OVERALL SUMMARY

Our reporting on trends is indicative of the larger insurance space. Like other industries, the Insurance and Financial Services industry, in general, is increasingly influenced by global climate and political change. Increased catastrophic weather activity has been reported and extensively discussed by other experts in a variety of different insurance segments. This represents one of the key drivers in insurance and its impact has been felt across many—if not all—lines of insurance.

Specifically, in the areas of Financial Lines Insurance – Those insurance segments that particularly impact the management and professional responsibilities of businesses, those weather trends have continued to contribute to conditions that make insurance placement on behalf of clients more challenging. Generally speaking, the cost of purchasing the insurance (pricing), the aggregate risk transfer amounts that insurers are willing to accept (limits and retentions) as well as the breadth of contractual provisions transferring risk (terms, conditions and enhancements) have all be significantly impacted by a generally hardening trend that has persisted for several financial quarters.

Additionally, litigation and risk activity are particularly pronounced space typically addressed though financial lines insurance. In the claims or litigation contexts which are also included in this update, we are seeing increases in key indicators that we estimate will influence more persistence in this hardening trend. While we are seeing pockets (like for private company management liability), where limits have found some stability over the last quarter.

Litigation trends—especially in connection with public securities—is still continuing to rise and present costly risks for insurers to consider. We believe this is having a particular impact on pricing, terms and conditions for public company management liability as well as activity in connection with Special Purpose Acquisition Companies (SPAC’s).

On the whole, market conditions are still very challenging for clients in the management lines space and we forecast significant increases on most lines for the foreseeable future (especially within the next 12 months).

For Professional lines, we have seen mixed signals of the market challenges exhibited on the other products. We have seen some premium relief for some segments and some relaxation on aggregate limits pressure. However, we have also seen more restrictive terms and conditions on the policies that will likely persist into the future.
### PUBLIC COMPANY DIRECTORS & OFFICERS LIABILITY

#### RETENTIONS

Markets will continue to harden but expected to begin to stabilize late Q4 2021. Until such time we expect continued rate pressure influenced by the impact of the CYAN decision. Underwriters will continue to evaluate risk with a post pandemic view, take a measured approach in response to other economic, political volatility and regulatory environmental factors.

#### COVERAGE

The market continues to remain in a state of consistent “hardening”. There has been little to no relief in market pricing in the Public Directors and Officers Liability sector. Market conditions are continuing to present pricing increases, on average greater than 20%.

#### PRICING

The Private Company sector is beginning to show signs of stabilization. Pricing adjustments are being made directly in response to events related to COVID-19, industry sector, capitalization, cash burn and regulatory environmental factors. Hospitality, Entertainment and Retail industries have seen the most significant increases.

#### LIMITS

Pricing will stabilize due to the increase capacity and completion of carrier’s portfolio correction. With the emergence of carriers moving toward Insurtech and API enabled technology, pressure to cap rate increase will be realized during the next 12 months.

#### CARRIER

We are beginning to see the emergence of new market capacity in the private company sector as capital is being redirected toward downstream client profiles. The post pandemic appetite for established business with less than $100m in revenues is becoming a carrier focus.

#### CLAIMS

Claims costs will continue to rise and claims associated with economic impacts of the pandemic will increase claims volatility. In addition, the plaintiff’s bar is giving more scrutiny to SPACs and de-SPACing, as well as board diversity matters. Public companies may face more regulatory scrutiny from the SEC.

### PRIVATE COMPANY DIRECTORS & OFFICERS LIABILITY

#### RETENTIONS

Claims volume remains flat while defense costs and other claims elements are in an upward trajectory, which is increasing overall claims activity and expense trends.

#### COVERAGE

We have not seen reason to believe that limits profiles are increasing for carriers. We expect to see a reduction in the number of lead primary carriers over the next 12 months.

#### PRICING

We will begin to see significant efficiencies driven by technology and API enablement.

#### LIMITS

We will continue to see upward pressure on retention levels.

#### CARRIER

We are beginning to see the emergence of new market capacity in the private company sector as capital is being redirected toward downstream client profiles. The post pandemic appetite for established business with less than $100m in revenues is becoming a carrier focus.

