Emerging Claims – Liability and Insurance Issues in Crowdfunding, Drones, Ride Sharing, Self-Driving Cars, Bitcoin, Food Labeling and Other Upcoming Claim Sources

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What will drive insurance claims in the near future? Self-driving cars and robotic drones were only concepts of the future five or ten years ago, yet now, they are here or just on the horizon. Even established investment vehicles for new business development are upturned with the introduction of virtual currencies, crowdfunding, and ride sharing, creating new risks and opportunities for global businesses and insurers alike. These new products and business models create the potential for new claims affecting different insurance product lines. In this paper we address several of these emerging claims and their potential liability and insurance implications.

I. Crowdfunding

A. Background of Crowdfunding

Equity crowdfunding is a method for new startup companies to raise capital by selling securities at a relatively small cost to a large number of investors, typically through an internet portal. Online crowdfunding appears to have begun in 2009 with rewards (non-equity) crowdfunding through the Kickstarter site. Rewards crowdfunding does not provide a share of the company, but instead, investors receive as an incentive something of value such as early access to, or a sample of, the product. The stated mission of the Kickstarter crowdfunding site was "empowering artists and creative projects to gather support for their ideas through rewards crowdfunding." [1] Today, the most popular crowdfunding websites still include Kickstarter, with the addition of other sites such as Indiegogo, Crowdfunder, RocketHub, and Crowdrise.[2] The top business crowdfunding campaigns include:

- **Pebble E-Paper Watch**: This project to produce one of the first affordable smart watches raised $10.3 million in 37 days. Investors were promised one of the watches and became upset when production was delayed. The company announced that "Kickstarter is Not a Store" and the watches were provided 10 months after the crowdfunding campaign ended.[3]

- **Ouya Open Source Game Console:** The Ouya game console project raised $8.5 million in 29 days through Kickstarter. Similar to Pebble, Ouya provided a game console to investors within 10 months of the end of the campaign.[4]

- **Pono Music High Resolution Music Player:** Pono raised $6 million in 30 days via Kickstarter for this music player that is supposed to let listeners "hear the music as the artist intended." Investors are scheduled to receive a player.[5]

- **Bitvore Data Mining:** Bitvore's crowdfunding campaign through the Fundable portal for its large data mining solution collected $4.5 million.[6]

[1] Chance Barnett, "Top 10 Crowdfunding Sites for Fundraising," Forbes.com, April 16, 2014.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*

As indicated above, rewards crowdfunding typically provides some incentive to the investor, such as early access to video games, music or other product of the startup. In order to raise larger sums of money, increase production and grow their business, companies began offering equity crowdfunding in which the investors obtain a stake in the business.[7] This equity crowdfunding has attracted the attention of the U.S. Securities and Exchange Commission ("SEC") and U.S. lawmakers as equity crowdfunding did not fall under the scope of the existing securities' regulations and the lack of reporting or registration requirements for equity crowdfunding presented opportunities for fraudulent offerings and investor loss.

B. The JOBS Act Governing Equity Crowdfunding in the U.S.

Despite the increased opportunity for fraud and the relative naïveté of the typical crowdfunding investor, lawmakers from both major U.S. political parties recognized the value of crowdfunding to the promotion of innovation and new startup companies. In an attempt to allow regulated crowdfunding, in April 2012, President Obama signed The Jumpstart Our Business Startups Act (JOBS) of 2012, 15 U.S.C. 78a et seq., permitting equity crowdfunding under certain restrictions and reporting requirements. Mary Jo White, Chair of the SEC notes in connection with SEC proposed rules under the JOBS Act "[T]his proposal is intended to help increase access of smaller companies to capital … In shaping this proposal, we sought to develop an effective, workable path to raising capital that, very importantly, also builds in necessary investor protections."[8] Ms. White also notes in connection with proposed rules that "I think the objective of the JOBS Act is one that we all prescribe to.., but we must have investor protection in mind. There must be credibility as well."[9]

The intent of the JOBS Act is job creation and economic growth through improved access to the capital markets for emerging growth companies as defined under the Act. The term Emerging Growth Company ("EGC") is defined under the act as a company with annual gross revenue of less than $1 billion with the additional requirements (among others) that the company not have had its initial public offering ("IPO") more than five years before and not have issued non-convertible debt in the prior three years of greater than $1 billion.

Once the JOBS Act is fully implemented, an issuer will be permitted to sell up to $1 million in securities during a 12 month period. The number of investors is not limited by the Act, but investors with annual incomes or net worth below $100,000 can invest only the greater of $2,000 or 5% of their incomes or net worth. Investors with annual incomes or net worth above $100,000 can invest the greater of 10% of their income or net worth or $100,000 annually.

