COMMITTEE NEWS

Insurance Regulation

45th TIPS Symposium Features Impact Of “Blue Wave” 2018 Midterms; Will This Create Shift To Tighter Insurance Regulation, As In The Past?

Editor’s Note: This article is a compilation of a panel discussion and presentation held at the 2019 ABA TIPS Midwinter Symposium, plus comments after the panel discussion, by Eric D Gerst, Esq. an ABA TIPS Insurance Regulation Committee (IRC) Vice Chair. The opinions of Mr. Gerst are his own, and do not necessarily represent the opinions of the ABA, or any of its staff or representatives, or of any other individual, corporation, client or organization.

The 45th Annual American Bar Association Tort Trial & Insurance Practices Section (ABA TIPS) Midwinter Symposium On Insurance And Employee Benefits was convened between January 17-19, 2019 in Coral Gables, Florida. The symposium was held shortly after the November 2018 “blue wave” midterm elections, where

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Chair

Carrie Rupprath is a shareholder at Winstead PC in Austin, Texas. She is Chair of the ABA TIPS Insurance Regulation Committee (IRC). Ms. Rupprath represents clients with regulatory issues, approvals and compliance matters. Her practice is primarily focused on representing clients in the insurance industry before the Texas Department of Insurance.

Editor

Eric D. Gerst is an attorney and legal consultant concentrating in insurance and transportation, with offices in the suburbs of Philadelphia. He is a member of the Philadelphia, PA, DC, & NYC bars, and has been admitted to practice before the Supreme Court of the United States. He has recently received an award from Martindale Hubbell for 25 years of holding an AV Preeminent Rating.

Eric has been a long time member of the American Bar Association and an active participant as a Vice-Chair of the ABA Tort Trial & Insurance Practices Section (TIPS) Insurance Regulation Committee (IRC). He also served as a participant on the ABA Task Force FIIRM (Federal Involvement In Insurance Regulatory Modernization). Eric is the Editor of the TIPS IRC Newsletter, an ABA publication.

Eric is also an award-winning published author. His first book was on the insurance industry. It was released in April 2008, and became #1 on Amazon.com’s “Bestseller List For Business Insurance”. Eric received a commendation from the Senate of the Commonwealth of Pennsylvania for publication of the book. He is completing work on his second book, which deals with the problems facing today’s financial institutions in the aftermath of the Bailout of 2008. This second book will contain recommendations for new stricter regulation and accountability for Wall Street, and is expected to be released in 2019. Eric received an “Award for Nonfiction” from the prestigious Philadelphia Writers Conference based upon early excerpts from the book. On the local community front, Eric has received an award for another book, the history of Bartram Covered Bridge (built in 1860) from the Delaware County, PA Historical Commission. Eric has been a guest lecturer at several universities, and has been featured in numerous appearances on TV, radio, and print media.

To submit information, comments or articles to the ABA TIPS IRC newsletter, contact the editor Eric D Gerst Esq., phone 610 356-9640; or by email edgphl@gmail.com
Photo Display: IRC Participates On 4 CLE Panels, Holds Business Meeting, At 45th Annual ABA TIPS Symposium On Insurance and Employee Benefits
Coral Gables, Florida January 17-19, 2019

Brochure

Historic Spanish Architecture
in Coral Gables Florida

Well Attended ABA TIPS Midwinter Symposium

Nearly 100 Attendees at the ABA TIPS 45th Annual Midwinter Symposium On Insurance And Employee Benefits. January 17-19, 2019, at Hyatt Regency Hotel, Coral Gables, Florida
Former Insurance Commissioners Roundtable Panel


Long-Term Care Panel

L to R: Rachel Giani; Moderator, Winstead PC, Austin TX; Jennifer “Ginger” M. Busby, Burr & Forman, LLP, Birmingham, AL; Jorge Gomez, LifeCare Assurance Company, Woodland Hills, CA; Sue Carol Greene-Buckner, The Prudential Insurance Company Of America, Roseland, NJ
Washington Update: After the Midterms – The Future Of Insurance Regulation


InsureTech & Big Data Panel

L to R: Lauren Dilizia-Ybarra, Esq. Moderator, Mitchell Williams Law Firm, Austin, TX; Linn F. Freedman Esq., Robinson & Cole LLP, Providence, RI; Steve Hendrich Esq., Aetna, Franklin, TN
ABA TIPS Midwinter Symposium Welcome Reception

American Bar Association 45th Annual TIPS Midwinter Symposium
January 17, 2019  –  Reagency Hyatt, Coral Gables, Fl

ABA TIPS Insurance Regulation Committee (IRC) 2019

IRC Business Meeting  –  January, 2019  –  Coral Gables, Florida

Attendees L to R: Chandler Rohwedder, Esq, AFLAC, Columbus, GA; Rachel Giani, Esq., Winstead PC, Austin, TX; Carrie Rupprath Esq. IRC Chair, Winstead PC, Austin, TX; Kathleen Wharton, Esq., McHenry, IL; Eric D. Gerst, Esq., Eric D Gerst, PC, Attys, Newtown Square, PA; (seated): James Wynn Esq., FTI Consulting Services, New York, NY; Francine Semaya, Esq., Attorney & Legal Consultant, New York, NY; Sue Carol Greene-Buckner, Esq., Prudential Financial, Roseland, NJ; and Tim Penn, Esq., IRC Chair-Elect (commencing Aug 2019), Travelers Companies, Hartford, CT.