#### CLAIMS

Claims costs will continue to rise and claims associated with economic impacts of the pandemic will increase claims volatility. Larger private companies and “unicorns” may attract increased SEC scrutiny.
### NOT FOR PROFIT DIRECTORS & OFFICERS LIABILITY

<table>
<thead>
<tr>
<th>METRICS</th>
<th>Q1 2021</th>
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<th>12 MONTH FORECAST</th>
<th>12 MONTH FORECAST COMMENTARY</th>
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<tbody>
<tr>
<td>PRICE</td>
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<td>20% to 30%</td>
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<td>CLAIMS</td>
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We have seen consistent upward pressure on rates, but at a less dramatic pace in comparison to the commercial space as portfolio adjustment have historically trailed behind in the Not for Profit sector. Certain segments, such as healthcare and social services, have seen more significant pricing increases in response to historic low pricing and claims.

Markets will continue to push double digit rate increases especially for the portion of the profile emerging from multi-year policies. Given that these policies are generally packaged with Employment Practices (EPLI), the vast majority of the rate burden has been distributed to EPLI.

**COMMENTARY**

- Insurers have reduced overall and per-layer limits made available for risks across the board—even in historically consistent and solid client relationships.

- Carriers continue to selectively increase retentions based on industry sector, especially in healthcare and social services. Industries impacted most by COVID-19 have experienced the most dramatic increases.

- This sector has experienced the most significant introduction of coverage retraction and restrictions. The addition of Absolute BI/PD and sexual abuse and molestation exclusions have become a fixture.

- Trend continues toward more restrictive policy wordings and coverages especially for the healthcare and social service organizations.

- Some developing appetites are likely to emerge and move toward greater reliance on technology to price and structure risk.

- Claims volume remains flat while defense costs and other claims elements are in an upward trajectory, which is increasing overall claims activity and expense trends. Not for profits are not immune from trending discrimination criticisms.

- Claims costs will continue to rise and claims associated with economic impacts of the pandemic will increase claims volatility.

- Capacity remains stable in this sector.

- The #MeToo and #BlackLivesMatter movements have prompted litigation against high profile companies, pushing pay disparity, discrimination and harassment claims to the front pages. Defense costs and other elements are in an upward trajectory, which is increasing overall claims activity and expense trends.

- Claims costs will continue to rise and claims associated with economic impacts of pandemic will increase claims volatility. The new administration is looking to expand civil rights protections which may lead to increased claims volume.

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### EMPLOYMENT PRACTICES LIABILITY

<table>
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<tr>
<th>METRICS</th>
<th>Q1 2021</th>
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<tr>
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<td>RETENTIONS</td>
<td></td>
<td>$</td>
<td>10% to 30%</td>
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<tr>
<td>COVERAGE</td>
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<tr>
<td>CLAIMS</td>
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Employment Practices is relatively unstable at this time due to the impact of COVID-19. Concerns over RFIs, the continued impact of the #MeToo movement and uncertainty of the domestic socioeconomic and political issues have caused carriers to front load their pricing models to accommodate for the uncertainty.

**COMMENTARY**

- Insurers have reduced overall and per-layer limits made available for risks across the board—even in historically consistent and solid client relationships.

- Carriers are and will continue to make adjustment on a state specific basis primarily influenced by legislation and loss trends.

- Carriers are beginning to present uniformity in approach especially as it relates to Biometric Information Privacy Act (BIPA) Exclusions on a countrywide basis. In addition, focused event driven exclusions (Reduction in Force/Downsizing ) have been introduced in response to COVID-19.

- There is no expectation in the shift in market leadership among the carriers. We do however expect to see a slight uptick in capacity especially with carriers that offer EPL as a blended product with the Directors and Officers Liability.

- Some developing appetites are likely to emerge as insurers being to see opportunity by increase in market capacity and technology.

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## CYBER

### RETENTIONS

Carriers continue to manage their capacity in their portfolios, especially above $5M. Sub-limits should be expected when carriers deploy their capacity above $5M, especially for Ransomware and Dependent Business Interruption.

### COVERAGE

Carriers were seeking retention increases on tougher industry classes, higher limits when ransomware controls were less favorable, or with claims activity. Waiting periods are also rising as high as 12 to 18 hours on the Business Interruption coverages. Coinsurance is becoming a standard clause for Ransomware.

### LIMITS

Carriers continued to reduce or exclude ransomware coverage when controls are less favorable. MFA has become a mandatory control to secure coverage.