The issuer in an equity crowdfunding must disclose the following to the SEC, potential investors, and the relevant broker or funding pool:

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[6] *Id.*; *see also*, "Bitvore nabs $4.5 million to be your 'data mining for dummies,'" Venturebeat.com, March 18, 2014.
[7] *Id.*
[8] SEC Press Release, "SEC Proposes Rules to Increase Access to Capital for Smaller Companies," Dec. 18, 2013.

[9] "SEC Chair Mary Jo White Talks JOBS Act in Testimony to Senate," Crowdfundinsidercom April 19, 2014.

- Description of business plan of the issuer;
- Description of ownership and capital structure of issuer;
- Financial condition of issuer; and
- Target amount and intended use of proceeds.

The JOBS Act provides investors with a private right of action against issuers. Section 302(c) of the Act imposes liability equivalent to section 12(a)(2) of the Securities Act of 1933. Specifically, to maintain a claim, the investor must establish that the issuer made a materially misleading statement or omission. The issuer has the burden of proof to show that it did not know, and in the exercise of reasonable care could not have known, of any untruth or omission. The investor is entitled to a refund of its investment and any consequential damages it can establish.

As of September 2014, the SEC had not yet submitted its proposed regulations that would fully implement the JOBS Act. However, the SEC has approved equity crowdfunding for accredited investors including investment companies, banks or nonprofits with assets exceeding $5 million and individuals with a net worth of more than $1 million or an annual income in excess of $200,000. A number of states have also implemented similar statutes, with some states reportedly allowing higher crowdfunding amounts.[10]

As of September 2014, thirteen states had enacted intra-state crowdfunding statutes.[11] Such statutes are designed to entice business to the enacting state as intra-state crowdfunding requires the company to be registered and doing business in the state to qualify under the federal intrastate exemption.[12] There is no hard data regarding the number of new crowdfunding campaigns in the enacted states, but the easing of reporting requirements and potential for larger investment caps may encourage companies to take advantage of the state crowdfunding exemptions over the eventual federal system. The requirement that the company do business in the funding state also levels the playing field among the states such that Delaware will not be an available crowdfunding state unless the company is registered and doing business there.

C. Insurance Implications of Equity Crowdfunding

The large number of individual less-experienced investors involved in equity crowdfunding campaigns may increase the potential for resulting lawsuits for perceived misrepresentations and omissions. Management at the startup companies may be less experienced and record-keeping may be lacking, suggesting a greater risk of future suits. As the JOBS Act limits the total investment to $1 million, total exposure from investor suits may be limited. However, at least one industry insider has speculated that "the circumstances of

[10] Amy O'Connor, "Insurers Wait on Sidelines as Crowdfunding Players Await SEC Rules," Insurance Journal/MyNewMarkets.com, Aug. 14, 2014.
[11] The thirteen states that have enacted crowdfunding legislation include Georgia, Kansas, Michigan, Alabama and Maine. An additional thirteen states, including California, New Jersey, Texas and Virginia have proposed but not yet enacted intrastate crowdfunding exemption statutes.
[12] Tom Sharbaugh, "Guest Post: Some States Have Sidestepped the JOBS Act's Burdensome Crowdfunding Rules," DandODiary.com, May 15, 2014.

crowdfunding – limited disclosure, internet distribution, small shareholders – could allow a fraud to go on racking up losses over a longer period before it's discovered."[13]

Insurers' reactions to the impending increase in crowdfunding campaigns have reportedly been mixed with some D&O insurers planning or already implementing specific exclusions in their policies to preclude coverage for crowdfunding-related exposures while others offer crowdfunding specific products. For example, Hartford Financial Services Group, Inc. offers "coverage related to private securities crowdfunding under the JOBS Act."[14] The specifics of this coverage were not disclosed.

Under currently issued D&O forms, several interesting coverage issues are raised by crowdfunding under the JOBS Act. Policies that exclude initial public offerings or coverage for violations of the Securities Acts of 1933 and 1934 may not exclude claims brought under the JOBS Act.[15] However, fraud exclusions and exclusions for restitution will likely apply in similar fashion to crowdfunding claims as to traditional securities' claims.

II. Bitcoin Virtual Currency

Dictionary definitions of the term "currency" typically refer to money issued or supported by a government.[16] However, in 2009, bitcoin was introduced as a virtual currency that was not tied to or supported by any government. Since its initial introduction, bitcoin's popularity has grown to recent reports of approximately 60,000 bitcoin transactions per day with recent acceptance of bitcoin currency by major retailers such as Overstock, EBay,[17] Dell and Expedia[18] as well as by political parties for campaign contributions and charities such as The United Way.[19] Although this daily transaction count pales in comparison to the 150 million transactions per day for Visa cards alone,[20] the growing popularity of bitcoin has sparked the interest of investors, consumers and retailers with some reports speculating that it will become the predominant global currency of the future.

