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Liability and Coverage Hot Spots: How a Changing World is Changing the Legal Landscape

I. Things Are Changing and They are Changing Fast. The Internet, the 24-Hour News Cycle, and New Social Trends and Awareness is Having and Will Continue to Have a Significant Effect on the World of Insurance Claims and Litigation.

Whether it is new theories of recovery against companies being charged with climate change; whether acts and crimes that were once "unforeseeable" no longer being viewed in that light; whether sex trafficking awareness creates new liability for owners and managers of businesses where profits are made even though they are not directly involved in the trafficking; whether it is multi-billion dollar lawsuits against an industry such as we have seen in the various opioid litigation matters; or whether old ideas regarding who is an "employee" or an "independent contractor"; there can be no doubt that insurers, defense lawyers, and coverage lawyers will have new types of claims to consider and new concepts of liability and coverage issues to work on.

II. Climate Change Issues

It is estimated that well over a thousand climate change related cases were filed prior to January 1, 2019. These cases come in two broad categories involving government and public authorities as well as private actions based on the actions of the defendant companies for allegedly causing climate change.

Perhaps the most famous case is *Juliana v. United States of America*, filed in 2015, in Oregon Federal Court in which the United States of America was named as a defendant by 21 young plaintiffs, originally naming President Obama and now naming President Trump. This lawsuit asserts that the government violated the youths' rights by encouraging and allowing activities that harm the plaintiff's rights to life and liberty and plaintiffs sought an order requiring the government to adopt methods for reducing greenhouse gas emissions. Judge Ann Aiken of the United Stated District Court of Oregon upheld the concept that access to a clean environment was a fundamental right and allowed the case to proceed. The trial is on hold pending disposition of various interlocutory appeals by the government as a result of rulings by Judge Aiken. The case is conceptionally driven by the "public trust doctrine," which holds that the

sovereign holds the country's resources in trust for public use. Ultimately, such holdings could be applied to the private sector, and used against insureds.

Some cases on climate change have been determined by the Supreme Court, including *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007). In that suit, 12 states sued the EPA for failing to regulate emissions of greenhouse gases. The Court agreed with the states by a 5-4 vote finding that the states had standing to sue the EPA for not issuing regulations; that greenhouse gases were air pollutants; and that the EPA was authorized to regulate them. The majority found that the Agency should be required to regulate such emissions to reduce the extent of global warming.

In *Kivalina v. Exxon Mobile Corp*., 696 F3d. 849 (9th Circuit 2012) Alaskan islanders claim damages from energy companies, claiming the weather patterns were due to climate change which had been caused by the companies' actions. The case was dismissed and the Ninth Circuit upheld the dismissed holding that the plaintiffs could not sue under Public Nuisance Statute due to the Federal Clean Air Act.

Recently on December 10, 2019, Exxon Mobile defeated a suit brought by the New York Attorney General over global warming. (*The People of the State of New York by Barbara D. Underwood against Exxon Mobil Corporation*) This case was the first case to go to trial against a major oil company over climate change and the New York Attorney General accused the Texas based company of using financial tricks to hide the true cost of climate change from investors. The Massachusetts Attorney General filed a similar lawsuit in October which accuses Exxon of misleading consumers as well as investors. Baltimore, Rhode Island, and over a dozen local companies have sued oil and gas companies over climate change. The lawsuits claim the companies created a public nuisance by producing the fossil fuels that contributed to global warming. They seek funds to pay for sea walls and infrastructure to guard against extreme weather and sea levels. Property owners and others who potentially face damages can be expected to bring further actions.

Additionally, the *Julianna v. United States of America* case has been copied in various other locations in the country.

Clearly, such litigation against companies pose interesting questions of causation and liability as well as issues relating to important insurance coverage issues involving professional liability insurance, directors and officers insurance, as well as general liability insurance. Issues relating to the possibility of future damages and the applicability of standard policy exclusions will need to be considered.

III. Unforeseen "Foreseeability"

In *Jane Doe, a Minor v. United Youth Soccer Association, Inc.* 9 Cal.App.5th 509 (2017) the court held a national youth organization could be held liable for the failure to require background checks of local coaches and a finding of negligence against the national organization. This case arguably upended the law on whether or not there was a special relationship between the national organization and the young female athlete in a Northern California city. Recognizing that there was no duty to protect others from the harm of third parties, the Court emphasized

exceptions based on the special relationship doctrine which largely turned on the foreseeability of harm to the plaintiff.

While the national organization lost the case in 2017, it seems it would have won the case if the case had been tried only a few years before. It is possible to assert that this change has been brought about by the barrage of news stories about child molestation that arise in youth sports programs, especially those involving athletes involved in the United States Olympic programs, such as gymnastics and swimming.

On October 1, 2017, the Las Vegas shooting at the Route 91 Festival occurred. This incident was followed by other nightclub shootings as well. Temples, Synagogues, and Mosques, five years ago, would have not arguably been held to a duty to protect people inside their building from criminal attacks. But the standards appear to be changing.

