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Insurance Insights

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Welcome to Insurance Insights

Insurance Insights Spotlight

Welcome to our first edition of ***Insurance Insights!*** We started this publication as a place to gather notable legal developments and trends relevant to the insurance industry. It helps us to share these reports within our team, and we hope they will be a helpful reference to you. Our focus areas are legal trends and developments in life insurance, coverage, annuities, and property and casualty, as well as privacy and AI issues impacting the insurance industry.

In this issue, we look back at developments from the past few months. The California Supreme Court weighed in on whether the presence of COVID-19 constitutes a "direct physical loss or damage to property" for coverage under commercial property policies, joining a developing consensus across the nation in addressing coverage claims for COVID-related business losses. Courts in the Golden State are also riding a wave of class actions related to a pair of statutes that mandate certain notice requirements before life insurance policies can lapse. On the opposite coast, a Georgia bill went into effect to rein in "***Holt*** demands"—a practice that has ensnared motor vehicle insurers in multimillion-dollar bad-faith litigation. And the Eleventh Circuit offered its interpretation of what the policy language "[m]onthly cost of insurance rates will be determined by us, based on our expectations as to future mortality experience" requires life insurers to do.

Tiffany Powers, Andy Tuck, Sam Park, Tania Rice

Life Insurance

Trends in California Lapse Litigation

Over a decade has now *elapsed* since California enacted Sections 10113.71 and 10113.72 of its Insurance Code. For life insurance policies issued or delivered in California, those statutes mandate a 60-day grace period after a missed premium, a 30-day notice before terminating due to nonpayment, and the insured's right to select a designee to receive a notice of a pending lapse (in addition to a notice to the policyholder, any known assignee, and any person with an interest in the policy).

Two important rulings in 2021 shaped the course of California lapse litigation. The California Supreme Court held that the statutes apply to all in-force policies, regardless of whether the policies were first issued before the statutes' enactment in 2013. And the Ninth Circuit held that an insurer's failure to comply with the statutory requirements means that the policy *cannot* lapse. As a result, an insurer who does not adhere to the notice and grace period requirements may be liable for a breach of contract for failing to pay benefits under a policy it deemed lapsed—even if the policy would have lapsed anyway due to the insured's continued failure to make payments.

Those rulings seemingly cleared a pathway for litigants to recover for statutory violations. However, doing so on a classwide basis has not been so easy. Several putative class actions have been filed in California district courts by named plaintiffs who were owners or beneficiaries of policies that lapsed. Plaintiffs have typically sought damages for breach of contract, as well as injunctive relief and monetary restitution under California's Unfair Competition Law. Courts have denied motions for class certification in at least five of those cases within the past two years.

In their denials, courts have found that plaintiffs must show that their damages were caused by the statutory violation. Accordingly, when some putative class members voluntarily allowed their policies to lapse, courts have found atypicality and a predominance of individualized issues that precluded class certification. As one court recently noted, the district courts that have certified classes claiming violations of the statutes "have done so only in distinguishable circumstances," such as when typicality was not challenged, damages were not sought, or the class excluded individuals who affirmatively canceled their policies.

Despite the growing number of recent class-certification denials, new putative class actions continue to be filed under the statutes.

One Cost-of-Insurance Challenge Is Dissected on Appeal ...

Advance Trust & Life Escrow Services LTA v. Protective Life Insurance Company, **No. 22-12991 (11th Cir. Mar. 1, 2024).**

The Eleventh Circuit affirmed in part and reversed in part a district court's dismissal of an insured's breach-of-contract claim related to cost-of-insurance rates for universal life insurance policies. The policy language at issue stated: "Monthly cost of insurance rates will be determined by us, based on our expectations as to future mortality experience." The insured contended that this language required the insurer to reassess and redetermine its cost-of-insurance rates monthly or periodically based on improved mortality expectations and experience, but that Protective Life never redetermined cost-of-insurance rates despite nationwide mortality rates improving at 1% per year. It was also alleged that the initial cost-of-insurance rate scale improperly considered factors other than expectations as to future mortality experience, such as expenses and lapse rates, while the policy language required it to exclusively consider "expectations as to future mortality experience." Finally, and alternatively, the insurer contended that Protective Life *actually had* redetermined cost-of-insurance rates and the redetermination ignored "expectations as to future mortality experience."