A. How Bitcoin Works

Bitcoin involves an internet-based general ledger system that tracks transactions between computers running bitcoin software. Transactions are tracked and validated through a system of linked computers known as "miners." The miners are paid in bitcoins for linking

[13] Douglas Mcleod, "Crowd Funding Introduces D&O Risks to Small Companies," BusinessInsurance.com, Jan. 27, 2013. ["Mcleod article"]
[14] Kate Shepherd, Hartford Management Liability Policy Targets Small, Midsize Firms," BusinessInsurance.com, June 12, 2013.
[15] Mcleod article.
[16] *See e.g.* Merriam-Webster dictionary defining currency as "the money that a country uses" (http://www.merriam-webster.com/dictionary/currency).
[17] Greg Bensinger, "Pay for Uber in Bitcoin…Coming Soon," WSJ.com, Sept. 8, 2014.
[18] Paul Vigna and Michael J. Casey, "BitBeat: Bitcoin Accepted Here; Dollars, Not So Much," WSJ.com, August 22, 2014.
[19] Paul Vigna and Michael J. Casey, "BitBeat: United Way Adds Bitcoin as Conduit for Donations," WSJ.com, September 15, 2014.
[20] Deloitte LLP, "Virtual Currency: Bitcoin and Beyond, Part 2," CIO Journal, WSJ.com, June 25, 2014.

their computers to the global network and verifying the encrypted transactions.[21] There is no bank or government agency involved in the transaction or the verification. Bitcoins can be stored by the user in an online exchange or in off-line storage, such as a USB key or other offline specialty hardware, referred to as "cold storage."

Companies have emerged that serve as storage facilities for bitcoin, known as vaults or wallet services, and the security of such stored bitcoin holdings has been a source of concern for this new virtual currency. These companies also allow the purchase of bitcoin using cash or electronic funds transfer.

On 12 September 2014, the first regulated platform for trading bitcoin derivatives began operating after the United States Commodity Futures Trading Commission issued no objections to a proposal for a swap execution facility proposed by New Jersey-based TeraExchange LLC.[22] Christian Martin, CEO and co-founder of TeraExchange said in an issued statement that "[r]egulated bitcoin swap trading provides institutional clients with a more efficient and confident way to hedge and trade."[23] The facility reportedly "established a price index that will create a bitcoin spot price based on data from at least six bitcoin exchanges." TeraExchange, LLC has also reportedly lined up 50 corporate clients to participate in the facility.[24]

An Electronically Traded Fund to be established by the Winklevoss twins, named Winklevoss Bitcoin Trust, is currently under an extended review period by the United States Securities and Exchange Commission.[25] A similar review was avoided by Bitcoin Investment Trust (referred to as "BIT"), operating since September 2013 as it is a private trust only open to accredited investors. BIT has invested capital of approximately $70 million, representing 1% of all outstanding bitcoin.[26]

B. New Currency, Old Scams

Invariably, new technologies do not prevent traditional claims; they merely affect the circumstances of their occurrence. Fraud, theft and deception crimes have certainly carried over to the bitcoin arena.

The most famous, and then infamous, bitcoin exchange was Tokyo-based Mt. Gox that launched in July 2010 and quickly became the most widely used bitcoin exchange.[27] The Mt. Gox exchange collapsed in early 2014 "following discovery of widespread security breaches, fraud and mismanagement."[28] The company reportedly filed for bankruptcy in Tokyo and reportedly lost 750,000 bitcoin belonging to its customers and 100,000 of its own.[29] Only

[21] Toph Tucker and Allison McCann, "Interactive Demonstration: This is How You Mine Some Bitcoin," Businessweek.com, January 13, 2014.
[22] Ed Beeson, "CFTC Gives Bitcoin a Boost as First Swap Platform Approved," Law360.com, Sept. 12, 2014.
[23] *Id.*
[24] *Id.*
[25] Rob Curran, "With a Bitcoin EFT, Risk Isn't Virtual," WSJ.com, Sept. 7, 2014.
[26] *Id.*
[27] Deloitte LLP, "Virtual Currency: Bitcoin and Beyond, Part 2," CIO Journal, WSJ.com, June 25, 2014.
[28] *Id.*
[29] Andrew Harris, "Mt. Gox Bitcoin Exchange Sued for 'Misappropriation,'"Bloomberg.com, Mar. 1, 2014.