### CLAIMS

Continued tightening of underwriting guidelines including the mandatory need for a Ransomware Supplemental. Coverage will be paired down when controls are lacking. MFA has become a critical component in the underwriting process. Emergence of several new MGA/ MGUs in the marketplace which could help process. Emergence of several new MGA/MGs have set up competition to take the place of the recent scarcity in certain areas. We expect continued COVID-19 claims in LPL, Agent / Broker & Consulting E&O. Moderate rate increases will likely follow for certain classes. We expect a rise in claims for professional firms affected by the Microsoft Exchange hack. In addition, tech firms affected by malware and ransomware that shut down their operations are experiencing a higher rate of E&O claims.

### PRICING

- **Y.O.Y. Change:** 30% to 50% (Minimum)
- **Commentary:** The claims activity this past year is causing carriers to review their rates and adjust accordingly. Rates are expected to continue to increase into 2021 for all industries (some will be more severe). SolarWinds and Microsoft server attack will also impact rates as more claims are submitted. Limits and Pricing will continue to be stressed into 2021.

### METRICS

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<tbody>
<tr>
<td>Retentions</td>
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<td>Limits</td>
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<td>$3M to $4M</td>
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<tr>
<td>Coverages</td>
<td>5% to 15%</td>
<td>$0.5M</td>
<td>$1M to $1.5M</td>
</tr>
<tr>
<td>Claims</td>
<td>20% to 30%</td>
<td>$1M</td>
<td>$2M to $3M</td>
</tr>
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## PROFESSIONAL LIABILITY

### PRESSING

- **Y.O.Y. Change:** 1% to 5%
- **Commentary:** Start-up businesses rated higher than in recent years. Certain classes have rated higher at renewal.

### LIMITS

- **Y.O.Y. Change:** 0% to 10%
- **Commentary:** Most did not experience the substantial increases seen in other lines.

### METRICS

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<td>0% to 10%</td>
<td>$1M</td>
<td>$2M to $3M</td>
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<td>$0.5M</td>
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<td>10% to 20%</td>
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### META

- **Y.O.Y. Change:** 0% to 10%
- **Commentary:** Carriers have been increasing retention levels for certain risks. Law firms saw $50k avg. retentions as business consultants raised from $5k to $10k & $15k+. Retentions for most contractors and A&E’s unchanged.

### METRICS

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<td>10% to 20%</td>
<td>$0.5M</td>
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### COMMENTARY

We are starting to see Primary limits capped at $5MM for many lines, with excess options reasonably attainable. Available limits mostly unchanged for other lines, with some exceptions for certain coverages, such as Rectification for certain Construction-related exposures.

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### COMMENTARY

Markets continue to seek higher retentions from new business as well as in their renewal options. Once the adjustments have been made, retentions should remain static.

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### COMMENTARY

Underwriters continued to restrict coverage surrounding COVID-19 exposures. Other policy wording remained consistent, with flexibility to negotiate certain enhancements.

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### COMMENTARY

Some long standing carriers for LPL, Accountants PL left the marketplace, while several new options have set up shop. Some carriers decreased appetite for certain Contractor and Real Estate risks.

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### COMMENTARY

We saw the beginning effects of professional services dealing with COVID and claims began to trickle in. With courts closed or reduced hours, Law Firms struggled to file cases on time and manage client expectations efficiently.
A California federal court dismissed a securities class action against defendant Velocity Financial, Inc., a real estate finance company, for alleged false or materially misleading statements and/or omissions presented by Velocity in its January 2020 offering materials as it went public. This included allegations that Velocity created a “rosy picture” of the market despite the fact that COVID-19 was set to disrupt the entire real estate market.

Plaintiff alleged violations of Sections 11 and 15 of the Securities Act of 1933, arising from “various statements in Velocity’s offering materials” that were allegedly false or materially misleading. These included that Velocity allegedly: (1) falsely extolled its underwriting practices through its use of “disciplined due diligence”; (2) misrepresented the growth of its loan portfolio by failing to disclose that such growth resulted from riskier short-term interest-free loans, and that a significant portion of the portfolio had become nonperforming; and (3) cited favorable market conditions despite the risk of the growing COVID-19 pandemic.

In ruling for Velocity, the court first found that Velocity’s statements relating to its underwriting practice in its offering materials were “non actionable puffery.” These included statements extolling Velocity’s application of “disciplined due diligence” and that its underwriting practices focused on “minimizing credit losses.” Second, the court found that Velocity had accurately disclosed its use of riskier short-term interest-free loans and any increase in non-performing loan growth.