After a robust review of cost-of-insurance jurisprudence in the Eleventh Circuit and beyond, and applying South Carolina law, the court affirmed the district court's decision that the phrase "[m]onthly cost of insurance rates will be determined by us …" did not impose a contractual duty to redetermine cost-of-insurance rates each month or periodically. The court also affirmed a ruling that the clause "based on our expectations as to future mortality experience" did not require the insurer to *exclusively* rely on expectations as to future mortality experience when setting cost-of-insurance rates. With these two findings, the court rejected both theories reliant upon an alleged failure to redetermine cost-of-insurance rates.

However, the plaintiff's claim was saved by its alternative—even contradictory—set of allegations that Protective Life redetermined its rates but *ignored* "expectations as to future mortality experience." Accepting the insured's allegations as true, the Eleventh Circuit concluded that the insured sufficiently pleaded a breach-of-contract claim under this theory and remanded the case for further proceedings. However, the court noted that past the pleading stage, "it remains to be seen what can be proven."

... While Another Speeds Up for Class Certification

***Newton v. Brighthouse Life Insurance Co.*, No. 1:20-cv-02001 (N.D. Ga. May 9, 2024).**

Faced with the plaintiff's motion for class certification in a case brought following a change in cost-of-insurance rates, Judge Amy Totenberg issued an order requiring

the parties to submit supplemental briefing on a list of discrete topics. Judge Totenberg sought clarity on "[t]he timeliness of Plaintiff's claims under the relevant statutes of limitations," "record evidence supporting or refuting Plaintiff's purported reliance on the relevant policy provisions," and "record evidence supporting or refuting" several of the plaintiff's claims regarding the insurer's conduct and the relevant contractual language. This order will likely require an expedited development of the key facts and legal arguments at the class-certification stage and contrasts starkly with other class-certification orders in similar cases.

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No Coverage for COVID – California High Court Deals Blow to Policyholders

***Another Planet Entertainment LLC v. Vigilant Insurance Co.*, No. S277893 (Cal. May 23, 2024).**

In answer to a certified question from the Ninth Circuit, the California Supreme Court held that "the actual or potential presence of the COVID-19 virus on an insured's premises generally does not constitute 'direct physical loss or damage to property' for purposes of coverage under a commercial property insurance policy."

Another Planet Entertainment, which produces and promotes concerts, sued Vigilant Insurance Company in California federal court seeking coverage for its business income losses stemming from closing its venues in compliance with government orders. Under California law, the "direct physical loss or damage to property" that is covered by typical property insurance policies requires a distinct, demonstrable, physical alteration to property. Another Planet argued that the presence of the virus rendered its properties unfit for use. Alternatively, it argued that the virus binds to surfaces and objects, physically altering them to fomites (inanimate objects that can transfer disease).

The district court granted Vigilant's motion to dismiss for failure to state a claim, and Another Planet appealed the decision. Given the conflicting decisions reached in the lower courts, the Ninth Circuit asked the California Supreme Court for guidance. Consistent with most courts nationwide, the California Supreme Court answered that question in the negative, finding that the government public health orders, which were legal rather than physical in nature, did not constitute a direct physical loss. The inability to use the property as intended was insufficient on its own to establish a physical loss. Additionally, the court found that COVID-19's alteration of the property on a microscopic level was not the reason the property was unusable and did not result in injury to or impairment of the property. The court noted, however, that while Another Planet's allegations were the most common type of allegations in support of pandemic-related property insurance coverage, it could not "determine that the COVID-19 virus can *never* cause direct physical loss or damage to property."

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Northern District of Alabama Grants Certification in Total-Loss Underpayment Class Action

***Reynolds v. Progressive Direct Insurance Co.*, No. 5:22-cv-00503 (N.D. Ala. Apr. 19, 2024), No. 24-90006 (11th Cir. June 14, 2024).**

On April 3, 2024, the Northern District of Alabama granted certification in a class action brought by insureds alleging they were paid less than the actual cash value as a result of Progressive's alleged practice of applying a "projected sold adjustment" in its total-loss settlements. The Alabama federal court concluded class certification was appropriate because the alleged practice's breach of Progressive's policy was an issue common to the class and the plaintiffs' damages methodology, under which the adjustment would be excised from the valuation, could be used to make a classwide liability determination.