approximately 200,000 of these lost bitcoins have been recovered.[30] In February 2014, Gregory Greene, a customer of Mt. Gox, filed a class action in Illinois federal district court against Mt. Gox and its owners. The proposed class action encompassed U.S. customers who paid to trade on the Mt. Gox exchange and those who had bitcoin or hard currency stored on the exchange on February 7, 2014 when a withdraw freeze was implemented.[31]

Bitcoin maintains a reputation as the currency of choice for drug dealers and money launderers and has been recently identified by the International Organization for Economic Cooperation and Development as playing a part in tax evasion and illicit tobacco transactions.[32] In October 2013, U.S. federal authorities shut down a website known as Silk Road, a site used for anonymous drug dealing, gun sales, contract murders and like, that traded only in bitcoin.[33] Silk Road's owner Ross William Ulbricht, known as "Dread Pirate Roberts" was also arrested and is awaiting trial in November 2014. The Silk Road website was subsequently restarted by separate individuals under the name Silk Road 2.0. This site was subsequently hacked, resulting in loss of $2.7 million in bitcoins.

On August 11, 2014, the United States Consumer Financial Protection Bureau issued a warning about bitcoin, XRP, Dogecoin and similar virtual currencies.[34] The agency also established a database to collect complaints concerning "problematic companies" that may be become the focus of enforcement actions.[35] The New York State Department of Financial Services is proposing a "BitLicense" to regulate firms accepting bitcoin and other virtual currencies.[36] The regulation would require licensing and that the company hold the same amount of virtual currency that they owe customers."[37]

C. Insurance for Bitcoin Losses

Not surprisingly, the loss events discussed above have led to a market for insurance coverage against losses from bitcoin thefts to the consumer, the vendor and the bitcoin vault companies. Elliptic Vault was the first to announce in January 2014 that it had reached a deal with Lloyd's to insure its customers' bitcoin storage in Elliptic's cold storage.[38] The details of the coverage and the per-claim limits were not disclosed but it was reported that claims would be paid in British pounds rather than bitcoin.[39] Later this year, the Lloyd's deal reportedly fell through and Great American Insurance Group's fidelity/crime division now reportedly offers coverage to Elliptic's customers.[40]

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[30] Takashi Mochizuki and Eleanor Warnock, "Mt. Gox Finds 200,000 Missing Bitcoins," WSJ.com, Mar. 20, 2014.
[31] Michael J. Case, "Man Sues Over Lost Billions," WSJ.com, Feb. 28, 2014.
[32] Ama Sarfo, "OECD Eyes Bitcoin, Tobacco Smuggling as Tax Crime Issues," Law360.com, September 20, 2014.
[33] Emily Flitter, "FBI Shuts Alleged Online Drug Marketplace, Silk Road," Reuters.com, Oct. 2, 2013.
[34] Alan Zibel, "Five Questions About the Bitcoin Crackdown," WSJ.com, August 12, 2014.
[35] *Id.*
[36] Melissa Hillebrand, "Insurers Now Offer Coverage for Virtual Currencies, N.Y. State Proposes Bitcoin Regulations," PropertyCasualty360.com, Jul. 17, 2014.
[37] *Id.*
[38] Joe Adler, "Bitcoin Backers Seek FDIC-Style Insurance," American Banker.com, Jan 22, 2014.
[39] *Id.*
[40] "Great American to Insure Bitcoin after Lloyd's Deal Collapses," Intelligent Insurer.com, Sept. 20, 2014.

Elliptic's competitor in the bitcoin storage industry, Coinbase, reported this summer that its customers have been insured for almost a year against theft and hacking.[41] Its coverage was brokered through AON with S&P rated A+ or better insurance companies and reportedly limits the average value of bit coins held in online storage for additional security. The Wall Street Journal projects that Coinbase's coverage does not extend to bitcoins in cold storage, estimated at 97% of its total holdings.[42]

By contrast to Coinbase, bitcoin wallet service Xapo reportedly self-insures its clients' bitcoin holdings through its captive Meridian Global Insurance Limited. Xapo also insures all bitcoin holdings rather than the 3% of online bitcoin holdings insured by Coinbase.[43]

Bitcoin vault company Circle Internet Financial reports that similar to Xapo, it insures both online and physical cold storage of bitcoin holdings; and similar to Coinbase it insures with AM Best A++ and S&P AA rated insurance companies.[44]

Startup insurer, Inscrypto, advertises itself as the Federal Deposit Insurance Corporation of bitcoin. According to Inscrypto's website, "[w]e are like Bitcoin's privately funded, decentralized version of the FDIC. We help you reduce or completely eliminate the risks of owning Bitcoin."[45] Inscrypto's LinkedIn page indicates that it has only a single employee. The viability of this new insurer is unknown.