On July 8, 1984, at a McDonald's restaurant in San Ysidro, California, James Huberty fatally shot 21 people and wounded 19 others before being killed by a police sniper. This crime remains the eighth deadliest mass shooting in American history. Lawsuits were filed against McDonald's and the San Diego Police Department. These suits were consolidated and dismissed by Motion for Summary Judgment. On July 25, 1987, the California Court of Appeal confirmed Summary Judgment for the defendants, ruling that McDonald's or any other business had no duty of care to protect patrons from an unforeseeable assault by a murderous madman and held that the security measures typically used by restaurants to deter criminals, such as guards and closed-circuit television, could not have possibly deterred the perpetrator. See, *Lopez v. McDonald's Corp.* 193 Cal.App.3d 495 (1987).

What would the result in the case be today?

Insurers and lawyers have to adjust to the new environment where insureds who are not the perpetrators of crime are held civilly liable for allowing the perpetrator to commit the crime in or around the premises of the insured. As stated by the court in *Jane Doe v. United States Youth Soccer Association* (*supra*) "[A] duty to take affirmative action to control the wrongful acts of the third party will be imposed only where such conduct would be reasonably anticipated. (citations omitted) Basically, 'the reasonableness standard is a test which determines, if, in the opinion of a court, the degree of foreseeability is high enough to charge the defendant with the duty to act on it.' (*Juarez*, *supra*. 81 Cal.App4th P402) Courts use a "sliding-scale balancing formula" under which the "imposition of a high burden requires heightened foreseeability, the minimal burden may be imposed upon the showing of a lesser agree of foreseeability." (cite omitted) Heightened foreseeability can be shown by evidence of prior criminal incidents or "other indications or a reasonably foreseeable risk of violent criminal assaults."

The court went on to hold that although defendants had no knowledge the perpetrator had previously sexually or physically abused anyone or had a propensity to do so, they were aware of incidents of physical or sexual abuse of youth members by its coaches at a steady yearly rate of between 2 and 5 per year." The court even stated that the national organization started the KidSafe Program which stated "One out of every 4 girls and one out of every 6 boys will be sexually abused before the age of 18." The court also quoted the pamphlet where it stated "pedophiles are drawn to places to where there are children. All youth sports including youth soccer are such places."

Such comments show that courts are willing to change common law regarding "duty" and "foreseeability" based on events we read and hear about in our connected world. Old assumptions and positions are sure to be questioned in new areas as we move forward.

IV. Opioid Litigation

While the opioid epidemic is taking a toll on addicts, and their family and friends, the monetary cost to government agencies and municipal entities is racking up, as well. The Centers for Disease Control estimates this cost to be approximately $75 billion annually. Others have estimated the financial effect to be anywhere from $50 billion to up to $1 trillion since 2001.

This means big settlements, several this year alone. In October, three of the nation's largest distributors: McKesson, Cardinal Health and AmerisourceBergen, agreed to settlements out of two counties in Ohio totaling roughly $260 million. In September, the maker of OxyContin Purdue Pharma reached an agreement in principle worth more than $10 billion, which laid out a framework for the company to settle in the MDL. In May, Israel-based Teva Pharmaceuticals agreed to an $85 million settlement with the state of Oklahoma.

In 2016, in *Travelers Property Casualty Company of America v. Anda, Inc.*, 658 Fed.Appx. 955 (11th Cir. 2016), the 11th Circuit affirmed summary judgment in favor of Travelers and St. Paul. The 11th Circuit chose not to determine whether the claims are for or because of bodily injury, but rather concluded that Travelers and St. Paul's general commercial liability policies do not afford coverage because of the policies' Product Exclusions that preclude coverage, namely, a "Products Exclusion" and a "Products and Completed Work Exclusion", respectively. These policies were governed under California law, and under California law, "arising out of" and "results from" require only a minimal causal connection or link between the products sold or distributed by an insured and the alleged injury. *Pension Trust Fund v. Fed. Ins. Co*., 307 F.3d 944, 952–53 (9th Cir. 2002).

Claims involving intentional or negligent misrepresentations do not constitute an accident under a liability policy. The *Travelers Property Casualty Co. of America v. Actavis, Inc.* (2017) 16 Cal.App.5th 1026 citing *Miller v. Western General Agency, Inc.* (1996) 41 Cal.App.4th 1144, 1150, 49 Cal.Rptr.2d 55 [no duty to defend claims for fraud, deceit, and negligent misrepresentation in connection with the advertising and sale of a home because the underlying claims did not allege an accident]; *Dykstra v. Foremost Ins. Co*. (1993) 14 Cal.App.4th 361, 367, 17 Cal.Rptr.2d 543 [no duty to defend because "coverage was provided for accidents only and not for intentional or negligent misrepresentations"].