On June 14, 2024, the Eleventh Circuit denied Progressive's Rule 23(f) petition.

Possible Circuit Split Brewing? Third Circuit Narrows Total-Loss Underpayment Auto Class Action Claims

***Lewis v. Government Employees Insurance Co.*, No. 22-3449 (3rd Cir. Apr. 2, 2024).**

On Rule 23(f) review, the Third Circuit partially vacated and partially affirmed the District of New Jersey's order granting certification in a class action alleging the plaintiffs were paid less than the actual cash value of their total-loss vehicles. The Third Circuit affirmed the district court's order certifying a class of insureds who alleged the insurer failed to account for taxes and fees in their total-loss settlement offers. However, the Third Circuit vacated the certification of a class of insureds who alleged the insurer

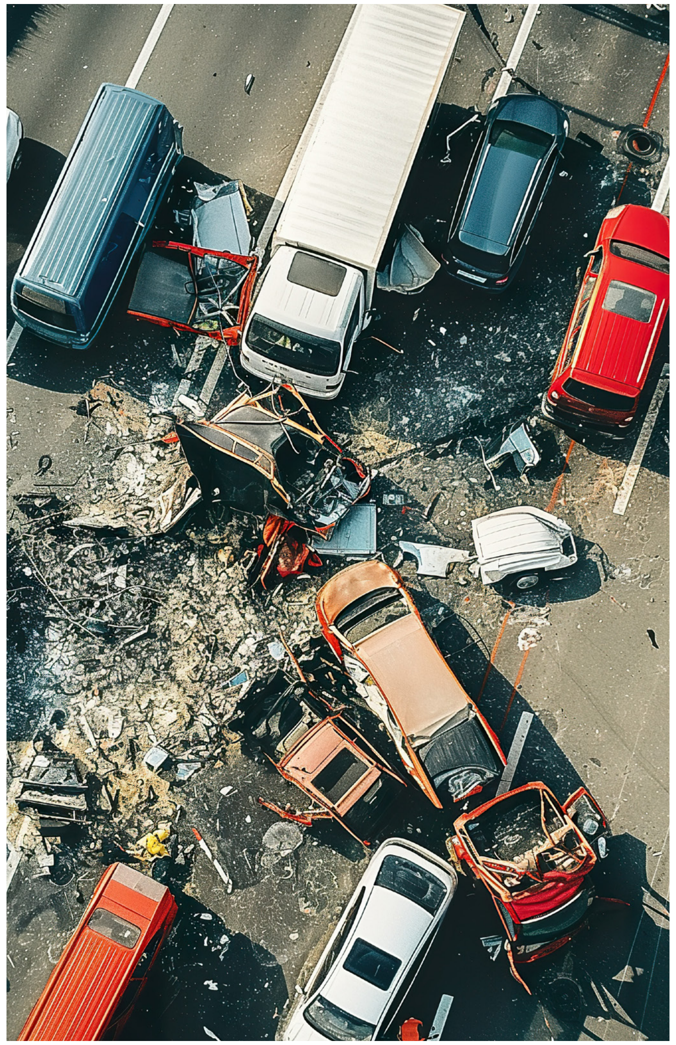
violated insurance laws when its third-party vendor applied a downward-condition adjustment to total-loss actual-cash-value valuations based on the assumption that used vehicles are always in worse condition than when they are on a dealer's lot. The Third Circuit found the named plaintiffs lacked standing to represent the insureds on this condition-adjustment claim because the insurer paid them additional settlement amounts exceeding the amount of their condition adjustment, which in turn offset any economic harm the plaintiffs could have suffered. The Third Circuit explained that the plaintiffs staked their claim on "an isolated intermediate step within [the insurer's] valuation process, but they ultimately avoided any financial injury." According to the Third Circuit, ignoring the insurer's additional settlement amount "would impermissibly divorce [the plaintiffs'] standing to sue from any real-world financial injury."

P&C Class Actions

The Third Circuit's decision comes on the heels of other appellate decisions reversing certification of similar total-loss underpayment auto class actions. The court in *Sampson v. United Services Automobile Association* and *Lara v. First National Insurance Company of America* concluded that figuring out whether each insured was injured requires individualized inquiries to determine whether such insured was paid actual cash value as required under their policies.