Insurance coverage for bitcoin claims is clearly in its infancy and whether additional products are developed for retailers and consumers will be dependent on the success of bitcoin as an alternative to hard currency and credit cards.

D. Issue Spotting in Bitcoin Claims

On the liability side, defenses will likely focus on issues of negligence in failing to secure customers' bitcoin holdings where vault companies are hacked or physically robbed from cold storage. Civil fraud and deception claims are also possible where bitcoins are entrusted to third parties. Issues of proof of amounts lost and valuation of bitcoins at the time of theft will also predominate and will be difficult given that bitcoin is similar to cash in its lack of a paper trail. Some commentators have suggested that bitcoin use may violate the U.S. Stamp Payment Act of 1862 that makes it a crime to issue circulate or pay out:

> any note, check, memorandum, token or other obligation for a less sum than $1, intended to circulate as money or to be received or used in lieu of lawful money of the United States, shall be fined under this title or imprisoned not more than six months, or both.

According to a Congressional Research Service report, bitcoin is unlikely to violate this law as the report states "[i]t does not seem likely that a currency that has no physicality would be held

[41] Michael J. Case and Paul Vigna, "BitBeat: Coinbase Stares a Row Over Wallet Insurance," WSJ.com, Aug. 28, 2014.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] Inscrypto Website, Go.inscrypto.com, accessed Sept. 21, 2014.

to be covered by this statute even though it circulates on the internet on a worldwide basis and is used for some payments of less than $1…."[46] Similarly, the report finds that the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693 et seq., that establishes a framework for transfers of money electronically would not apply to bitcoin transactions as they do not involve a depository institution.[47]However, the Department of the Treasury's Financial Crimes Enforcement Network ("FINCEN") issued interpretative guidance on 18 March 2013 requiring bitcoin exchanges to register as money services businesses under the Bank Secrecy Act.[48] Additionally, investments in bitcoins may be deemed securities and regulated by the SEC.[49]

On the coverage side, bitcoin claims may be brought against specialty products designed to provide limited or broad bitcoin loss coverage or may involve D&O or errors and omission coverage issued to bitcoin vault companies. Traditional coverage defenses in bitcoin claims may include personal profit exclusions and intentional acts exclusions in the civil fraud cases.

III. Drones

Drones are the common name for small, unmanned aircraft systems that were originally used by the military, but have been adapted to commercial uses. Drones have made recent U.S. headlines as potential delivery vehicles for Amazon and UPS.[50] They are also being used by smaller businesses and hobbyists. Drones are remote-controlled and capable of carrying "high-powered cameras, infrared sensors, facial-recognition technology and license plate readers."[51] The United States Federal Aviation Administration ("FAA") has reportedly allocated $63.4 billion to modernize U.S. air traffic control systems to accommodate drone traffic and the FAA estimates that approximately 7,500 commercial drones could be viable in five years.[52] In June, 2014, the FAA approved BP's use of drones to survey pipelines, roads and equipment in Prudhoe Bay in Alaska.[53] This is the first approved commercial drone use in the U.S.[54]

Liability issues stemming from use of drones are expected to focus on bodily injuries from drone crashes and privacy issues as businesses and individuals collect photos and other information flying over private property. Products claims against drone manufacturers for defective products and breach of warranty are also likely as the use of drones becomes more common.[55]

The demand for drone-specific insurance policies covering both liability and first party property claims will increase as the use of drones becomes more widespread. Such policies

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[46] Craig K. Elwell, M. Maureen Murphy, Michael V. Seitzinger, "Bitcoin: Questions, Answers, and Analysis of Legal Issues," Congressional Research Service, www.crs.gov., July 15, 2014, p. 12.
[47] *Id.* at 13.
[48] *Id.* at 14.
[49] *Id.* at 15.
[50] Jonathan Randles, "Amazon Seeks FCC's Blessing on Drone Test Flights," Law360.com, July 11, 2014.
[51] Vikki Stone, "Insurance Coverage for Commercial Drones: Sky's the Limit," PropertyCasualty360.com, Jan. 15, 2014.
[52] *Id.*
[53] "BP Allowed Commercial Drones by US Regulators in Unprecedented Decision," TheGuardian.com, June 10, 2014.
[54] *Id.*
[55] Erin Coe, "Commercial Drones Herald Product Liability, Privacy Suits," Law360.com, Jan 16, 2014.

will likely be issued by commercial aircraft insurers. We also anticipate that insurers will seek to include specific drone exclusions in general liability policies to avoid any ambiguity as to the application of such policies to drone-related exposures.