Generally, claims in opioid litigation against manufacturers allege companies exaggerated the benefits of opioid medications and knew these drugs were over prescribed, yet failed to warn medical professionals of the extremely addictive nature of the narcotics and the need for strict dosage.

If it is any indication, the big settlements in opioid litigation from 2019 alone point Big Pharma ceding a major contention of opioid litigation with regard to false advertising and misrepresentation. And as early as 2007, the makers of OxyContin, Purdue Pharma, and three top executives pleaded guilty in federal court to criminal charges that they misled regulators, doctors and patients about OxyContin's risk of addiction and its potential to be abused. Despite

paying a fine of $600 million, the company continued its aggressive promotion of the drug, playing down its risk and overselling its benefits.

V. The "Gig" Economy

The term "gig economy" refers to a general workforce environment in which short-term engagements, temporary contracts, and independent contracting is commonplace.

Freelancers and contract workers make up the fastest-growing segment of the American workforce, and are expected to surpass half of all workers within a decade. But, under current employment law, these workers are ineligible for most of the rights and benefits of traditional employees. (https://www.npr.org/2018/01/22/578825135/rise-of-the-contract-workers-work-is-different-now)

The advent of the so-called "gig economy" and the increasing use of "independent contractors" threatens to leave growing numbers of workers unprotected by the remedial statutes designed to shield them from the vagaries of the workplace. The distinction between independent contractor and employee continues to present definitional challenges and reveals the pervasive practical difficulty in applying traditional, multi-factor tests.

These new relationships also threaten to shield businesses from liability for the harm those workers caused while laboring on their behalf. Agnieszka A. McPeak, *Sharing Tort Liability in the New Sharing Economy,* 49 Conn. L. Rev. 171, 188–215 (2016) (describing how Uber and other companies in the "sharing economy" that rely almost entirely on independent contractors present challenges in the application of tort law). Scholars have suggested that our common law needs to adapt in other ways to assure compensation for wrongs committed by persons holding one of these new positions. *See, e.g., Id*. at 215–25. *Gil v. Clara Maass Medical Center*, 450 N.J.Super. 368 (2017), citing Miriam A. Cherry & Antonio Aloisi, *"Dependent Contractors" in the Gig Economy: A Comparative Approach,* 66 Am. U. L. Rev.635 (2017); Orly Lobel, *The Gig Economy & The Future of Employment and Labor Law*, 51 U.S.F. L. Rev. 51, 61 (2017).

Since October of 2012, there have been more than a hundred lawsuits filed against Uber in the U.S. alone Among the more noteworthy decisions are *O'Connor v. Uber Technologies* (N. D. Cal. 2015) and *Razak v. Uber Technologies* (E. D. Pa. 2018), which reached opposite results. In O'Connor, a federal trial court in Northern California held that Uber drivers were presumptively employees, but that there were genuine issues of fact as to the level of control asserted by Uber such that summary judgment on the matter was not appropriate. Significantly, the Court's opinion concluded that current laws were not well equipped to deal with the "sharing economy", and that new legislation might be required to clarify California law on the matter.

Legislation recently signed into law in California, known as Assembly Bill 5, requires companies like Uber, Lyft, and DoorDash to reclassify some workers as employees instead of contractors. That could potentially jeopardize their entire business models, by requiring them to offer drivers hourly wages and other benefits. If workers are required to stick to schedules and work for only one company, it could also eliminate gig economy opportunities.

Under the new law, in order for a company to treat a worker as a contractor they must prove that the worker is independent and able to perform services free of company control, that the

services the worker provides are not part of the company's typical course of business and that the person separately works in the same type of business outside of the contracted work.

In October, the trio of ridesharing and delivery companies launched a $90 million campaign called Protect App-Based Drives and Services with the express goal of getting a ballot measure approved by voters in 2020 to offset the effects of the recent legislation signed into law by Democratic Gov. Gavin Newsom, known as Assembly Bill 5. https://www.foxbusiness.com/technology/uber-lyft-doordash-counterattack-california-gig-economy

Paul Oyer, the Fred H. Merrill Professor of Economics at Stanford University, identifies three key emerging policy issues:

First, the exploitation of gig workers may be a potential problem because unlike traditional employees, gig workers don't have the right to form unions and bargain collectively under labor laws in most places.

Secondly, as the independent workforce has grown, there has been a push to mandate benefits for these workers that are comparable to those offered to traditional employees. At the same time, others have pushed for policies to make benefits more portable, allowing workers to take their benefits with them as they move and to use these benefits when workers participate in independent work, which may enhance labor market flexibility.

Finally, a contentious policy issue for gig workers has been the topic of worker classification – whether these workers are employees or independent contractors. Litigation involving worker misclassification allegations are complicated and require careful analysis, as the distinction between different classifications matters more for some types of workers than others.

https://www.analysisgroup.com/labor-and-employment-issues-in-the-gig-economy/(2017)