Also attending the Symposium but not available for the picture: Alan Rachlin, Esq., New York Department of Financial Services, New York, NY; Russell Buhite, Esq., Ogletree Deakins, Seattle, WA; Briana Montminy, Esq., Burr & Forman LLP; Nashville, TN and Lauren DiLizia-Ybarra, Esq., Mitchell Williams Law Firm, Austin, TX.
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Self-Driving Cars and Future Changes in the Regulatory and Insurance Infrastructure

For the past decade, there has been a perennial prediction that self-driving cars will be commercially available in just a few years and will immediately transform transportation and road use.

In the past year, the predictions have shifted to a more pessimistic tone. We hear frequent statements that the remaining hurdles are far more intractable than expected and that commercial deployment will not occur for years. The current reality lies somewhere in between the past over-optimism and the current naysaying.

The Current State of Autonomous Driving

There are an ever increasing number of technology companies and traditional auto manufacturers – and cross-industry alliances – working on self-driving cars. As of January 2019, California had issued autonomous vehicle testing licenses to 62 companies, up from a handful in 2014. Sixty-one of these licenses apply to vehicles that retain conventional controls and have a back-up driver. In 2018 Google’s self-driving car subsidiary Waymo obtained the first California testing license for a dedicated design without operator controls.

Operation of self-driving cars as ride hailing fleets is reaching the beta testing phase with Waymo’s commercial pilot program in the Phoenix area. Additional commercial fleet pilot programs will be in operation in 2019 and 2020.

Given the focus of the pilot projects, the first wide-spread commercial use of self-driving cars will probably be ride hailing fleets. Many these fleet vehicles will not have operator controls. Initially, the fleets will operate within fairly narrow geographic footprints. There will be operating condition limitations as well. Current vehicles still have difficulty coping with driving conditions such as heavy rain or blizzards.

The sale (or leasing) of self-driving cars to the public for personal use will probably trail the launch of commercial ride hailing fleets. It is quite possible that these cars will have operator controls but will be able to toggle into fully automated mode. Dual mode vehicles will allow the owner to use the car even in places or in driving conditions where automated operation is not possible. In driver controlled mode, the car will be similar to a conventional car with a full array of driver assist features.

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What’s All This About “InsurTech”? 

Coming soon to a regulator near you: InsurTech! What is this you might ask? And why are insurance regulators standing up and taking notice? Loosely defined InsurTech is a set of technological innovations introduced to the business of insurance so as to capture the growing acceptance by millennials of more hands-on approach to insurance needs through use of computer technology. It encompasses issues from marketing of policies, through initial underwriting, and claims examination.

In particular, insurers are rapidly expanding the use of on-line applications, smartphone apps, and claims management software. It allows insureds to customize coverage while saving money. Increasingly, prospective insureds are bypassing the traditional sales agent on the corner. For the carrier, it captures the younger market that is more than comfortable making big purchases using a smart-phone app. One InsurTech company, Trov, allows an insured to insure their belonging by using an app such that an insured can swipe coverage “on” or “off” depending on their needs at the moment. Telematic and wearable sensor data enables lower premiums for less risky behavior, including driving less and exercising more. Auto carriers are increasingly tailoring coverage amounts, limits, and territory to the needs of their customers through such innovations as usage-based or pay-per-mile car insurance.

From an underwriting standpoint, IoT sensors allow carriers to set premiums based on real events, in real time, using data linked to individuals rather than samples of data linked to groups. Of course, the traditional way for a carrier to determine risk was to use analog tools such as actuarial tables which take into account broad demographic features such as age, sex, and geography. What InsurTech brings to the table is the ability to analyze more particularized customer behavior to determine how to price a policy. Lemonade Insurance Company uses smart-phone apps to obtain applications, then uses big-data algorithms to issue policies much faster than was traditionally possible. At the same time, they are able to pay claims much faster using these technological advances. InsurTech now encompasses everything from distribution and marketing, to product design, underwriting, claims management, and balance-sheet control.

But this technological revolution in how insurance is designed, marketed, priced, and sold has posed some challenges for state insurance regulators. The regulators are trying to get a handle on the situation without standing in the way of progress. Does an insurance carrier need to comply with state insurance regulations regarding solicitation of insurance (usually defined as explaining coverages, providing recommendations, quoting rates, or rendering advice as to what to purchase) or is a

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Most Current Medigap Plans Will Not Be Affected By The Medicare Access & CHIP Reauthorization Act of 2015 (MACRA), Which Starts 1/1/2020 – Stay Tuned

Most everyone remembers all the hype, and doom and gloom, and concerns expressed by many pundits and so-called subject matter experts as the year 2000 approached. My company at the time had a huge Y2K project team engaged and all of us were on standby as the new year approached. There were long lines at ATM machines so people could squirrel away some cash in case the credit and debit card systems crashed. Some people were stocking up on groceries.

The television stations started showing the new year arriving in Australia and other countries on the other side of the world. No major catastrophes or power grid failures occurred. People began calming down. And consultants had to begin thinking about new projects to peddle.

I remember sitting on my deck in the cold Indiana air, stone cold sober because the project team members had to commit to not consuming any adult beverages, watching some fireworks with some tunes playing thinking what a bunch of crock it all was – and being very happy to be a lawyer and not an IT or systems professional, or a consultant. Hard to believe all that was 20 years ago.