Finally, as for Velocity’s purported failure to disclose the potential effect of the COVID-19 pandemic on market conditions, the court held that Plaintiff failed to allege how Velocity “would have known about the coronavirus risks at the time of the IPO to include a more specific warning.” The court found that the Plaintiff did not allege how Velocity “would or could have known the extent of the coronavirus pandemic, or even the presence of the disease in America, at the time of the IPO.” As such, there would have been no need for Velocity to include any disclosure about the pandemic in its offering materials.

In a landmark case regarding business interruption policies, the U.K. Supreme Court ruled on January 15, 2021 that insurers must pay companies forced to close during the U.K.’s first COVID-19 related lock down. This ruling in favor of the Financial Conduct Authority is estimated to affect around 370,000 policyholders with over 700 types of policies.

In so ruling, the Supreme Court considered four common types of BI coverage: (1) disease clauses, (2) prevention of access clauses, (3) hybrid clauses, and (4) trends clauses. The Court stated there was coverage for policyholders under all of these clauses based on the Court’s finding of a causal link between COVID-19 shutdowns and BI losses.

Specifically, the Supreme Court’s ruling allows for policyholders with disease clauses to establish cover for their BI losses, provided that there was at least one occurrence of COVID-19 within the specified geographical area at the relevant time. Additionally, policyholders will also be able to invoke the prevention of access clauses and hybrid clauses where they were unable to use the premises for a discrete business activity or a discrete part of the premises for its business activities. To establish that the BI loss was proximately caused, it is sufficient to prove that the interruption was a result of action by the government taken in response to cases of COVID-19.

Finally, insurers cannot invoke trends clauses to reduce the indemnity payable to policyholders on the basis of the wider consequences of the COVID-19 pandemic. Trend clauses quantify BI losses and allow for the adjustment of losses, factoring in trends or circumstances that may have impacted the financial results of the business, in order to approximate the financial results that would have occurred notwithstanding the occurrence of the insured peril. The Supreme Court concluded that all “consequences of the Covid-19 pandemic” are related to the insured peril in this context, and therefore fall outside the scope of the trends clauses.

Financial Conduct Authority v Arch Insurance (UK) Ltd and others, UKSC 1 (January 15, 2021).

A California federal judge dismissed a putative class action brought by M&M Consulting Group, LLC (M&M) against Chase and First Republic Bank for their purported failure to pay fees to agents who assisted small businesses in acquiring federal loans under the Paycheck Protection Program (PPP).

Plaintiff M&M is a consulting company that aided borrowers in applying for federally guaranteed loans through the PPP. M&M provided assistance to borrowers wishing to take part in the PPP and served as borrowers’ agent for certain transactions. M&M alleged that J.P. Morgan and the other defendants failed to pay it mandatory Agent Fees pursuant to CARES Act and other SBA Regulations.

The Court found that absent an agreement between the agent and lender pursuant to the traditional SBA Section 7(a) guidelines, lenders are not required to pay agent fees under the text of the CARES Act or its implementing regulations. In so ruling, the court found that under longstanding SBA regulations, agents were only entitled to receive fees for their work in connection with securing a loan when they first executed a compensation agreement.

Additionally, the PPP’s only mention of agent fees provides that “[a]n agent that assists an eligible recipient to prepare an application for a covered loan may not collect a fee in excess of the limits established by the Administrator.” 15 U.S.C. § 636(a)(36)(P)(ii). The Court agreed with J.P. Morgan’s argument that the choice of language in the CARES Act – the word choice of “may” as opposed to “shall” or “must” – indicates that payment of such agent fees is not compulsory. The court stated that the language does not create an independent entitlement for agent fees; rather, it simply imposes a limit on the amount of fees an agent is permitted to collect in the event of an agreement for agent fees. Further, the court noted that nothing in the statutory language of the CARES Act “suggests that Congress intended to create an implied private right of action.” Since the court found that M&M was not entitled to agent fees absent a compensation agreement, its companion claims for unjust enrichment and conversion also failed. The court ruled in favor of defendants and dismissed the complaint.

On August 11, 2020, Citibank N.A., acting in its capacity as Administrative Agent for a syndicated term loan taken out by Revlon, Inc., intended to wire approximately $7.8 million in interest payments to Revlon's lenders. Due to human error, Citibank wound up wiring $894 million of its own money, that amount equaling the principal that Revlon owed to its lenders.

On August 12, 2020, Citibank began sending recall notices to the recipients to recover the monies. When those efforts proved unsuccessful, Citibank began filing lawsuits in the USDC Southern District of NY on August 17, 2020 alleging unjust enrichment, conversion, money had and received, and payment by mistake. The court issued temporary restraining orders in connection with each of the lawsuits to prevent the lenders from “removing, withdrawing, transferring, assigning, or otherwise disposing of” the portion of the wired funds its affiliated entities had received.