IV. Self-Driving Cars

By all reports, the future is now and driverless cars are only a few years away. Google's driverless car has reportedly logged over 700,000 test hours on public roads. Tesla's CEO Elon Musk said recently "the technology to make a fully autonomous car will be ready in five or six years, and the result will be vehicles far less likely to harm occupants and others on the road."[56] In September 2014, Audi was the first company to obtain one of California's new autonomous vehicle driving permits.[57] As early as 2016, Cadillac will be introducing a hands-free cruise control feature that will provide some degree of autonomous driving.[58] Mercedes' S-Class currently has 70% autonomous driving.[59]

The fully autonomous car is close at hand and significant issues remain as to liability concerning such cars. For example, if a driver does not install required software updates, will a product claim still exist against the car's manufacturer? Will the inaccuracy of maps causing the car to run through a red light or fail to stop at a stop sign create liability for the GPS data providers and their programmers? Consumers also worry about the possibility for hacking of the GPS and driving systems in such cars as computerized high-end cars are being increasingly stolen by hacking. The possibility also exists that hackers could bring traffic to a standstill by a global hacking of autonomous cars. The U.S. National Highway Traffic Safety Administration has reportedly warned states not to allow fully self-driving cars while it conducts a safety study expected to be completed in 2017.

On the insurance side, autonomous cars are touted as potentially significantly reducing the number of auto accidents and resulting exposure to insurers. For the present time, under California's new regulations, autonomous cars testing on public roads must have at least $5 million in insurance for bodily injury or property damage.[60] This high coverage requirement reflects the still-uncertain nature of the safety of these vehicles. It remains unknown whether the claim costs will be more significant as the cost to repair these cars will likely be higher and injuries, when they occur, may be more severe. How the insurers will price policies when the loss data is not yet developed will remain a challenge for insurers in this upcoming driverless car scenario. Traditional products liability coverage issues will also be implicated by accidents and inevitable recalls in this new product line.

[56] Mike Ramsey, "Tesla CEO Musk Sees Fully Autonomous Car Ready in Five or Six Years," WSJ.com, Sept. 17, 2014.
[57] Chris Bruce, "Audi Scores first CA Autonomous Car Permit," Autoblog.com, Sept. 17, 2014.
[58] Matthew Rocco, "Self-Driving Cadillac Brings Industry Closer to Autonomous Car," Foxbusiness.com, Sept. 8, 2014.
[59] Gordon Crovitz, "The Feds Stall Self-Driving Cars," WSJ.com, Aug. 24, 2014.
[60] *Id.*

V. Food Labeling Claims: The Supreme Court's Decision in *Pom Wonderful*; New USFDA-Mandated Food Labels for Genetically Modified Foods, Nutrition and Gluten-Free Products

While food-related claims are not "new" in any sense of the word, recent years have seen increased liabilities in food mislabeling in new areas. Each year brings increased focus on potential health impacts and labeling of foods containing genetically modified organisms ("GMOs") and this year, the United States Food and Drug Administration ("FDA") implemented new regulations concerning "gluten free" claims. The Supreme Court also addressed who can bring a mislabeling claim, holding that competitors were not precluded by the FDA's regulatory scheme from pursuing mislabeling claims that injure them as a competitor. This could open up a new wave of mislabeling claims as companies use these claims as an additional means of capturing market share.

A. Genetically Modified Foods

Genetically modified foods have been in commercial distribution since the late 1990's and are reportedly contained in 80% of packaged foods.[61] GMOs have continued to top industry headlines for a number of years with consumer groups and states pressing for labeling, limitations, or outright prohibition of GMO-containing products.[62] Many food manufacturers, such as General Mills, Post Holdings, Chipotle and Ben and Jerry's ice cream have voluntarily cut GMO ingredients from many of their products in response to consumer pressures.[63] In May 2014, Vermont passed a GMO-labeling bill and in November 2014, Oregon and Colorado will hold referendum votes on GMO labeling.[64] California's referendum for GMO labeling was narrowly defeated in in 2012.[65]

B. Regulation of Gluten-Free Labeling

Sales of gluten-free foods have increased dramatically in the last few years as Americans suffering from the auto-immune disorder celiac disease and even non-celiac consumers believing they have a reaction to gluten have turned to gluten free foods.[66] Sales of gluten-free foods are up 16% to $23.34 billion in the past year.[67] Under newly applicable FDA regulations, products must contain less than 20 parts per million gluten to be labeled as "gluten free." It is believed that the new rule will protect manufacturers from liability suits as previous claims for mislabeling products as "gluten free" could rely on a determination that very small amounts of