Medicare is the medical plan available to people when they reach age 65 or become disabled or diagnosed with End Stage Renal Disease. Medicare operates like many of the traditional major medical plans in that it only covers eighty per cent of eligible expenses. The remainder or “gap” is totally unlimited and the Medicare beneficiary’s responsibility. There’s no cap.

Medicare Supplement plans are designed to help consumers meet the gap. They’re often referred to as Medigap plans. There are a number of Medigap plans. They are standardized coverages meaning a Plan A offered by any company is identical to any other company’s Plan A. Makes for quick comparison. Medicare does not provide any coverage for prescription drugs. Neither do any of the Medigap plans sold today.

Medicare Advantage is another option for seniors to address their medical needs when turning age 65. These plans actually replace Original Medicare and often come bundled with prescription drug coverage. A more detailed discussion about Medicare Advantage plans is beyond the scope and space limitations of this article.

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Corporate Governance in Insurance: Maintaining a Culture of Compliance with New and Developing Cybersecurity Requirements

Editors Note: This article first appeared in the Winter 2018 issue of The Demotech Difference, a publication of Demotech, Inc., www.demotech.com. Reprinted with permission

Cybersecurity has emerged over the past several years as one of if not the greatest concerns to the insurance industry, with multiple high-profile data breaches of insurance companies and other entities demonstrating the potential scope of the issue. The growing threat has prompted both the insurance industry and regulators to devote vast resources to cybersecurity preparedness. Overseeing the development and maintenance of protocols to effectively manage cybersecurity threats and satisfy applicable reporting requirements has become a critical corporate governance and compliance issue for insurance companies across the United States.

Maintaining an insurer’s cybersecurity program and ensuring that the company complies with all legal and regulatory reporting requirements is becoming increasingly difficult. In recent years, state legislatures and insurance regulatory agencies have implemented a myriad of cybersecurity legal and regulatory standards making it difficult for insurers to stay abreast of developing changes. Ultimately, ensuring compliance with new cybersecurity standards is an issue that must be addressed at the top and boards must ensure that their organizations not only comply with current standards, but that they are also prepared to comply with new and evolving standards that are being adopted across the country.

The New York Cybersecurity Regulations

The New York Department of Financial Services took the lead on establishing new cybersecurity standards applicable to banks, insurance companies, and other financial institutions when it adopted cybersecurity regulations that went into effect on March 1, 2017 (the New York Cyber Regulation). Specifically, the New York Cyber Regulation applies to “covered entities”, which include any person operating under or required to operate under a license, registration, charter, or similar authorization under New York’s Banking, Insurance, or Financial Services Laws.

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New Congress Picks Up Flood Insurance Reform That Last Congress Fumbled

On January 3rd, 2019 the 116th Congress of the United States convened. While there was much celebration of the new Congress as the most diverse and youngest in history, the members of the House of Representatives and the Senate soon began the painstaking work of solving some of the nation’s most vexing legislative and political problems. One of those problems is reform of the National Flood Insurance Program (NFIP), which the 115th Congress attempted but never completed. With a new Democratic majority in the House as of 2019, and a larger Republican majority in the Senate, it is unclear whether the political dynamics that stymied NFIP reform in the last Congress have changed for the better or whether they have been made worse in the new Congress.

Where the 115th Congress Left Off on NFIP Reform

While the 115th Congress began in 2016 with great enthusiasm to reform the NFIP, by the end of its term in 2018 not much was accomplished. The House Financial Services Committee, then chaired by former Rep. Jeb Hensarling (R—TX) (who did not seek reelection in 2018), held numerous hearings and vigorous debates on various aspects of NFIP reform. Hensarling often engaged in heated, though respectful, exchanges with then ranking page member Rep. Maxine Waters (D—CA) on NFIP reform proposals that reflected their philosophical differences on the NFIP, differences that extended to their respective parties’ positions on the program. In general, Hensarling was frustrated with the amount of NFIP debt that resulted from the program’s borrowing from the U.S. Treasury following major catastrophic flooding events such as Hurricane Katrina and Superstorm Sandy. He sought reforms that would make the NFIP more actuarially sound and would also incentivize private insurance carriers to enter the residential flood insurance market. Rep. Waters, while sharing the concerns about NFIP indebtedness to the Treasury and lack of market competition, thought there were other ways to address those issues. With respect to NFIP debt, Waters advocated forgiving the program’s debt so that premium dollars were not spent to pay interest to the U.S. Treasury. With respect to market competition, she expressed concern about reform proposals that could allow private insurance carriers to “cherry pick” the best risks and leave the worst risks to the NFIP, worsening the program’s financial position. The only thing that was agreed in the 115th Congress was that the NFIP would be extended to May 31, 2019.¹

¹The last Congress ending in 2018, could not reach consensus on NFIP reform, and only passed a short-term extension until May 31, 2019. With the new Democratic majority now in the U.S. House, at least 6 NFIP reform bills have been introduced.

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Now Rep. Waters is the Chair of the House Financial Services Committee in the 116th Congress. She brings to her new position extensive experience with NFIP reform. In 2012, she co-sponsored the Biggert-Waters Flood Insurance Reform and Modernization Act (“BW-12”), a major reform bill which made significant changes in how the NFIP charged premiums and evaluated risks and also attempted to open the NFIP to competition from private flood insurance carriers. After BW-12 was signed into law and the Federal Emergency Management Agency (FEMA) began implementing its reforms, the pushback from policyholders affected by the rate changes and other reforms became so intense that just two years later Congress passed the Homeowner Flood Insurance Affordability Act (Affordability Act) which weakened or repealed some of the BW-12 reforms. Rep. Waters actually voted in favor of the Affordability Act that scaled back the law that bore her name, having reconsidered the pace of NFIP reforms that BW-12 mandated.