Meanwhile, the Third, Fourth, Sixth, and Seventh Circuits have granted insurers' Rule 23(f) petitions for interlocutory appeal of other district courts' orders certifying similar total-loss underpayment class actions. At the same time, the Ninth and Eleventh Circuits recently denied insurers' Rule 23(f) petitions for interlocutory appeal of orders certifying similar total-loss class actions, while the Tenth Circuit granted an insured's Rule 23(f) petition appealing an order denying certification.

Resolution of these multiple pending class certification appeals risks a circuit split. ■



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Bad-Faith Statute

Q: Will Georgia's Newest Legislative "Fix" to Bad-Faith Insurance Litigation Work?

A: … Maybe?

Georgia Senate Bill 83, which came into effect on July 1, retools the Georgia Code governing settlement offers for motor vehicle personal injury cases. Although it represents a step in the right direction, only time will tell whether it provides much needed certainty to bad-faith insurance litigation.

It is an understatement to say that insurance policy demands in motor vehicle personal injury actions (often dubbed "*Holt* demands") remain a contentious and needlessly complex issue in Georgia. From a policy perspective, Georgia courts recognize a cause of action for an insurer's bad-faith (or negligent) failure to settle for good reasons: to better align an insurer with the interests of its insured and to discourage insurers from rolling the dice in litigation.

In practice, however, Holt demands have proven ripe for abuse. Plaintiffs' firms frequently wield "set-up" *Holt* demands—using laundry lists of conditions, strict to-the-letter compliance, and shady releases to elicit a denial and ensnare insurers in multimillion-dollar bad-faith insurance litigation. One particularly infamous *Holt* demand "was 39 pages long and contained 30 footnotes" and was riddled with conditions, making it nearly impossible to comprehend much less accept. Complicating matters, courts recently have avoided addressing other legislative fixes to *Holt* demands, leaving insurers without any answers for a plaintiffs' bar keen on manufacturing any basis to tee up bad-faith litigation.

Senate Bill 83 revises O.C.G.A. § 9-11-67.1 to address these issues and curb some of the more significant abuses with *Holt* demands. First, SB 83 specifies "the only material terms" that may be included in a valid *Holt* demand. Second, although a *Holt* demand may contain other "immaterial" terms, SB 83 creates a safe harbor for recipients *so long as* they (1) accept the material terms of the *Holt* demand "in their entirety"; and (2) have not previously rejected a valid *Holt* demand. Finally, SB 83 expands these requirements to apply to any offer to settle a tort claim for bodily injury or death arising from a motor vehicle collision, "even where such offer expressly provides that *any* or all of [O.C.G.A. § 9-11-67.1] does not apply to such offer" and even if the offer requires waiving these requirements.

Will these changes finally put an end to *Holt* demand maneuvering? Probably not, at least not completely. For starters, the parties will typically not litigate compliance with SB 83 until *after* bad-faith litigation has commenced for a supposedly "rejected" *Holt* demand—which forces insurers to confront the prospect of a massive judgment. SB 83 also did not address that insurers ostensibly seeking "clarification" about a release can only do so at their peril. History suggests that plaintiffs' lawyers will claim that any attempt to seek "clarification" is actually a rejection to tee up bad-faith litigation, notwithstanding the Georgia General Assembly's attempt to eliminate these arguments in the original version of O.C.G.A. § 9-11-67.1. And there's no doubt that enterprising plaintiffs' counsel will leverage any ambiguity with the "material" terms of a demand and push the limits of these new requirements. Still, SB 83 represents a step in the right direction to providing some additional direction and clarity for insurers when a *Holt* demand comes through the door. ■

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Annuities

Department of Labor's New Fiduciary Rule Put on Hold

***Federation of Americans for Consumer Choice Inc., et al. v. United States Department of Labor, et al.,* No. 6:24-cv-00163 (E.D. Tex. May 2, 2024).**

This lawsuit arises out of a new rule promulgated by the Department of Labor (DOL) on April 25, 2024 that broadened the scope of who is considered an "investment advice fiduciary" under ERISA and amended provisions for the compensation insurance agents can receive when they are deemed to be fiduciaries under the new rule. The plaintiffs allege the DOL's new rule wants to "fundamentally reshape" 50 years of settled practices in the insurance industry and specifically would require that any professional recommending a product, such as annuities, to an investor when rolling over assets from an employer-based plan to an IRA to be deemed a fiduciary. The plaintiffs seek to strike down the new rule and its amendments on the grounds that it is contrary to the law and arbitrary and capricious.