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The court heard arguments from Citibank and both sides in December, 2020, and on February 16, 2021 ruled in favor of the lenders. The court ruled that in New York, while a failure to return money that is wired by mistake could be unjust enrichment or conversion requiring that the recipient return such money to its sender, there is an exception: the recipient is allowed to keep the funds if they discharge a valid debt, the recipient made no misrepresentations to induce the payment, and the recipient did not have notice of the mistake. The lenders asserted a “discharge for value” defense, which the court accepted. As such, the lenders are entitled to keep the money, for now. The TROs remain in place pending the court's review of their impact.

The mistakes that lead to this tremendous loss were the result of human error. Employees of Citibank were unaware of what “boxes had to be checked” to keep the $894 million at the bank in an appropriate “wash” account. Had the employee checked two more boxes, this would not have occurred. Further, one of the “are you sure??” warnings an employee received in connection with the money transfer did not indicate that the $894 million would be leaving the bank.

There are many stories of small mistakes resulting in disaster and significant loss, and this appears to be an instance where simple, clear training would have avoided this outcome.

Citibank August 11, 2020 Wire Transfers, Case No. 20-06539 (S.D.N.Y. 2020)

**BANKING**

Bank Not Automatically Entitled to Return of Mistakenly Wired Funds If They Discharge a Valid Debt

On August 11, 2020, Citibank N.A., acting in its capacity as Administrative Agent for a syndicated term loan taken out by Revlon, Inc., intended to wire approximately $7.8 million in interest payments to Revlon's lenders. Due to human error, Citibank wound up wiring $894 million of its own money, that amount equaling the principal that Revlon owed to its lenders.

On August 12, 2020, Citibank began sending recall notices to the recipients to recover the monies. When those efforts proved unsuccessful, Citibank began filing lawsuits in the USDC Southern District of NY on August 17, 2020 alleging unjust enrichment, conversion, money had and received, and payment by mistake. The court issued temporary restraining orders in connection with each of the lawsuits to prevent the lenders from “removing, withdrawing, transferring, assigning, or otherwise disposing of” the portion of the wired funds its affiliated entities had received.

The court heard arguments from Citibank and both sides in December, 2020, and on February 16, 2021 ruled in favor of the lenders. The court ruled that in New York, while a failure to return money that is wired by mistake could be unjust enrichment or conversion requiring that the recipient return such money to its sender, there is an exception: the recipient is allowed to keep the funds if they discharge a valid debt, the recipient made no misrepresentations to induce the payment, and the recipient did not have notice of the mistake. The lenders asserted a “discharge for value” defense, which the court accepted. As such, the lenders are entitled to keep the money, for now. The TROs remain in place pending the court's review of their impact.

The mistakes that lead to this tremendous loss were the result of human error. Employees of Citibank were unaware of what “boxes had to be checked” to keep the $894 million at the bank in an appropriate “wash” account. Had the employee checked two more boxes, this would not have occurred. Further, one of the “are you sure??” warnings an employee received in connection with the money transfer did not indicate that the $894 million would be leaving the bank.

There are many stories of small mistakes resulting in disaster and significant loss, and this appears to be an instance where simple, clear training would have avoided this outcome.

Citibank August 11, 2020 Wire Transfers, Case No. 20-06539 (S.D.N.Y. 2020)

**GENERAL PARTNERSHIP LIABILITY**

Duties of Partners are to the Partnership, Review of Investors Interests in Assessing a Transaction Not Necessary

Investors in Regency Energy Partners (Regency) filed suit against the partnership in connection with the acquisition of the company by Energy Transfer Partners, alleging the agreement undersold Regency by $1.6 billion in the $10.1 billion deal.

The investors alleged the Regency partners who agreed to the deal acted in bad faith. The Delaware Chancery Court dismissed the action – for a second time – basing the decision, in part, on a “fair and reasonable standard” that the court described as “something similar, if not equivalent to, entire fairness review,” requiring assessments of both fair dealing and fair price. The court ultimately found that, while there were issues with the process of the sale, the Regency partners met their burden that the merger was fair and reasonable to the partnership.