Pending NFIP Reform Legislation

There are already half a dozen bills in the House of Representatives in 2019 addressing various aspects of NFIP reform. The bills have been referred to the House Financial Services Committee. Brief summaries of the bills follow.

H.R. 342 – Flood Insurance Rate Map Interagency Technology (FIRM IT) Act of 2019: The bill would amend BW-12 to require the Federal Emergency Management Agency (FEMA) to work with the Department of Defense, the National Oceanic and Atmospheric Administration and the U.S. Geological Survey to obtain all current information on topography, water flows, and other information relevant to the creation of new flood insurance rate maps (FIRMs).

H.R. 470 – A Bill to Repeal the Mandatory Flood Insurance Coverage Requirement for Commercial Properties Located in Flood Hazard Areas: The bill would amend current law to remove the mandatory purchase requirement for commercial properties located in flood hazard areas and would limit such requirements to residential properties under certain circumstances.

H.R. 471 – Taxpayer Exposure Mitigation Act: The bill would require the NFIP Administrator to determine an annual probable maximum loss amount target for the NFIP and then cede a portion of the risk to the reinsurance and capital markets.

H.R. 472 – Community Mapping Act: The bill would require FEMA to create standards for local and state governments for the creation of “alternative” flood insurance rate maps, and would require FEMA to approve the use of such alternative maps in the NFIP under certain circumstances.

To fix the NFIP, Democrats have suggested extending the NFIP program for at least 5 years, forgiveness of NFIP debt to the US Treasury, more market competition, and more affordability.

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H.R. 830 – *Flood Insurance for Farmers Act of 2019*: The bill would allow for the repair, expansion and construction of agricultural structures located in special flood hazard zones without the necessity of elevation of structures. This exemption from elevation requirements would include one single-family dwelling located on agricultural property.

H.R. 1402 – *To transfer functions related to the preparation of flood maps from the Administrator of the Federal Emergency Management Agency to the Director of the United States Geological Survey, and for other purposes*: This bill may be a response to complaints that the process FEMA is following to create new flood insurance rate maps is taking too much time.

**Discussion Drafts**

In addition to the bills summarized above, several discussion drafts are under review that touch on various aspects of NFIP reform, such as administrative changes, flood insurance risk map creation, and coverage for increased cost of compliance with new flood-related building standards. A discussion draft from Financial Services Committee Chair Waters would extend the NFIP for five years, forgive all of the program’s debt to the U.S. Treasury, and require FEMA to develop a demonstration program on flood insurance affordability for low income individuals through means-tested discounted premium rates.

**What’s Next**

The House Financial Services Committee held a hearing on NFIP reauthorization on March 13, 2019 during which the Committee heard from several witnesses representing state governments, trade associations and environmental groups with respect to the referred bills and discussion drafts. The TIPS Insurance Regulation Committee will continue to follow the work of the House Financial Services Committee on NFIP reauthorization and reform and will provide updates in future editions of this newsletter.

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**Endnotes**

1  *Pub. L. No. 115-396.*
control of the United States House of Representatives switched strongly from Republican to Democrat, prompting the observation that with this split in legislative power (Republicans controlling the Senate and the Democrats now controlling the House of Representatives) we can expect stronger regulation of the insurance industry and more protection of the consumer.

The 3 day symposium, held at the Hyatt Regency Coral Gables, Fl, was at the attended by more than 100 people, and featured more than 12 CLE panel discussions on current and emerging issues in the insurance area. The symposium was hosted by 4 of ABA TIPS committees: Life, Employee Benefits, Health and Disability, and Insurance Regulation. The faculty included plaintiff and defense lawyers, in-house corporate attorneys, insurance company counsel, current and former state insurance commissioners, legal consultants, and officials of industry associations.

According to panelist Eric D Gerst Esq, a Vice Chair of the ABA TIPS Insurance Regulation Committee (IRC), and ABA TIPS IRC Newsletter Editor, the change in political power in the House of Representatives as a result of the November 2018 election, will result in a push for stronger regulation of the insurance industry. Gerst noted the significant change from the pre-November 2018 political scene, which had a fully Republican-controlled White House, Senate and House, to a post-November 2018 power split in Congress. Gerst was part of a CLE panel entitled “Washington DC update – After the Midterms”

To support this prediction of stronger insurance regulation, Gerst created a PowerPoint presentation to the attendees, which demonstrated the historical regulatory trends over the years. He noted many examples, where each time the country experienced abuses of our economic system after the creation of a loose regulatory system, the government tended to swing the pendulum back toward a much tighter insurance regulatory culture.

Historically when, as now, the U. S. experiences abuses of our economic system in an era of weakening regulation, there has been strong political power in Congress to push the pendulum toward compromise and toward a much tighter regulatory culture.

The 1st example of the swing to a much tighter regulatory culture cited by Gerst was the “Trust Buster” era of Pres. Teddy Roosevelt in the early part of the 20th century, when the government passed antitrust and other legislation to combat the growing monopolistic business practices of big banking, railroads, and oil barons of the 1890’s.

