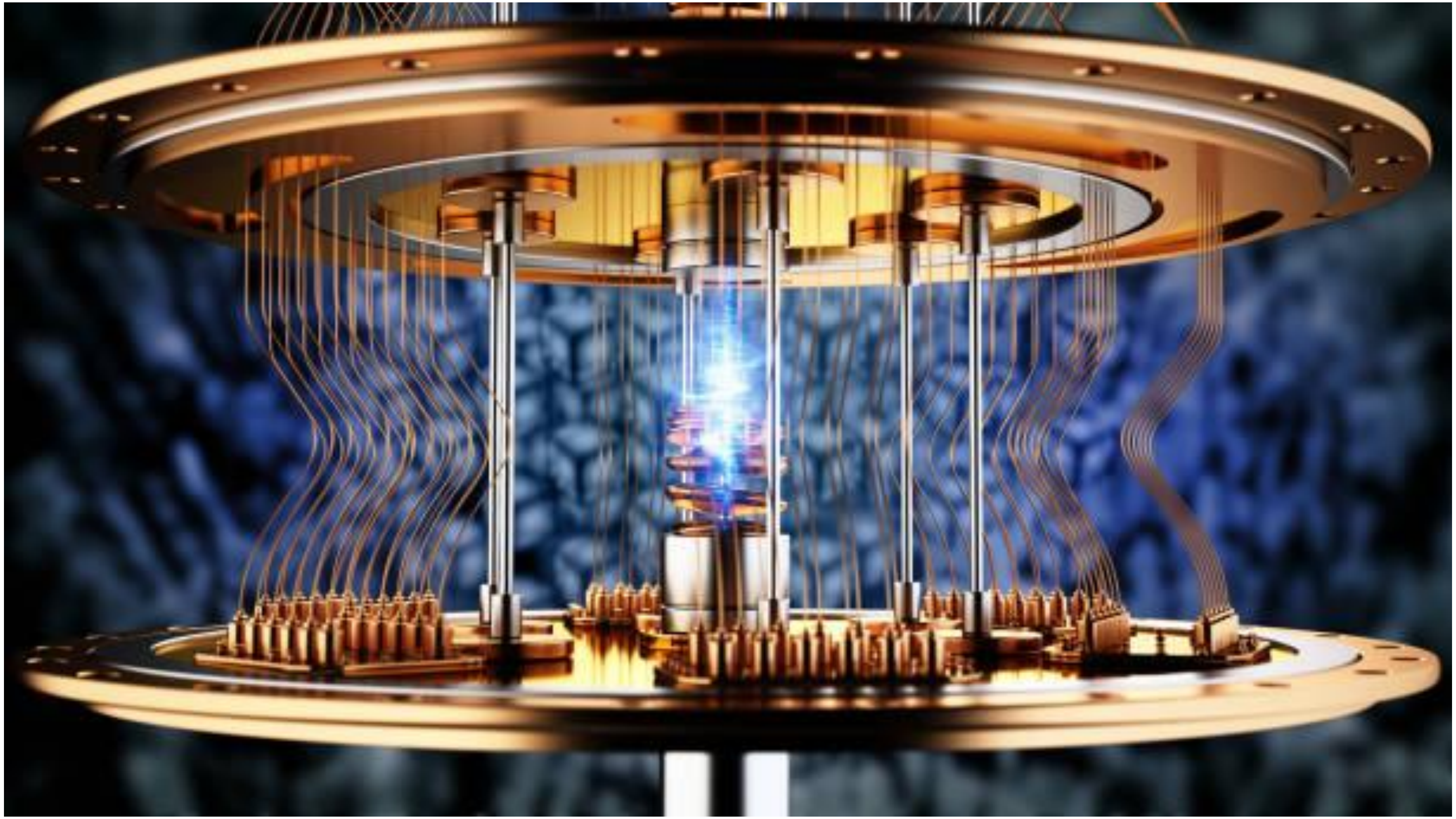
1) Quantum Computing



2) ADR Clauses in D&O Policies

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3) Bump Up – Run Off

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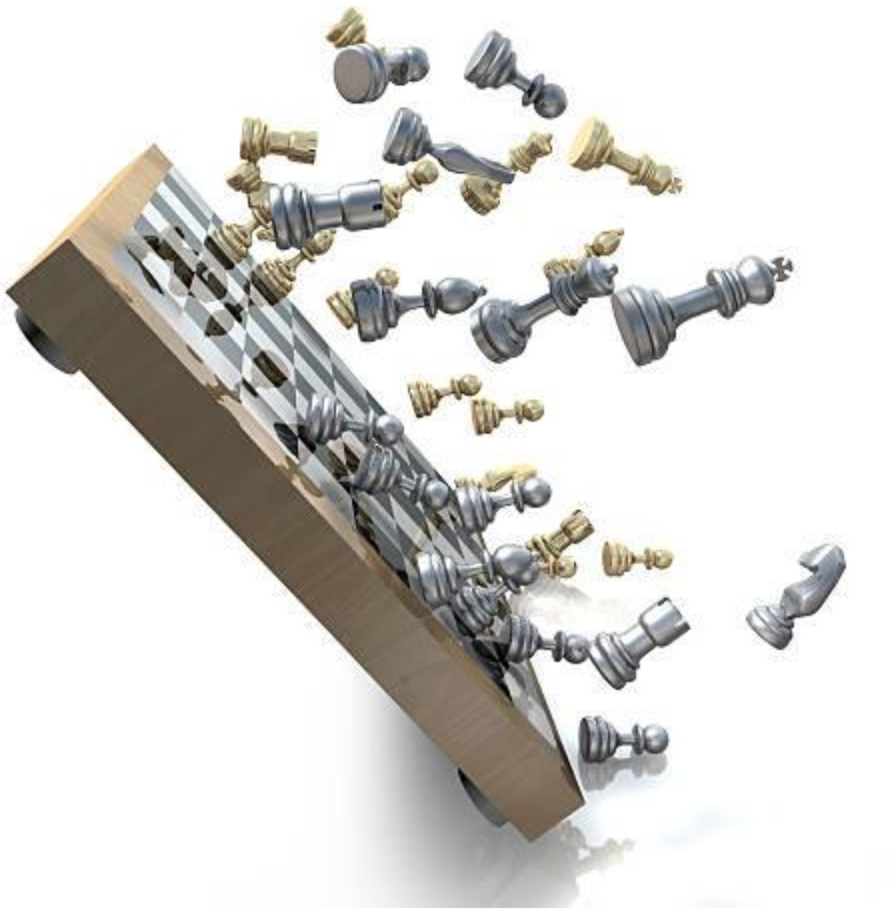
4) Data Points - Class Actions?



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The 2025 – 2026 Recap Scorecard 5-to-5

1. Class Actions Down in 2025 ⬇
2. Disgorgement Remedy No Showing Pecuniary Harm ⬆
3. Interrelated Acts Precluded Coverage *Under Armour* ⬇
4. AI Infrastructure Suits ⬆
5. I.V.I. in Bankruptcy Precludes Trustee Claim ⬇
6. Arbitration Clauses Don't Bind Individuals *In Re Orion Health* ⬆
7. Harassment Not Breach of Fiduciary Duty ⬇
8. The S.E.C. Had Been Tough on Crypto. ⬇
9. Bump-up Gets Bumped-Out! - Harman Int'l ⬆
10. AI-Robotic-Pump-Washer! - *RichTech Robotics* ⬆

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Questions

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Arbitration and Mediation: What to Do and What Not to Do – and How it Relates to Insurance Coverage

Steven J. Pudell, *Moderator*
Judge Joseph A. Dickson (U.S.M.J) (ret.)
Judge Peter E. Doyne (ret.)
Judge Michael F. O’Neill (ret.)

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Thank You

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