The chancellor noted that the dispute involved a limited partnership agreement in which the duties of a general partner to a partnership and limited partners are “entirely contractual in nature,” rather than fiduciary. As such, upon determining the deal was fair and reasonable as regards the partnership, there was no required or additional review as to whether it was in the best interests of the investors.

Dieckman v. Regency GP LP et al., Case No. 11130-CB (Del. Ch. 2021)
Investors brought a putative class action against a Special Purpose Acquisition Company (SPAC) which merged (and effectively acquired) a clinical-stage bio pharmaceutical company called Immunovant. The class essentially seeks to include investors who purchased or otherwise acquired Immunovant securities between October 2, 2019 and February 1, 2021.

Notably, the plaintiffs, represented by the Pomerantz law firm in New York, allege that the SPAC made false and misleading statements by failing to disclose inadequate due diligence on the acquired company, Immunovant, including the clinical and commercial viability of the products that Immunovant was developing. As a result of subsequent disclosures, on February 2, 2021, the stock price for Immunovant fell over 42%. The plaintiffs brought the suit alleging violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder as well as under 20(a) of the Exchange Act for liability by the controlling persons of Immunovant.

“As a result,” reads the complaint, “the [SPAC Sponsor] Defendants and the Churchill Individual Defendants were highly incentive to complete an initial public offering and to convince shareholders to approve the Merger.”

Jasicki v. Morgan Stanley Smith Barney LLC et al., Case No. A-1629-19T1 (Sup.App Ct. NJ 2021)

A class action lawsuit was filed by retail store employees of Apple (Amanda Frlekin et al v. Apple Inc.) claiming the company should have paid them for time spent getting their bags checked after they clocked out. Apple's defense was that there would be no bag check for employees who did not bring bags or their own Apple products to work. The trial judge ruled in favor of Apple based on a company program designed to direct such matters to arbitration and to convince shareholders to approve it by continuing to work for the company. The appellate panel commented that the arbitration was not unilaterally imposed because it gave the employee the choice to consent to arbitration or opt out. The court ruled that the company did not have to prove the claimant read the e-mail, but only that she received the e-mail.

What makes this decision stand out is that she did not even have to sign or otherwise acknowledge a specific written clause in her employment contract. The mandatory arbitration provisions were sent out via an e-mail to the claimant, and she had the opportunity to explicitly opt out of the program, or if she did not respond and continued her employment with the Morgan Stanley, she would be bound by the provisions under Morgan Stanley arbitration program. As it turns out, the court ruled she did not even have to confirm she read and/or agreed to the provision.

Frlekin v. Apple, Inc., Case No. 15-17832 (9th Cir 2020)
The question before the court was whether a risk of future harm and time spent replacing a payment card are enough to establish standing under Article III. The court first noted a strong split between the circuits on this issue, but ultimately decided that a risk of future harm and the other steps the plaintiff had taken were not sufficient to meet standing requirements. The court based its decision on a line of cases holding that a plaintiff cannot manufacture his own damages and in order to confer standing, the putative damage must either be certainly imminent or there must be a solid risk of such damage occurring. The court implored the U.S. Supreme Court to weigh in on what constitutes sufficient harm to meet Article III standing in data breach cases.

Tsao v. Captiva, Case No. 18-14959 (11th Cir. 2021)

Decency Act (which grants a broad liability shield to tech companies for content posted on their platforms by users and other third parties), barred plaintiffs’ claims to the extent they were based on “Zoombombings” orchestrated by third parties, as the statute immunizes interactive service providers like Zoom from such allegations.

Judge Koh agreed with Zoom’s assertions but stated “Appalling as this content is, Zoom’s failure to edit or block user-generated content” is “the very activity Congress sought to immunize,” Judge Koh ruled: “The bulk of Plaintiffs’ Zoombombing claims lie against the ‘Zoombombers’ who shared heinous content, not Zoom itself. Zoom merely ‘provide[d] neutral tools for navigating’ its service.”

Finally, the judge said the plaintiffs failed to prove that Zoom shared or sold their data without permission, and at best alleged that the San Jose-based company “disclosed certain other people’s data, not necessarily Plaintiffs’ data.”

Zoom Video Communications, Inc. Privacy Litigation, Case No.20-cv-02155 (N.D. Cal 2021)

On March 12, 2021, Northern District of California Judge Lucy H. Koh partially freed Zoom from a consolidated putative class action alleging a range of privacy and data security missteps, ruling that the plaintiffs had failed to show that Zoom had illegally shared their personal data and that the company was largely immune from claims over “Zoombombing” disruptions.