The plaintiffs filed a motion for stay of the effective date and preliminary injunction, arguing that 86,000 life insurance agents around the country are affected by this new rule, and that, as a result of it, there will be a loss of access to annuities, which is antithetical to the interests of members of the middle class saving for retirement, who need the security annuities provide. The plaintiffs' motion was heard on July 23, 2024, and the court issued an order granting it two days later.

In its 42-page order, the court noted that the Fifth Circuit had previously vacated a prior attempt by the DOL to expand the meaning of "fiduciary" under ERISA because it conflicted with the plain text of ERISA, was inconsistent with ERISA's "fiduciary" definition, and unreasonably treated numerous financial services providers "in tandem with ERISA employer-sponsored plan fiduciaries." The court found that the "2024 Fiduciary Rule suffers from many of the same problems." The court found that the plaintiffs are likely to succeed on the merits of their claim because the 2024 Fiduciary Rule conflicts with ERISA in several ways, including by treating as fiduciaries those who engage in one-time recommendations to roll over assets from an ERISA plan to an IRA. The court stayed the effective date of the rule until further order form the court. ■

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Spotlight Interview

MONA BHALLA

***New Lateral Partner,
Insurance Litigation & Regulation Team***

Mona was recently interviewed by her new colleague Andy Tuck, co-head of Alston & Bird's Insurance Group.

Q: What's the best day of your life so far?

I can't identify a single day but would rather point to a year in my life. When I was 12 years old, my father took a sabbatical and moved the family back to India. Unfortunately, my mom died when I was very young, two years after our return to the U.S., which is the primary reason why this year was so impactful. Spending that year in India was the happiest I had seen my mother as she was reunited with her family whom she left 12 years before. I got to witness firsthand the joy my mom experienced to be in her home country and to raise her kids in the Indian tradition. I'll never forget the many memories we made that year as a full family unit, including the month we lived on a houseboat in Kashmir.

Q: Are there any experiences or anything that you haven't done yet that you would like to do?

I've always been drawn to education and to teaching in particular. Both of my parents were educators. Recently, I had the opportunity to guest lecture at the University of Connecticut Law School on AI in the insurance space. That gave me a little bit of a taste of what it could be like. Maybe later in my career at Alston & Bird, I'll seek out an adjunct professor role at one of the many law schools in the New York City area.

Q: Wonderful. What drew you to insurance and then, later, regulatory law?

Initially, at the onset of my career, I tried to stay away from insurance regulatory law. During the five years I spent at LeBoeuf, I focused on capital markets and trained as a corporate M&A securities lawyer. But I did work with insurance companies going public, primarily representing underwriters, and I worked on a few demutualizations. I left LeBoeuf to go to Willkie to diversify my practice. After LeBoeuf and Willkie, I was looking to go in-house, and nobody other than an insurance company would hire me. At that time, I said, "Absolutely not." Then I eventually ended up leaving to go to an insurance company, and doing what I said I didn't want to do for the next 19 years.

I was in-house at both Equitable and AllianceBernstein, and then I went to TIAA. Almost three years in at TIAA, I was approached by then-CEO Roger Ferguson with an opportunity to meet the superintendent of the New York State Department of Financial Services, who at the time was Linda Lacewell, to discuss a possible senior role at the agency. Working in government had not been a feasible option for me earlier in my career as I, like many others, was saddled with a tremendous amount of student debt, and you know government doesn't pay market rates. But in 2019, I was in a very different financial situation, and I also had a near-death experience that made me really take stock of what I had done in my career, my life at that stage, and what I wanted to do—so I jumped at the challenge.

I ended up taking the position as the head of the Life Bureau, and I continue to be glad that I did. I had a team of 130 people and 650 regulated entities. The irony doesn't escape me: Earlier in my career, I protested so loudly that I did not want to be an insurance regulatory person, and guess what? I am and am very proud of it.