A second example of regulatory tightening was in the 1930’s, where Congress created legislative “walls” between banks, brokerage and insurance companies, with the passage of the Glass-Steagall Act of 1933; in this case, the government was trying to protect the consumer by reacting to the reckless investing and unscrupulous business practices which created the stock market crash of 1929 and the Great Depression of the 1930’s that followed. The government believed the separation of

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Gerst cited a 3rd example of a tightening of the regulatory culture, this time as a result of the economic abuses which occurred at the start of the 21st century. This regulatory tightening occurred at the end of the 1st decade of the 21st century, through the passage in Congress of the Dodd Frank Wall Street Reform And Consumer Protection Act of 2010, which, among other things, created several watchdog new federal agencies including The Federal Insurance Office (FIO). Other pro-consumer laws passed at about the same time were The Fraud Enforcement and Recovery Act (FERA), and the consumer oriented health plan known as the Affordable Care Act (a.k.a. Obamacare).

These federal laws were in large part a reaction to the unintended consequences of the Gramm-Leach-Bliley Act of 1999 (GLB). Gerst explained that at the start of the 21st century, the U.S. government was enjoying a stock market “new economy tech bubble”, so it passed the GLB of 1999 and subsequent laws, which were designed as a noble idea of expanding home ownership to 1st time homeowners in the subprime mortgage market. The GLB of 1999 and the laws that followed, made it easier for banks to make risky loans to applicants with little or no assets or income. GLB repealed the consumer protections of the Glass-Steagall Act and created a deregulatory culture. In what Gerst describes as a “major error”, the GLB allowed use of collateral debt obligations (a.k.a. derivatives) to be pledged as “insurance” against any losses to lenders, with virtually no government oversight. When the economy turned down in the mid–2000’s, it resulted in massive mortgage foreclosures, especially in the subprime residential market. In many cases, the derivatives pledged to the lenders as “insurance” against foreclosure losses were found to be mostly worthless. When the financial community learned that the GLB had quietly removed the requirement of government oversight of the adequacy of the pledged derivative security, this caused shock and a credit freeze to the international banking system. In the US, it resulted in the Great Recession of 2008, from which the country (except upper echelons i.e. the 1% wealthiest) has still not recovered. In that same year, the government, facing bankruptcy of the major financial institutions, ultimately decided to create a “no strings” series of loans through a multitrillion dollar taxpayer bailout of some of the largest financial institutions, considered by the George W. Bush Administration and its Treasury Secretary Henry Paulson as “too big to fail”.

Gerst cites a 4th example of insurance regulatory tightening as a result of the “blue wave” of the 2018 midterm elections. Previously, when Republicans controlled the White House and Congress (from 2016 with the election of Donald J Trump,
until the midterm elections in November 2018), there was a significant whittling away of regulatory reforms. The “exhibit A” of this problem was the announcement in February 2017 of the executive order by Pres. Trump to eliminate regulations on a “meat axe” approach, i.e. two-for-one basis. That is to say, for every new regulation being proposed, the proposer must eliminate two regulations currently on the books, and without any additional cost for the new regulation. In addition, Pres. Trump created a tax-cut windfall for the 1% upper echelon taxpayer, with no real advantage to the middle class or working class, or the other 99%.

In summary, Gerst believes the 2018 midterm “Blue Wave” pressure for tighter insurance regulation will be compounded when the majority of average Americans learns that they have continued to suffer a significant loss of personal wealth and income, even after the passage of the consumer protections and reform under the Dodd Frank Act in 2010. Therefore with the split in power between the 2 houses of Congress Senate controlled by Republicans, and the House of Representatives controlled by Democrats) this will result in another push for compromise, and resulting in a tighter insurance regulatory culture.
The Need for Regulatory Infrastructure

Self-driving car deployment requires a regulatory infrastructure, as well as technological developments. The regulatory structure for autonomous vehicles is partially federal and partially state-based. The National Highway Traffic Safety Administration (NHTSA) establishes motor vehicle equipment standards in the Federal Motor Vehicle Safety Standards (FMVSS). Most of us are familiar with FMVSS requirements such as high mounted rear brake lights and air bags.

Some of the older FMVSS standards are incompatible with dedicated driverless cars designs. For example, the FMVSS require that a car have both a brake pedal and a handbrake and be equipped with a driver operated turn signals. (Curiously, there is no federal standard requiring cars to be equipped with a steering wheel. When NHTSA was first charged with creating the FMVSS requirements, steering wheels were already universal equipment.)

Currently, NHTSA is granting exceptions to the FMVSS requirements on a case-by-case basis to developers of self-driving cars. The agency has indicated that eventually it will promulgate generally applicable equipment standards for autonomous vehicles.

The second component of the emerging regulatory structure for autonomous vehicles is state vehicles codes and state departments of motor vehicles. State vehicle codes will need to be adapted to accommodate self-driving cars. For example, one of the promising features of self-driving cars is increased mobility for the disabled and elderly. Applying driver license requirements to self-driving cars without operator controls would preclude people without driver’s licenses from traveling in a fully automated vehicle on their own.

Dual mode cars will also pose licensing enforcement issues that will not arise with dedicated self-driving cars. Traffic law enforcers will need ready means to determine whether the vehicle is in autonomous mode and, therefore, whether the person sitting in the “driver’s seat” needs to hold a valid license.