The Plaintiffs, eleven individuals and two churches that have used Zoom, accused the video conferencing provider of unlawfully sharing their personal data with unauthorized third parties such as Facebook and LinkedIn, failing to prevent malicious meeting disruptions known as “Zoombombings” and misrepresenting the strength of its encryption protocols.

The Plaintiffs brought claims for contractual breaches and unfair business practices as well as various claims associated with Zoom’s purported unauthorized data sharing, alleged negligence, consumer violations and anti-hacking laws. Judge Koh allowed some contract-based claims to proceed while dismissing the other allegations. Zoom asserted that Section 230 of the Communications Decency Act (which grants a broad liability shield to tech companies for content posted on their platforms by users and other third parties), barred plaintiffs’ claims to the extent they were based on “Zoombombing” orchestrated by third parties, as the statute immunizes interactive service providers like Zoom from such allegations.

Illegal Sharing of Information

On February 4, 2021, following a security breach that exposed his credit card information, restaurant owner Tan Tsao filed a lawsuit on behalf of a presumed class of customers of PQS, a group of American fast dining restaurants owned by Captiva MVP Restaurant Partners. Immediately following the breach, the Plaintiff promptly canceled his credit cards although there was no immediate evidence that his credit card number had been stolen or illegally used. Tsao sued the restaurant on behalf of a class of customers, claiming “negligence and deceptive and unfair conduct” under Florida’s Deceptive and Unfair Trade Practices Statute.

In his appeal, Tsao solicited damages in the form of the loss of the use of his credit card, his credit card reward points, and the time and costs associated with canceling his card and protecting himself against future identity theft.

PRIVACY

Zoom Partially Freed from Putative Class Action Due to Plaintiffs’ Failure to Show Illegal Sharing of Information

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Judge Koh agreed with Zoom’s assertions but stated “Appalling as this content is, Zoom’s failure to edit or block user-generated content” is “the very activity Congress sought to immunize,” Judge Koh ruled: “The bulk of Plaintiffs’ Zoombombing claims lie against the ‘Zoombombers’ who shared heinous content, not Zoom itself. Zoom merely ‘provide[d] neutral tools for navigating’ its service.”

Finally, the judge said the plaintiffs failed to prove that Zoom shared or sold their data without permission, and at best alleged that the San Jose-based company “disclosed certain other people’s data, not necessarily Plaintiffs’ data.”

Zoom Video Communications, Inc. Privacy Litigation, Case No.20-cv-02155 (N.D. Cal 2021)

A law firm suffered a data breach that resulted in sensitive information about its clients being released on the internet. The plaintiff (a former client) sued the defendant/Clark Hill and requested, in discovery, a copy of materials relating to the breach and the materials for a number of reasons, primarily that the investigation was performed mainly for business reasons, not for the purpose of giving legal advice.

Specifically, the law firm argued that certain materials were protected from discovery because it had initiated a “two-track” investigation into the breach, in which one track was a non-privileged investigation into the breach and the other track was an investigation for legal purposes and that materials prepared on the legal track were protected from discovery. The court disagreed, noting that Clark Hill failed to show that it had actually conducted a two track investigation. The court also found that the conditions of the case showed Clark Hill had made indistinct the non-privileged business track and the legal track in ways meaningful to its privilege determination.

The decision demonstrates a further shift by some courts to treat work product and privilege assertions over forensic investigation materials with skepticism.
Dole Food Company and its CEO, David Murdock, sought coverage from its eighth-level excess insurer RSUI to help cover $222 million in settlements they reached to resolve two stockholder suits over Dole's allegedly fraudulent 2013 take-private deal. In 2013, Murdock owned 40% of Dole stock and acquired the remaining stock before selling the company into private ownership for $1.6 billion. Various stockholders sued in Delaware Chancery Court in 2013 challenging the transaction.

After a nine-day trial, Vice Chancellor Travis Laster in August 2015 found that Murdock and Michael Carter, Dole's COO and General Counsel, had “engaged in fraud” to bring down the share prices before they purchased the remaining stock. The court found them jointly and severally liable for fraud and misrepresentations about the deal and found damages in excess of $148 million. Murdock and Dole settled this action for $113.5 million.

A second securities class action was filed in Delaware federal court in December 2015, alleging that Dole and Murdock misled investors and cited extensively from “Corporate Citizenry” and that D&O Policy Covered Allegations of Fraud. Dole settled this action for $113.5 million.

