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Insuring The Sharing Economy and Fintech:

The Exposures and Related Coverage Issues, Where Things Now Stand, and Where They May be Heading

by Todd Kremin & Peter J. Biging

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Sharing economies, however you define them, are here to stay. They have grown from a relatively socially-focused open-sourced community of peer-to-peer based sharing of access to goods and services, to full-fledged multi-national businesses. The now-established organizations who pioneered the sharing and on-demand space have paved the way for new business entrepreneurs who conceive of novel ventures to capitalize on evolving technologies to enhance, and often disrupt, existing industries. While ride-sourcing, peer-to-peer travel accommodations (e.g. homesharing), and music sharing may have dominated the headlines, new services and platforms are frequently emerging. As people change the way they transact business across most industries, governments continue to struggle with regulation that keeps pace.

As discussed in greater detail below, a body of caselaw is beginning to take shape providing guidance for the more mature sharing platforms in more established sharing industries. But emerging business sectors, such as financial technology (fintech), have not received uniform guidance from regulators or the courts. What is certain is that government at all levels will continue to introduce new ways to regulate these evolving sharing platforms, and the affected companies will be confronted with a host of unique legal and logistical issues, ranging from licensing to risk management. And, these unique issues will inevitably generate new regulation, litigation, and insurance solutions. Until then, an analysis of the evolution of the diverse sharing economies serves as a useful guide.

The Business Structure of Sharing and On-Demand Platforms Create Unique Exposures

As any insurance underwriter will tell you, to properly analyze the corporate exposure of a company, it is important to first understand the general exposure of the industry, then any unique exposures presented by that company. However, the sharing economies have shifted the typical business structure in established industries. This shift in business structure has changed the overall industry exposure, as well as the individual corporate exposure. To understand the shift, it is instructive to look at the fundamental change that the sharing-economy platforms have precipitated. To understand the change, it is essential to first comprehend how these sharing and on-demand platforms operate.

Merriam Webster's dictionary defines the term "Sharing Economy" as "economic activity that involves individuals buying or selling usually temporary access to goods or services especially as arranged through an online company or organization." This definition describes the basic function and operation of sharing-economy and on-demand businesses, and explains the general difference from traditional market participants. By its nature, any business transaction arranged through an online company or organization has its own inherent cyber-related risks, which can form the basis of a treatise on their own. But the online presence is not the defining factor of an on-demand or sharing-economy business. Instead, a sharing-economy business typically sheds itself of the fully-integrated business model, and relies on the resources of a collective to achieve the company's objective.

Ride-sourcing or transportation network companies (TNC), for example, use their drivers' vehicles (i.e. the collective resource) rather than maintaining a dedicated fleet of livery cars. Similarly, peer-to peer travel accommodations utilize user-owned/occupied real estate. Thus, while the exposure of traditional taxi and limousine companies and hotels is well established, the most prominent services and assets of these companies are now sourced from a collective, creating a shift in the corporate exposure.

At this point ridesharing and

homesharing are not novel concepts, have garnered significant competition in their respective spaces, and, as discussed below, some of the insurance coverage issues have been identified, at times litigated, and in some instances resolved in some manner. However, as discussed below, there continue to be atypical exposures for other sharing platform companies which may subject them to litigation in jurisdictions that may not have laws, regulations, or guidance from the courts to resolve some of the potentially litigated disputes.

Insurance Coverage Issues Specific to Ridesharing

Ridesharing-related insurance coverage disputes have typically involved a personal auto policy ("PAP") for a car accident while the driver was using a ridesharing application. As discussed below, the courts around the country have decided insurance coverage disputes under PAPs and those decisions have provided guidance for the burgeoning ridesharing industry. Aside from typical auto exposure, ridesharing platforms have exposure to employment, cyber, and various other claims as well. While the cyber exposure is similar to that experienced by any other business storing customer data, the auto liability and employment/labor risk is particularly unique to the ridesharing industry. Thus, each is addressed in turn.