Several organizations are currently working on modifications to state motor vehicle codes to accommodate self-driving cars. In May 2018, the American Association of Motor Vehicle Administrators (AAMVA), whose members are the state departments of motor vehicles, issued a report titled “Jurisdictional Guidelines for the Safe Testing and Deployment of Highly Automated Vehicles.” The Uniform Law Commission (ULC) is in the final stages of a three year project to draft a model set of amendments to state vehicle codes. The model law would create sufficient uniformity across state motor vehicle laws to permit the multi-state operation of self-driving cars. In addition, several automated vehicle trade associations have produced model vehicle code amendments for self-driving cars.

Several organizations are working on modifications to state motor vehicle codes and model laws to accommodate self-driving cars.
Insurance Issues

Auto insurance requirements are set by the states. There is an emerging consensus among stakeholders that insurance requirements for self-driving cars should be decided by the states. Individual states will need to wrestle with the insurance challenges posed by self-driving cars in fleet operation and private ownership.

For vehicles lacking operator controls, there may be coverage issues under conventional auto policy language. Except for rather contrived hypotheticals, accidents involving “operator” error by the autonomous vehicle would not involve negligence by the owner of the vehicle or a passenger riding in the vehicle. This could lead to coverage denials by the auto insurer; which would require the injured party to bring a product liability suit.

For serious injuries, this would likely mean that an injured party would benefit from higher product liability coverage limits compared to limits under auto policies—especially minimum limits policies. However, the costs of bringing product liability suits could effectively preclude recovery for minor auto accidents. It will not be cost-effective for a motorist to pay thousands of dollars to hire a lawyer to bring a product liability claim to recover damages from a fender bender caused by an autonomous vehicle.

Auto insurers have a well-honed system for resolving a large volume accident claims with minimal litigation. In contrast, product liability insurers operate in a very different claims environment, with less frequent claims and a higher incidence of litigation. Even with fully automated vehicles, auto coverage will still be needed to cover liability scenarios involving poor maintenance and to provide first party property coverage. Given the high transactional costs for product liability suits, there are sound public policy reasons to keep auto insurers as the “point of entry” for liability claims that involve hardware and software failures.

Faced with coverage limitations in conventional commercial and private passenger auto policies, there will be pressure on states to enact statutes requiring auto insurers to provide coverage for autonomous vehicle accidents, even when the owner or passenger is not at fault. While auto insurers would not be precluded from seeking subrogation from product liability insurers, they would be required to provide coverage for claims where their insureds (and permissive users) were not at fault. This hypothetical broader coverage wouldn’t be no-fault, but neither would it be a conventional auto liability policy.

An alternative approach to the problem of auto accidents caused by software or hardware failures is commercial auto policies tailored to address autonomous vehicles. Currently, the commercial fleets in beta testing are all operated by technology and auto manufacturing companies and are subject to state autonomous vehicle testing licenses that require insurance coverage. In the future, self-driving cars will be an insurance conundrum. For example, will autonomous cars involved in accidents be covered by products liability insurance or liability insurance? Or both?
Vehicle fleets will be operated by companies that are not software developers or manufacturers. Those companies will need commercial auto policies that don’t have the potential coverage gaps that exist in conventional policies. Indeed, states may require such coverage for self-driving car fleets.

A number of experts predict that self-driving cars will be leased, rather than sold, to individuals to allow the manufacturer greater control over software updates. Under this business model, insurance coverage could be provided with the lease and priced into the lease charge. Coverage would be provided under a commercial auto policy with policy language tailored to self-driving cars. Even if individual ownership remains the dominate business model, group auto policies providing coverage for purchasers of a given make and model could be another mechanism for providing coverage that would avoid the problem of trying to recover damages from minor accidents through product liability claims.

Auto insurance policies drafted to provide coverage for accidents involving autonomous vehicles will be needed. However, it remains unclear whether the insurers will provide such coverage in response to market demand or whether states will enact statutes mandating auto coverage for self-driving cars.

States will have to take the lead on the type of insurance required for autonomous vehicles.

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carrier merely advertising without the intent to solicit thereby negating in many cases the need for a producer’s license? Several insurance carriers fined one software company after it had partnered with several carriers to sell policies to businesses using its products because, in their view, it allowed unlicensed employees to sell, solicit, and negotiate insurance. State licensing laws may also be implicated where digital P&C carriers selling policies online and through a smart-phone app, and processing claims the same way, partner with others to offer their policies on their own apps and web-sites. Are they running afoul of licensing laws? It depends.

How are regulators addressing capital adequacy for the InsurTech companies who are now able, through the ability to insure small items with the swipe of an app? How much capital do they need in comparison to a traditional carrier insuring a house, car, or a life? Regulators are now well aware of these fast-moving trends in the business and are taking steps to address concerns.

On a national level, the NAIC has taken on the challenge head on by establishing the NAIC Innovation and Technology Task Force in 2017 to help insurance regulators stay informed on key developments regarding InsurTech. The plan is to help regulators deal with not only established carriers in this arena, but also tech start-ups who often partner with carriers to offer products and services. The Task Force meets regularly and recently completed a survey of regulators as to what the various states were doing to address these technological innovations and trends. It has published a list of contacts on the NAIC website for each state as a resource. It has also identified particular issues that are giving regulators the most challenges, such as e-signatures, the cancellation notice process, and anti-rebating laws. The NAIC, and state regulators alike, understand that these technological innovations in the sale and management of insurance products are not going away and that they hold particular appeal for the younger market that carriers are trying to capture. They are working closely with carriers and tech companies to determine how to best protect insureds while allowing this growing segment of the market to flourish.