[61] Annie Gasparro, "The GMO Fight Ripples Down the Food Chain; Facing Consumer Pressure, More Firms are Jettisoning GMOs from their Foods," WSJ.com, Aug. 7, 2014. [herafater "Gasparro article"]
[62] Jacob Bunge, "Monsanto, Under Attack for GMOs, Has a New Defender," WSJ.com, Sept. 4, 2014.
[63] *Id.;* Kate Bachelder, "Meet. Mr. Frankenfood," WSJ.com, Aug. 22, 2014. [hereafter "Bachelder article"]; Gasparro article.
[64] Bachelder article.
[65] Gasparro article.
[66] Annie Gasparro, "Call Your Food Gluten Free? As of Today, There are Rules," WSJ.com, Aug. 5, 2014; Kat Greene, "FDA Launches Final Gluten-Free Labeling Rule," Law360.com, Aug. 4, 2014.
[67] *Id.*

gluten were still contained in the product.[68] Current technology cannot accurately detect levels below 20 ppm, but as technology improves, the new regulations will protect manufacturers form mislabeling claims where trace amounts of gluten remain in the product. The FDA has also taken the position that this new definition of "gluten-free" will preempt any state definitions in effect, instead imposing a national standard that can be relied on by the consumers of such products.[69] There have been few gluten-free claims since manufacturers began adhering to the proposed FDA rule of 20 ppm that was announced in 2007.[70]

C. "All Natural"?

A number of claims have arisen concerning the meaning of "all natural" and companies and consumers have received no guidance on this issue from the FDA. In fact, according to reports:

> "[t]he Food and Drug Administration has no definition, says a spokeswoman, but rather a long-standing policy that it considers "natural" to mean that "nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food." The agency's website says it is "difficult to define a food product that is 'natural' because the food has probably been processed and is no longer the product of the earth."[71]

A "food labeling modernization" bill, introduced in September 2013 in Congress, looks to force the FDA to establish a single, standard nutrition labeling system, including new guidelines for the use of "natural." The bill was referred to the Congressional Subcommittee on Health, but has not progressed further. In response to the many suits concerning "all natural" labeling claims, companies have begun removing this designation from their packaging.[72]

D. The U.S. Supreme Court Decision in *Pom Wonderful*

The most significant development in the area of food mislabeling claims was the U.S. Supreme Court's decision in *POM Wonderful, LLC v Coca-Cola Co.*[73] In *Pom Wonderful*, the Supreme Court opened the door to allow companies to bring direct mislabeling claims against their competitors. The plaintiff, Pom Wonderful, manufactured a blueberry pomegranate juice blend. It filed suit against its competitor the Coca Cola Company ("Coke") for the latter's mislabeling of its Minute Maid pomegranate-blueberry juice blend. Coke's product label displayed the words "pomegranate" and "blueberry" in large-type capital letters, but contained

[68] Greg Ryan, "FDA's Gluten-Free Rule Will Help Food Makers Avoid Liability," Law360.com, Aug. 16, 2013.
[69] *Id.*
[70] *Id.*
[71] Mike Esterl, "Some Food Companies Ditch 'Natural' Label", WSJ.com, Nov 7, 2013.
[72] *Id.*
[73] *POM Wonderful, LLC v Coca-Cola Co.*, 134 S.Ct. 2228 (June 12, 2014).

only .2% blueberry juice and .3% pomegranate juice.[74] The juice contained .1% raspberry juice and the remaining 99.4% of the juice blend was inexpensive apple and grape juices. Pom Wonderful's suit against Coke was brought pursuant to the Lanham Act[75] that permits competitors to sue one another for unfair competition arising from false or misleading product descriptions.[76]

Coke argued, and the Ninth Circuit Court of Appeals agreed, that application of the Lanham Act was precluded by the Food, Drug and Cosmetic Act ("FDCA") and the FDA's implementing regulations that specifically regulate the labeling of juice blend beverages. Essentially Coke argued that only the FDA, not Pom Wonderful, could bring a claim against Coke for mislabeling of its juice blend. The FDA also argued in an *amicus curiae* brief that Pom Wonderful's claims are precluded "to the extent that the FDCA or FDA regulations specifically require or authorize the challenged aspects of [the] label."[77] Essentially, the FDA argued that Pom Wonderful could not maintain its Lanham Act claim to challenge the name of the Coke product, but it could maintain the claim as to other aspects of the label.[78]

The Supreme Court rejected Coke's and the FDA's claims and held that the Lanham Act claim is not precluded by the FDCA, holding:

> nothing in the text, history, or structure of the FDCA or the Lanham Act shows the congressional purpose or design to forbid these suits. Quite to the contrary, the FDCA and the Lanham Act complement each other in the federal regulation of misleading food and beverage labels. Competitors, in their own interest, may bring Lanham Act claims like POM's that challenge food and beverage labels that are regulated by the FDCA.[79]

The Court further held the FDA, whose regulations implemented only the FDCA, not the Lanham Act, could not "reorder federal statutory rights without congressional authorization."[80]

Following the *Pom Wonderful* decision, product manufacturers have an incentive to bring suits against their competitors to challenge false labeling as a means to preserve or increase their own market share in a given market. It has only been a few months since this decision was handed down and its full effect remains to be seen. Questions remain as to whether competitors will be able to show they suffered lost market share and profits under their Lanham Act claims as a result of the claimed mislabeling.