Drivers, TNCs, and regulators alike have been concerned with insurance coverage for drivers and their vehicles engaged with TNCs. The dilemma was that the drivers were using their personal vehicles, insured under a PAP when driving passengers for compensation. As could be expected, drivers that were signed into a ridesharing platform were experiencing gaps in coverage, primarily under two similar exclusions in their PAP: (1) the livery exclusion and (2) the "pizza" or "for charge" exclusion. The PAP livery exclusion typically precludes coverage when the vehicle is being rented out, used to carry passengers for hire, or while the vehicle is being used as a public or livery conveyance. Similarly, the "pizza" or "for charge" exclusion precludes coverage for claims arising out of the ownership, maintenance or use of a vehicle while being used to carry persons or property for compensation or a fee. Courts around the country have addressed these standard exclusions in a PAP.[1]

Notwithstanding the historical exclusions in a PAP, the ridesharing and insurance industries, with the guidance of the National Association of Insurance Commissioners (NAIC), have distilled TNC coverage periods to delineate when the PAP or the commercial/TNC-provided insurance should be triggered. Those periods are as follows:[2]

Coverage Periods	Definition
Period 0	Not logged into system
Period 1	Logged into the system but pre-match
Period 2	Driver and passenger matched through customer pickup
Period 3	Passenger Occupying the vehicle

With these coverage periods delineated, PAP and commercial insurers have been able to better sort through the "other insurance" issues presented when more than one policy covers the driver and/or vehicle involved in an accident. TNCs now offer insurance to its drivers that covers each phase of the trip, from signing into the app, through dropping off a passenger. On their websites, Uber and Lyft provide a relatively straightforward explanation of the coverage available, which is reproduced in Figures 1 and 2.

Figure 1

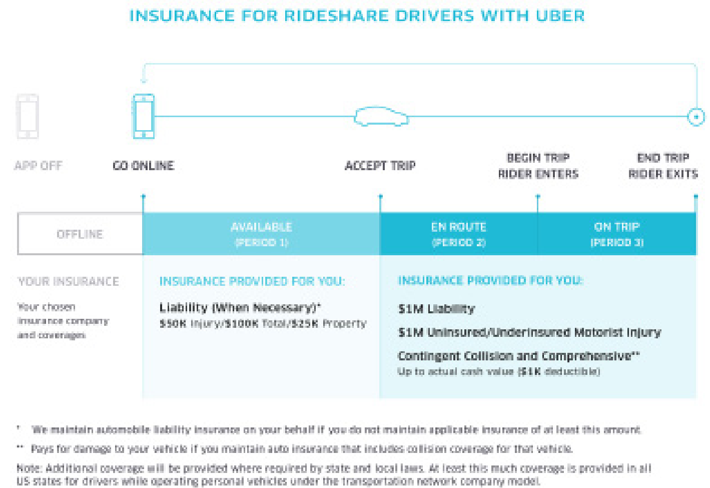
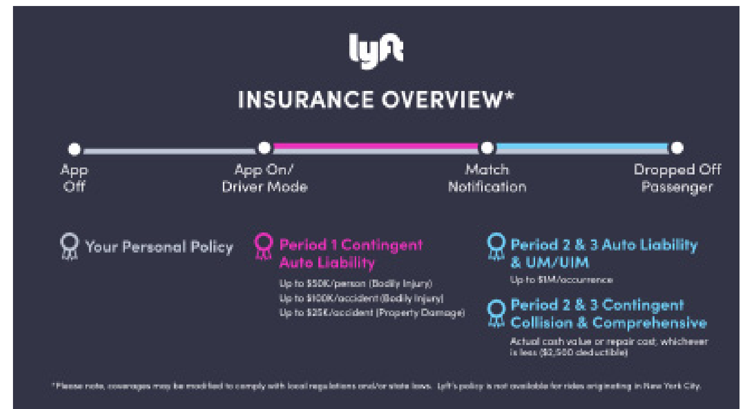


Figure 2



Another concern that has not been fully addressed by the insurance industry and their regulators is the cancellation or rescission of PAPs for drivers who do not disclose to their PAP insurer that the insured vehicles are used to drive for TNCs. For reasons including a desire to save on premiums, some TNC drivers do not disclose their involvement with TNCs or misrepresent the intended use of the vehicle. A failure to disclose, and/or a misrepresentation on an insurance application could result in the cancellation or retroactive rescission of the PAP. Yet, many TNC drivers are loathe to procure higher-priced commercial insurance or hybrid personal/commercial policies. These issues have been alleviated, to some extent, by the TNC-offered insurance programs, but drivers will continue to face these issues if they fail to disclose their involvement with the ridesharing companies.