The NAIC’s Big Data Working Group has also been established to review current regulatory frameworks used to oversee insurers’ use of consumer and non-insurance data and to recommend modifications to model laws and regulations pertaining to underwriting, rating, and claims when necessary. A separate Speed to Market Working Group has also been established to consider whether further controls or enhancement are needed in the System for Electronic Rates and Forms Filing (SERFF) process. The SERFF platform allows carriers to submit forms, manage documents, and interface with regulators in the review process so as to accelerate the approval process while ensuring market compliance and consumer protection.
MACRA Point Of View... continued from page 12

MACRA stands for the Medicare Access and CHIP Reauthorization Act of 2015. There was a lot of hoopla prior to 2015 about how Medicare expenses were rising. The pundits had the day opining that first dollar coverage offered by Medicare Supplement plans contributed to the rise in Medicare expenditures – like people who may be scheduling doctor appointments or other services just because they don’t have to cough up a $20 co-pay. In fact, people with “experience” in the medical system have no desire to go to another doctor’s office or get another test, co-pay or not.

MACRA prohibits the sale of Medicare Supplement policies that cover Part B deductibles to “newly eligible” Medicare beneficiaries defined as those individuals who: (a) have attained age 65 on or after January 1, 2020; or (b) first become eligible for Medicare due to age, disability or end-stage renal disease, on or after January 1, 2020.

For “newly eligible” beneficiaries, references in the law to Medigap plans C and F are deemed as references to plans D and G, effective on or after January 1, 2020. And a new High Deductible G plan can be sold on or after January 1, 2020.

As of January 1, 2020, MACRA does the following: first, it prohibits first dollar Part B coverage on Medicare Supplement plans (C and F) to “newly eligible” Medicare beneficiaries; so Plans C and F cannot be sold to those “newly eligible” for Medicare. Second, it makes Plans D and G the guarantee issue plans for “newly eligible” Medicare beneficiaries for the specified periods under current law that name C or F for current Medicare beneficiaries.

MACRA is unique from previous modifications to the Medicare Supplement law in that MACRA does not close the previous blocks of business. MACRA states that for ‘newly eligible’ only “C or F shall be deemed, as of January 1, 2020, to be a reference to a Medicare Supplemental policy which has a benefit package classified as D or G respectively.” MACRA does not state that all plans will have a new effective date as of January 1, 2020. Therefore, except for C and F for “newly eligible” only, all other blocks of plans will remain in the same status as before January 1, 2020, including High F plans.

At the end of the day, how “big” will MACRA be to Medigap? My sense is while early yet, the number of those becoming eligible for Medicare on and after January 1, 2020 pales in comparison to the number of current Medicare beneficiaries. So, I don’t think the impact will be that significant immediately. I’ll stop there before I make the actuaries nervous.

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Medicare Supplement plans C and F are not going away. They will still be available to current Medicare beneficiaries (those eligible for Medicare prior to January 1, 2020). Current beneficiaries can continue buying them, either on a first time basis or replacing existing coverage. Plans C and F cannot be offered to someone not eligible for Medicare until after January 1, 2020, now called the “newly eligible”.

States saw some issues in the field after MACRA was passed that caused regulators to be concerned that some producers were using MACRA to roll business. Complaints alleged producers were telling current policyholders that they need to move out of their existing Plan C or F because those plans were “going away” or become closed with large rate increases on the horizon. Companies selling Medigap plans are educating insurance producers about MACRA and the NAIC has developed some communications to help consumers and producers understand it. It will be interesting to see what the impact is to the overall Medicare budget once MACRA is in place long enough for the data to be analyzed.
According to NYDFS Superintendent Maria Vullo, the key goal in developing the New York Cyber Regulation was to adopt flexible standards to permit companies to assess their risks and adopt an appropriate cybersecurity program. This risk-based approach is favored by the industry over a more rigid standards-based approach. There are also some fixed standards, such as regular reporting requirements and a requirement that cybersecurity personnel regularly attend training sessions. With certain exceptions, entities covered by the regulation must periodically conduct and document a risk assessment, and certify each year to the Superintendent of Financial Services that they are in compliance with the regulation. The first certification is due by February of 2018.

Insurers should be aware of the New York Cyber Regulation, regardless of whether they operate in New York, because, as is explained further below, it has set the tone for the development of future laws and regulations that are being developed by legislatures and insurance departments across the country.

The NAIC Insurance Data Security Model Law

The National Association of Insurance Commissioners (NAIC) followed in New York’s footsteps in 2017 when it approved the Insurance Data Security Model Law (the Model Law), which creates standards for data security and for the investigation of and notification to the insurance commissioner of certain cybersecurity events. The Model Law requires that covered licensees develop cybersecurity programs, conduct cybersecurity testing, and develop incident response plans for breach notification procedures. While the two are not identical, the Model Law is similar to the New York Cyber Regulation and adopts many of the same concepts and terminology. Despite certain differences between the two, the drafters of the Model Law included a drafting note indicating that a company that is in compliance with the New York Cyber Regulation is also in compliance with the Model Law.

As indicated above, the Model Law applies to “licensees,” which include any individual or entity (other than nongovernment agencies) operating, or required to operate, under a license, registration, or other authorization under the insurance laws of a state. Excluded from that definition are purchasing groups and risk retention groups chartered and licensed in another state as well as assuming insurers domiciled in another jurisdiction. The Model Law establishes a framework for licensees to protect the security of nonpublic information and information systems through the development of information security programs based on the insurer’s risk assessment. The information security program must be designed to mitigate identified risk and must include administrative, technical, and physical safeguards for the protection of nonpublic information and information systems.