Labeling claims in various areas, such as "gluten-free," "GMO-free," and "all natural" will likely play out in the courts in coming months and years. The recent FDA regulation setting the 20 ppm level for the meaning of "gluten-free" may result in fewer suits as manufacturers have a bright-line rule for the "gluten free" advertising. Future labeling regulations regarding

[74] *Id.* at 2233.
[75] 15 U.S.C. § 1125
[76] *Pom Wonderful,* 134 S.Ct. at 2233.
[77] *Id.* at 2240.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 2241.

GMO contents and the meaning of "all natural" may provide further certainty for consumers and producers.

VI. Ride-Sharing

So-called "transportation network companies" such as Uber, Lyft and Sidecar have been featured repeatedly in the press in recent months as cities grapple with whether to allow these services that connect individual automobile drivers with persons seeking rides. Drivers and prospective riders download a mobile app that connects them and calculates a price based on the distance of the ride. Traditional taxi drivers who have paid for their licenses and see their business impacted by these ad hoc cars-for-hire have been understandably active in their opposition of such ride sharing businesses. In June 2014 the state of Virginia issued a cease and desist order against Uber and Lyft and Pennsylvania has been imposing daily fines of $1,000 on both companies for ongoing operations in Pittsburgh, Pennsylvania.[81]

The availability of insurance for ride-sharing has featured prominently in the debate over allowing ride sharing companies to operate in various cities. Opponents cite the lack of adequate insurance as a basis to prohibit ride-sharing altogether. Uber reportedly provides $1 million in primary liability coverage for passengers while they are being transported. However, opponents cite to the lack of insurance during the period that an Uber or other ride share car has the app open and is available for passengers, but is not currently transporting someone. This criticism stems from a New Year's Day accident in which an Uber driver struck and killed a child in San Francisco.[82] The driver was not currently transporting anyone, but the app was open and the driver was available for passengers. Lyft reportedly provides secondary coverage during this gap period with the driver's personal insurance providing primary coverage. The Insurance Federation of Pennsylvania, Inc. advised the Pennsylvania Public Utilities Commission that "Lyft only offers contingent coverage during this [gap] period, such that before the company's insurance will cover a claim, the driver would have to go through his or her personal insurer – emphasizing that this process will create uncertainty, confusion and delay while the contingency issues get resolved."[83]

On September 17, 2014 California enacted legislation requiring all ride sharing drivers to carry at least $50,000 per person and $100,000 per occurrence of death and personal injury coverage during the period they are "at work" via the apps, i.e. from the time the app is turned on.[84] The regulations also reportedly create a "personal insurance firewall" such that the driver's personal automobile policy no longer "subsidize[s] the commercial activity of transportation network companies."[85] This legislation will presumably settle the issue of the contingency of coverage during the period the driver is available for passengers but is not yet transporting them.

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[81] Kim Lyons, "Growing Opposition to Ride Share Companies Goes Global," Pittsburgh Post-Gazette.com, June 12, 2014.
[82] Kat Greene, "Uber, Lyft Face New Insurance Regs as Calif. Gov. Signs Law," Law360.com, Sept. 18, 2014. ["Greene article"]
[83] Dan Packel, "Lyft, Uber Ridesharing Bids Fall Short, Pa. Insurers Say," Law360.com, Sept. 16, 2014.
[84] Greene article.
[85] *Id.*

The various states in the U.S. are grappling with ways to allow ridesharing but to keep passengers safe through required education and minimum insurance requirements. Specialized products may need to be developed to address the issues and circumstances that are unique to this emerging transportation system.

VII. Conclusions

No one can predict with 100% accuracy what will be the next big claim type. The best we can do is to keep abreast of new technologies and trends to be prepared when the claims develop. In this paper, we have identified the new products such as bitcoin, drones and self-driving cars that we may see in coming years as a basis for new claim types. The number, if not the type, of claims may also increase as crowdfunding has opened up the possibility of significantly more D&O claims across a greater number of smaller insureds. Food labeling claims continue, but now concern new areas such as genetically modified foods and gluten. Insurers will find new marketing opportunities for these new products and industry segments and the claims will likely follow.