Certain metropolitan areas have begun regulating TNCs and the insurance required to operate in those regulated jurisdictions. For example, the New York City Taxi and Limousine Commission (the "TLC") recently enacted a new regulation governing the licensure of

"e-hail applications."[3] As respects insurance requirement under the TLC regulation, in order to obtain a license to operate an e-hail application, or otherwise known as a TNC, the company applying for the license must provide proof of insurance. In short, the applying TNC must procure general liability, professional liability, and crime insurance with limits and terms specified in the regulation, and must provide proof of that insurance to the city upon licensure of the e-hail application and upon renewal of each policy. Yet, of all the lines of insurance that an "e-hail application" is required to procure to be licensed to operate in New York City, auto insurance covering their drivers is not among them.

Notably, the TNC business model is not the only sharing-economy-based transportation platform. But other transportation-sharing business models that have cropped up do not present the same insurance coverage questions. For example, car sharing is another model of sharing transportation where car-sharing companies match car owners willing to rent their vehicle with people seeking cars for rent. But, since there is a clear demarcation as to when the car is rented, there is less opportunity for gaps in coverage.

While this signals that the TNC insurance issues have largely been addressed, the auto insurers are not the only insurers Uber and other TNC's will have to deal with. The ridesharing industry and the TNCs also face other risks that carry with them their own separate insurance implications. Indeed, in its short period of existence, Uber has been the target of lawsuits alleging: (1) wage and hour violations;[4] (2) unfair competition, and Lanham Act and RICO violations for running an illegal "gypsy cab operation";[5] (3) false advertising;[6] (4) antitrust violations;[7] and (5) products liability.[8] As could be expected, these lawsuits hold the potential to trigger a wide variety of insurance policies, including but not limited to an employment practices liability, management liability (D&O), and commercial general liability policy.

Thus, while the issues of coverage under personal and commercial auto policies related to the ridesharing industry have largely been resolved, coverage disputes under the other policies remain primarily untouched by the courts. Not to say that coverage disputes have not arisen under these policies; but the parties in all or at least most instances ultimately have resolved their differences by settlement and without a judicial determination. As an example, in 2013, Uber's professional liability insurer commenced a declaratory judgment action seeking a declaration that it was not obligated to defend or indemnify Uber in connection with an underlying lawsuit alleging unfair competition and tortious interference with contractual relationships with a taxi company's drivers.[9] In its complaint, the insurer cited several exclusions, including the deceptive trade practices exclusion, unfair business practices exclusion, and the policy's conduct exclusions. The matter was resolved by settlement. As a result, the industry received little guidance on the applicability of these exclusions in this specific context. Nonetheless, using history as a guide, although insurance coverage for lawsuits against Uber and other TNCs is uncertain, the enterprising plaintiffs' bar will likely continue to target the TNC industry for years to come, regardless of whether insurance is available to cover the losses.

Insurance Coverage Issues Specific to Homesharing

Homesharing, particularly in the form of short-term rentals, has become an increasingly popular alternative for travelers seeking affordable accommodations. Indeed, homesharing has become one of the most prolific and competitive sharing economies, and as a result, has garnered significant attention from its established hospitality-industry competitors. Surprisingly, even as the popularity of homesharing soars, governments have been slow to update their laws to explicitly permit these new homesharing platforms to operate. In some instances, they have acted to flatly prohibit homesharing altogether.[10]

From the perspective of the homesharing host, in the insurance context, homesharing presents two major risks: (1) Potential injuries to guests/renters; and (2) Potential property damage to the property owner's residence or theft of the personal property. Some insurers may allow policyholders under a traditional homeowner's or renters policy to use their property as a rental for a one-time, special occasion such a local sporting event, as long as the insurer is informed about it in advance. Other insurers still require the property owner to procure separate commercial policies specifically written to address the risk of hotels or a bed and breakfast. In either event, this presents coverage issues and concerns for people looking to get into the homesharing game, and the potential for coverage litigation when losses arise.