Q: How do you plan to stay on the cutting edge now that you're in private practice?

Thankfully, the firm has given me the opportunity to continue to go to industry conferences. The NAIC has multiple conferences each year, and these are great for staying abreast of emerging important issues nationwide and globally and for connecting with regulators. That's so critical because the practice that we're creating at Alston & Bird is not going to be New York–specific. Yes, it's very important to be licensed in New York from a commercial financial perspective. But there are 49 other states, and many of our clients are domiciled in those other states. So, it's crucial to continue to go to these events and to continue to foster these relationships with my partners from my previous life. I use the word partner very liberally to encompass the commissioners, the deputy commissioners, and other insurance industry participants.

Q: Well, let's talk about your current partners. Collaboration is essential in our firm as a new lateral. How have you been navigating working with the new team members here on the insurance team?

I have been so fortunate to meet so many people during the interview process, not just those dedicated to the litigation and trial practice insurance subgroup, but also members in IP, privacy, cyber, and structured finance, which has been great because many of the people I've met have reached out to me to help work on specific projects. For example, I have helped with a couple of structuring deals. This has been great because it's giving me exposure to other people and to add value where needed.

Q: Among all the collaborations you've had so far, have there been any that have been particularly successful?

On the structured finance side, yes, I do believe that I have been helpful navigating some complex affiliate/related-party issues. I'm hopeful that for the arbitration I'm working on, the fact that I have a regulatory background can help with prepping one of our expert witnesses, who is a former regulator. Being able to speak the same language is going to be very helpful, and I'm hoping I can add value.

Q: Are there any particular thoughts you have about how you want to focus your practice now that you're in private practice?

Yes, I would love for the practice to be regulatory but also would like to bring my transactional experience to bear. The model involving insurance transactions varies in law firms. You could have one firm responsible for only the transactional work while another provides the regulatory overlay, and then there are others that offer both. I have both skill sets, and so, ultimately, the goal is to build out a practice that can offer both services.

Q: What are the legal challenges in the insurance industry that our insurer clients should be thinking about?

Cyber and data privacy are really at the top of the list and will always be an area of concern. Cyber is something that companies need to be constantly on top of and vigilant about, and we're going to see other states model laws after New York's Part 500. That's NY's cyber reg. There's also a lot going on in the artificial intelligence/machine learning space as it pertains to life insurance—in particular, the use of external consumer data and information sources. AI has to be done in a way that doesn't result in disparate impact or any kind of unintended discrimination on protected classes.

Q: What's the best piece of advice you've ever been given?

I had always been taught that life teaches you lessons and that everyone who comes into your life is a teacher. Many people have pretty much espoused similar ideals to their children or their students. But what I think oftentimes gets misplaced is that people tend to want to mimic good or great teachers. I think it's equally, and perhaps even more important, to identify bad teachers who you don't want to emulate. I always want to treat others the way I want to be treated. I know it's very biblical, but I think it really resonates.

Q: Moving on to another subject. I spend a good bit of time in New York. It's always for work, though. If I had 48 hours in New York that was not for work, what should I do?

Being a theater lover, I highly recommend you see something on Broadway. If you can get a ticket, *Hamilton* is definitely in my top five, and I am a tough critic. I think you would enjoy it. It's very creative and unique, and even if you've seen it on the Disney channel, it doesn't compare to seeing it live.

You have to see the Statue of Liberty. You don't have to go up, and I think parts of it are closed, but you do have to take the ferry because it's a beautiful ride. If you get a nice day, just get on the Staten Island Ferry and go see the Statue of Liberty. There is a new area in New York called Hudson Yards, and being a true, almost native New Yorker, I am amazed at how beautiful this area is. There's the Vessel, a sculptural walkable monument that was closed during the pandemic. There's also the Peak, where you can see the most amazing views of the city.

Q: Well, it sounds like I have to get up there later this year and do all those things. All right, last question, why Alston & Bird?

Honestly, it really came down to people, culture, and opportunity. Everybody has been super welcoming, honest, and encouraging. The firm has given me the runway to do something I've never done before: To be entrepreneurial to some degree and harness all those collaborative skills and the network I've developed—and, hopefully, the skill set—to combine all these things, build out a practice, and work with your other practice areas to add value.