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Corporate Governance... continued from page 27

The Model Law also requires that the board of directors or a board committee is responsible for the development, implementation, and maintenance of the information security program. Moreover, the board or committee must prepare a written report, at least annually, summarizing the overall status of the information security program, the insurer’s compliance with the Model Law, and other material matters, including cybersecurity events, violations of the information security program, and recommendations for changes. This requirement is significant because it creates affirmative obligations for the board and makes the board responsible for cybersecurity from a governance perspective.

As with other NAIC model laws, the Model Law will have a significant impact on the manner in which states regulate matters related to its subject matter, regardless of whether states fully implement all of its requirements. Although most states have yet to adopt the Model Law, many experts believe it eventually will become the law in the majority of United States jurisdictions. Insurance company boards should not wait until the Model Law is adopted in their backyards, but should instead immediately begin overseeing the development of information security programs by their organizations and ensure that they comply with the Model Act’s requirements now.

The South Carolina Data Security Act

South Carolina became the first state to adopt the Model Law in May of 2018. The South Carolina Data Security Act (the South Carolina Act) was effective January 1, 2019 and is nearly identical to the Model Law. Like the Model Law, the South Carolina Act requires that licensed insurers implement a comprehensive written information security program based on self-conducted, mandatory risk assessment. Insurers licensed in South Carolina must submit an annual statement to the Director certifying they are in compliance with the Act and also establish incident response plans and comply with certain reporting and response requirements in the event of a cybersecurity event. Importantly, the South Carolina Act establishes minimum requirements for a licensee’s board of directors regarding the board’s oversight of the licensee’s information security program.

As part of the risk management process required by the South Carolina Act, insurers must evaluate whether to implement certain security measures, including implementing authentication protocols and access controls on the company’s information systems, restricting access of nonpublic information, encryption of information, and conducting regular testing of its cybersecurity systems to identify actual and attempted attacks or intrusions.

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Like the Model Act, the South Carolina Act differs to some extent from the New York Cybersecurity Regulations. However, unlike the Model Act, the South Carolina Cyber Act did not include the NAIC drafter's note related to compliance with the New York Cybersecurity Regulation. Indeed, it is unclear whether South Carolina will consider companies that are compliant with the New York Cyber Regulation to be compliant with the South Carolina Cyber Act. Thus, even companies that are already in compliance with the New York Cybersecurity Regulation must closely monitor developments related to the South Carolina Act if they are currently doing business in South Carolina, or wish to do business there in the future.

Conclusion

Rather than being compelled to act through regulatory action or litigation, boards should be proactive and create company-wide cybersecurity protocols that regularly test the company's cybersecurity systems, train its employees in cyber risk management, establish a data breach response and reporting plan, and manage relationships with third-party service providers. Implementing important corporate governance mechanisms aimed at securing the company's data management and IT systems will help the board mitigate cyber risk and potential liability. Importantly, maintaining oversight over a robust cybersecurity program can help achieve a culture of compliance in light of new and evolving regulatory requirements.

Cybersecurity will continue to be a major issue affecting all companies, but it is a particular concern for companies like insurers that collect and store massive amounts of sensitive policyholder data. Insurance company directors may be exposed to legal liability if they fail to implement and oversee cybersecurity protocols in their respective organizations. Policyholders and shareholders who have been injured as a result of breaches will seek to hold the board responsible for the breaches. Regulators will continue to take action against companies that do not adequately protect their consumer data. Regulators will also continue to create regulations imposing cybersecurity requirements on directors and their companies. Effective corporate governance is the key to ensuring compliance with those regulations, satisfying the board's duty of care, and avoiding the severe consequences of a data breach.
## Calendar

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<tr>
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<tr>
<td><strong>Motor Vehicle Products Liability Conference</strong></td>
<td>Janet Hummons – 312/988-5656, Danielle Daly – 312/988-5708</td>
<td>Hotel Del Coronado, CA</td>
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<tr>
<td><strong>Toxic Torts &amp; Environmental Law Conference</strong></td>
<td>Janet Hummons – 312/988-5656</td>
<td>Hotel Del Coronado, CA</td>
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<tr>
<td><strong>National Trial Academy</strong></td>
<td>Juel Jones – 312/988-5597</td>
<td>Reno, NV</td>
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<tr>
<td><strong>Fidelity &amp; Surety Law Spring Conference</strong></td>
<td>Janet Hummons – 312/988-5656, Danielle Daly – 312/988-5708</td>
<td>JW Marriott Hotel, Austin, TX</td>
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<td><strong>Property Insurance Conference</strong></td>
<td>Juel Jones – 312/988-5597</td>
<td>JW Marriott Hotel, Austin, TX</td>
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<td><strong>ABA Annual Meeting</strong></td>
<td>Juel Jones – 312/988-5597</td>
<td>San Francisco, CA</td>
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<td><strong>TIPS Fall Leadership Meeting</strong></td>
<td>Janet Hummons – 312/988-5656, Juel Jones – 312/988-5596</td>
<td>Grand Wailea Hotel, Wailea, HI</td>
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<td><strong>Aviation Litigation</strong></td>
<td>Danielle Daly – 312/988-5708</td>
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<tr>
<td><strong>Fidelity &amp; Surety Law Fall Conference</strong></td>
<td>Janet Hummons – 312/988-5656, Danielle Daly – 312/988-5708</td>
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