Homeowners' insurers faced with a claim arising from a homesharing arrangement, such as a short-term rental arranged through a platform like Airbnb, would first point to the business pursuits exclusion to preclude coverage. This standard exclusion contained in most homeowners' policies excludes coverage for liability for injuries or damages to third parties arising out of "business pursuits". While some homeowners' policies might provide a limited exception to the business pursuits exclusion for subleasing, the short-term rentals may not qualify as a sublease. To solve the third-party liability insurance problem, Airbnb, for example, provides "host protection insurance" through a program underwritten through the London insurance market, for all hosts that list their property through Airbnb. In addition, Airbnb provides a $ 1million first-party property "host guarantee" which purportedly protects against property damage by the guests.

While homesharing platforms, such as Airbnb and some of its smaller competitors, have addressed insurance coverage dilemma for its hosts, there are other insurance risks related directly to the homesharing companies themselves, and the operational risks these companies face present other insurance coverage issues under various other types of insurance policies. For example, the homesharing behemoth Airbnb and others have been subject to lawsuits: (1) alleging that the homesharing company was operating as a real estate broker without a license;[11] (2) alleging wrongful eviction of tenants for purposes of increasing profits through short-term rentals;[12] (3) seeking an injunction preventing the homesharing company from turning over personal data of the homeowners collected through the website.[13] Like the ridesharing industry, the lawsuits against homesharing entities could implicate coverage – or present issues of coverage – under cyber liability, management liability, and errors and omissions insurance policies.

To this point, while there has not been any notable coverage litigation related to the homesharing industry, there are several issues that could emerge. Indeed, Airbnb had received requests for information from

various governmental entities about its hosts in connection with various governmental investigations into the hosts, not Airbnb itself. Such requests for information, particularly as they related to potential tax evasion of third-parties running illegal hotels, could give rise to coverage issues concerning whether such requests for information constitute "Claims" under management liability policies. On their face, these requests for information do not meet the standard management liability policy's definition of "Claim," but these issues and other coverage issues are likely to be addressed head on by savvy and entrepreneurial policyholder lawyers who will inevitably attempt to obtain coverage for their client-insureds in connection with a homesharing-related investigation or lawsuit.

The New Frontier of Financial Technology

In addition to the more typical ride-sourcing and homesharing models to which we have grown accustomed, the fintech sector has also seen explosive growth in terms of the number of companies, services offered, and the overall operational disruption they have caused to this highly regulated industry. Indeed, the financial technology industry has spawned entrants delivering diverse financial services to businesses and consumers, including trading platforms, online banking, credit scoring, crowd funding, and data-driven loan decisions. Sometimes overlooked is enterprise risk management, which often includes various insurance policies and large insurance towers to protect against known, and sometimes unknown risk. The problem, however, is that traditional products do not necessarily align with the fintech business model because they do not address fintech-specific liability, which is still a developing area of the law.

Still, the insurers for these companies are being called on to protect the companies from these elusive exposures. As could be expected, when the exposure is uncertain and often undefined in potential scope and severity, the insurance coverage required to adequately protect these companies should be broad. And while litigation in the TNC and peer-to-peer accommodation sectors has matured and provides some guidance as respects the insurance coverage for the risks, the courts have been provided little opportunity to address insurance coverage for the newer, fintech company exposures. That does not mean that insurers are flying blind. The experience from traditional financial institutions, sharing and on-demand companies, and other technology companies provides a strong basis to evaluate the risk and underwrite the fintech companies. However, it is clearly a different game, and the risks and issues are not easily pegged.

The main challenge for insurers underwriting the emerging and continuously changing fintech industry arises in underwriting an insurance product that covers the technology product or service component of the operation, as well as the regulatory, fiduciary duty, or suitability component that is unique to financial institutions. For example, an online trading platform might be subject to very different claims by investors using the platform. Claims alleging a flaw in the software, functionality or lack of availability of the platform might be covered under a technology E&O insurance product. That can be contrasted when the same investor alleges that that the platform itself is inadequately or inappropriately pricing securities, credit risk, or whatever the platform is designed to do (e.g. professional liability claims); then, the coverage would likely fall under a financial institutions E&O product. However, claims arising from a data breach exposing the investors' personal information might fall under a cyber liability product. Still other fintech ventures also face risk that might fall under a D&O, fiduciary, or fidelity insurance product. The challenge for the fintech company, their brokers, and the insurance companies looking to underwrite these risks, is formulating a product that can adequately cover the varied risks the companies face. Some insurance markets have created a fintech-specific package policy which includes E&O, D&O, fidelity, and cyber liability cover. But many policies issued to the emerging fintech companies end up being manuscript conglomerations of other existing products.