In January 2016, several excess insurers filed a coverage suit against Dole and Murdock in Delaware. All insurers except RSUI eventually settled with Dole. Dole’s policy with RSUI contained an exclusion for deliberate fraudulent conduct, although it extended only to claims of fraud that are established in a “final, non-appealable adjudication adverse to such insured in the underlying action.” Dole and Murdock argued that this requirement was not met because they settled each of the stockholder suits before entry of final judgment and there was no finding of fraud in the underlying action.

The Delaware Supreme Court issued a ruling March 3, 2021 finding in favor of Dole on several grounds. First, the Court found that Delaware law applied as Dole was incorporated in Delaware and Delaware had an interest in protecting its “corporate citizenry.” This finding came despite the fact that Dole was headquartered in California. This ruling was critical as in Delaware claims based on fraud are insurable but they are not in California.

Based on that ruling, the Court next turned to whether the fraud exclusion was triggered. The Court found that the RSUI fraud exclusion did not bar coverage as there was no finding of fraud in “the underlying action.” Rather, the second suit – although based on the fraud findings by Judge Laster – was settled for $74 million and as such the final judgment requirement was not met.

Finally, the Court held that despite “relative exposures” language in the RSUI allocation provision, the larger settlement theory applied to the allocation provision. Under “relative exposure” theory of allocation, insurers attempt to allocate payment of defense costs and settlement between covered and non-covered amounts, based on the “relative exposure” of the defendants to the covered and non-covered claims. In comparison, under the larger settlement theory of allocation, allocation only applies when the wrongful acts drive the defense and settlement costs of the litigation higher than they would have been if only the insured parties/actions had been defended or settled. The Court found that despite the use of “relative exposure” language in the RSUI policy, the allocation provision in the RSUI policy only addressed when the parties use their best efforts to agree on a fair allocation. However, the provision did not expressly dictate the terms if the parties cannot agree and thus the larger settlement theory of allocation applied.


A Texas Federal Judge ruled that neither National Union (AIG) nor Beazley were required to provide coverage for a “phishing” scheme loss suffered by a plaintiff/policyholder, RealPage in 2018 because there was no “direct loss” as required by the policy.

In particular, the court noted that the phishing losses were not “direct” as required by the policy since the funds that were stolen were held by a third party payment processor at the time they were stolen. RealPage – a real estate software provider – reimbursed clients after it allowed funds to be transferred from third party accounts held at Wells Fargo.

Ultimately, the judge held that the RealPage was not holding the funds (required to be considered “direct loss”) but rather had credentials to direct the funding through the Wells Fargo accounts.


A Delaware court found that the uninsurability defense – prohibiting coverage for the disgorgement or restitution of ill-gotten gains – was not enforceable under a policy issued to Delaware-organized policyholders that also contained “law most favorable” language.

Three Delaware-organized private equity firms were sued by a company’s bankruptcy estate, alleging that their investment funds and managers acquired the company, raided its high-performing assets, and left the remainder of the company as an overly leveraged shell. The bankruptcy estate asserted claims for fraudulent conveyance, breach of fiduciary duty and related business torts. The firms settled those claims for $72 million and sought coverage from its D&O and E&O insurers. The insurers declined coverage under the uninsurability defense.

The firms moved for judgment on the pleadings on the uninsurability defense, asserting that Delaware law applies and Delaware does not have a public policy insurance against restitution or disgorgement. The insurers argued that New York law applies and New York does have such a public policy against insuring restitution. The insurers contended that the funds settlement was uninsurable as a matter of public policy as it represents the disgorgement of, or restitution of, ill-gotten gains.

The court found that the analysis hinged on a conflict of law analysis and that under the policies, the parties agreed that the “law most favorable” to the insured would apply to coverage disputes in which the insurers challenged a loss as uninsurable. The court found that had the insurers wished to avoid exposure to settlements like the one at issue, they could have drafted the policies in another way. However, they did not and as such Delaware law applies as it was most favorable to the firms. The court stated that the Delaware legislature has not enacted a statute forbidding insurance for restitution or disgorgement and, as such, the uninsurability defense was denied as a matter of Delaware law.

The court found that despite the fact that the firms were headquartered in New York, the policies were issued and brokered in New York and the underlying misconduct and resulting litigation occurred in New York, the policies at issue were fiduciary liability insurance contracts written to cover Delaware entities. The court stated that Delaware has a “superseding interest in the merits of disputes involving insurance coverage for fiduciary mismanagement of Delaware organizations.”
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