While *Prosper Marketplace v. Greenwich Ins. Co.* was decided when fintech companies were only starting to take root, it is nonetheless illustrative of how insurers could end up covering unintended risk when underwriting new and unique fintech risks.[14] Prosper Marketplace is a peer-to-peer lending platform that was sued for alleged violation of securities laws, alleging that Prosper Marketplace was engaged in the sale of unregistered securities. Ultimately, the Court held that the services exclusion in the D&O Policy did not apply because the services of selling the loans, as was the business practice of Prosper Marketplace, was not sufficiently clear to exclude coverage. Without getting into depth on the court's reasoning, the Court clearly took the position that the insurer could have specifically excluded the type of claim at issue, but failed to explicitly do so in the Policy. While *Prosper Marketplace* was decided in California, and the decision might be limited in jurisdiction and scope, it provides an important lesson in underwriting fintech risks. Indeed, *Proper Marketplace* stresses the importance of using policy language specific to fintech risks and the importance of specific exclusions to achieve the underwriting intent when presented with challenging claim scenarios.

What Insurance Issues Might Lie Ahead For The Evolving Business Structures

While the fintech revolution may be past its infancy stage, it is still immature. Many of the higher-profile claims to date have fit squarely, or at least somewhat neatly, in the traditional risk boxes. But the novel business models create unique risk, which will produce unique claims, which in turn will inevitably have diverse implications on the various coverages within a fintech entity's insurance portfolio.

As a threshold matter, the issue of an insurance portfolio for startups, including fintech companies, might be a fiction of its own. Startups might not have initial capital or foresight to pay premium for a package of insurance products that a traditional financial institution might have purchased as a matter of course. Yet, these startups operating in the financial sector face many of the same risks as more traditional counterparts, and often enhanced risk based on the fintech's platform. Thus, the first observation is that potentially high-exposure claims might go uncovered because the companies chose not to insure certain risks.

Assuming a fintech platform purchases a suite of insurance products that would make even the most conservative executives comfortable, one not-so-unique observation is the exposures of the fintech companies are not wholly different that those faced by their more traditional counterparts. Thus, the insurance coverage issues related to these new technology-based "financial institutions" might be the same or similar issues faced by the financial institution sector generally.

With that backdrop, however, our reading of the tea leaves indicates that claims stemming from purported regulatory violations might crop up, and regulatory exclusions that found their way back into D&O policies following the most recent wave of failed banks could be a ripe issue. More specifically, many regulators have announced initiatives and their respective intent to address the new wave of financial technology, but have yet to promulgate regulations which define the parameters in which these entities are permitted to operate. And, while the vast regulation of financial institutions is applicable whether the company actually operates on Wall Street or from the cloud, many questions about potential new regulations have yet to be answered. Indeed, it is yet to be determined how the fintech industry's use of artificial intelligence, algorithmic trading, or big data to provide investment advice will be regulated. But, insurance policies that might otherwise contain regulatory exclusions particularly relevant to the exposures associated with the financial sector's specific activities might not be able to address these issues head on without guidance on the regulatory risk faced. For example, the Office of the Comptroller of the Currency ("OCC") has considered allowing fintech companies to be chartered as special purpose national banks, which carries with it the vast web of evolving regulations (including the currently disputed Dodd Frank Act) which govern those entities. Thus, while a fintech company might seek some form of coverage for alleged regulatory violations during the underwriting process, there might be some dispute about specific regulatory coverage and exclusions as the regulatory landscape evolves.

Turning next to insurance coverage for operational risk of financial institutions, a little-discussed product that might get more traction as the fintech industry matures is costs of corrections coverages. While these coverages might have been traditionally geared towards investment advisers (and investment funds), many fintech companies are replicating some of the services provided by advisers and, as a result, have similar exposures arising from similar operational or technical errors. Although this could be viewed as a product innovation for the fintech segment of the financial institutions sector, it could prove valuable and get triggered with increased frequency as a result of the increased potential for technical errors, which , if left uncorrected, could result in claim. Of course, this coverage would need to be carefully worded to avoid savvy insureds from utilizing it as a piggybank for development and beta testing new platforms or ideas.

One certainty the insurance industry can count on is that the fintech companies will keep the attention of the enterprising plaintiffs' bar for the foreseeable future, and new theories of liability might arise as the technology evolves, and the fintech sector, including the insuretech sub-sector, provides new solutions and disrupts the status quo.

Conclusion

As Rachel Botsman and Roo Rodgers aptly stated in their book *What's Mine is Yours: The Rise Of Collaborative Consumption:*

> "There is now an unbounded marketplace of efficient peer-to-peer exchanges between producer and consumer, seller and buyer, lender and borrower, and neighbor and neighbor. Online exchanges mimic the close ties once formed through face-to-face exchanges in villages, but on a much larger and unconfined scale. In other words, technology is reinventing old forms of trust."

These seismic and disruptive changes to established industries have introduced new and different risks, or at least risks that might not have been contemplated in the brick-and-mortar industries of yesterday. The insurance industry has and will continue to adapt to these risks at a breakneck pace, but must be cognizant to keep stride with the changing laws and regulations governing the various industries that have moved largely to cyberspace.

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Endnotes

1 *See e.g., State Farm Mut. Auto. Ins. Co. v. Logisticare Solutions*, LLC, 751 F.3d 684 (5th Cir. 201); *Progressive Premier Ins. Co. of Ill. v. Newell,* 320 Ga. App. 301, 739 S.E.2d 756 (Ga. App. 2013); *Niemeyer v. Western Reserve Mutual Casualty Co.*, 2010-Ohio-1710 (3d Dist. 2010); *Progressive Max Ins. Co. v. Matta*, 2008-Ohio-1112 (7th Dist. 2008); *Strader v Progressive Ins.*, 230 S.W.3d 621 (Mo. App. 2007); *Prudential Prop. & Cas. Ins. Co. v. Sartno*, 588 Pa. 205, 903 A.2d 1170 (PA Sup. Ct. 2006); *Progressive Gulf Ins. Co. v. We Care Day Care Ctr., Inc.*, 953 So. 2d 250 (Miss. App. 2006); *Am. Motorists Ins. Co. v. Travelers Ins. Co.*, 604 N.Y.S.2d 475 (N.Y. Ct. App. 1993).

2 *See* National Association of Insurance Commissioners 2015 Whitepaper, *Transportation Network Company Insurance Principles for Legislators and Regulators, www.naic.org/documents/committees_c_sharing_econ_wg_exposure_adopted_tnc_white_paper_150331.pdf*

3 *See*, NYC TLC Regulations, C. 78

4 *See, O'Connor v. Uber*, Case No. 13-3826 (N.D. Cal); *Lavitman v. Uber*, Case No. 13-10172 (D. Mass.)

5 *See, Checker Cab Philadelphia, Inc. v. Uber,* Case No. 14-07265 (E.D. Pa.)

6 *See, Sabatino v. Uber*, Case No. 15-00363 (N.D. Cal.)

7 *See, Meyer v. Kalanick*, Case No. 15-9796 (S.D.N.Y.)

8 *See, Liu v. Uber*, Case No CGC 14 536979 (Jan. 27, 2014 Cal Sup.)

9 *See, Landmark Am. Ins. Co. v. Uber Technologies, Inc.*, Case No. 13-cv-02109 (N.D. Ill.)

10 Airbnb provides a relatively comprehensive reference of the current laws and regulations governing the homesharing industry. *See, https://www.airbnb.com/help/article/1376/responsible-hosting-in-the-united-states*

11 *See, Plazza v. Airbnb*, Case No. 16–1085 (S.D.N.Y Feb. 11, 2016); Schumacher v. Airbnb, Case No. 15-05734 (Dec. 14, 2015 N.D. Cal.)

12 *See, Kirshman et al. v. Airbnb et al.*, Case No. BC 604504 (Dec. 16, 2015 Cal. Super. Ct.)

13 *See, New Yorkers Making Ends Meet in the Sharing Economy v. Airbnb*, Case No. 158526/2014 (N.Y. Sup. Ct. Sep. 2, 2014)

14 *Prosper Marketplace v. Greenwich Ins. Co.*, 2012 Cal. App. Unpub. LEXIS 5213, 2012 WL 2878121 (Cal. App. 1st Dist. July 16, 2012).