Key Insurance Decisions, Trends, and Developments in 2024 and a Look Ahead to 2025 [i]

Scott M. Seaman
312.704.3699 | sseaman@hinshawlaw.com

Pedro E. Hernandez
305.428.5043 | phernandez@hinshawlaw.com

Lisa M. Roccanova
312.704.3955 | lroccanova@hinshawlaw.com

hinshawlaw.com

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Introduction

As 2025 rapidly approaches, we look back at some of the key decisions, trends, and developments impacting the U.S. insurance industry in 2024 and provide a forecast of potential trends and developments for 2025.

Civil lawsuits and claims in the U.S. continued to be fueled by social inflation, a record number of nuclear and thermonuclear awards, and large settlements in 2024, even as economic inflation has cooled to some extent. Considerable attention continues to be devoted to cyber coverage and the systemic challenges associated with artificial intelligence (AI) and cyberattacks.

Insurers and their policyholders continue to be challenged by a wide range of risks and claims, including climate and weather-related claims, mass tort claims and policyholder bankruptcies, COVID-19 business interruption claims, cyber and privacy, PFAS, traditional environmental and asbestos claims, opioids, lead paint, construction defect, sexual misconduct claims, and D&O/securities claims, which dominated claims and litigation activities and court decisions. An unusually high number of U.S. Supreme Court cases impacting insurers have been rendered in 2023 and 2024.

Part I: Overriding Trends and Dynamics Impacting Insurers

Insurers have been impacted by some overriding trends and dynamics that transcend any particular claim type or line of coverage. Social inflation and nuclear verdicts have amped up after the pandemic-related court closures. In recent years, insurers have had to contend with primacy placed on environmental, social, and governance (ESG) considerations as businesses in general and in connection with underwriting, claims handling, and investment activities.

They have had to contend with the Biden Administration's "whole of government" approach coupled with state and international developments. Insurers are expected to face a climate of decreased emphases on ESG and diversity, equity, and inclusion (DEI) attributable to the anti-ESG movement, U.S. Supreme Court jurisprudence, and an expected retraction of focus and regulation by the incoming Trump Administration.

A. Social Inflation

Although economic inflation has dropped from a 40-year high of 9.1 percent in 2022 to approximately 2.6 percent in 2024, it remains more than double the rate of 2020.[ii] Social inflation continues to run rampant in the United States, where a world-leading 40 million lawsuits are filed per year.[iii] The tort system costs per household range from in excess of US $2,000 to $5,500, depending upon the state.[iv] According to one report, nuclear verdicts have increased by 27 percent, and thermonuclear verdicts have reached record numbers.

Combating social inflation remains challenging in a legal landscape fraught with improvident legal and evidentiary rulings by judges coupled with nuclear and thermonuclear verdicts by juries. Traditional rules of evidence and jury instructions have been ineffective in tapering the anti-corporate proclivities of younger jurors and in addressing the challenges presented in this instant information age. Third-party litigation funding continues to scourge defendants. The defense bar has pushed for courts to require disclosure of litigation funding. At best, this is a partial fix that has been met with mixed success.

A 2024 Louisiana law generally precludes litigation funders from controlling litigation or settlement and makes litigation financing contracts discoverable in civil cases. In addition, the law requires disclosure of litigation funding entities from "countries of concern" (including Russia, China, and Iran) and for a copy of such funding agreements to be provided to the state's attorney general. Influence and meddling in the U.S. civil justice system have been a growing concern.

Defense lawyers have done a better job in countering plaintiff's reptilian tactics and anchoring damages in recent years, but defendants have not been effective in diminishing the effects of the US $1.5 billion annual spend by the plaintiff's bar in advertising to recruit plaintiffs and pre-condition future jurors to render large verdicts. The myopic focus of some insurers on reducing defense expenditures continues to contribute to larger indemnity payments. Little meaningful tort reform has been enacted across the United States in recent years, except for Florida, where the early results have been somewhat positive.

For a comprehensive review of social inflation, including the factors endemic in the U.S. civil justice system making it susceptible to social inflation, the societal trends fueling social inflation, the costs of social inflation, the impact of judicial rocket dockets, and countering and combating social inflation, *see* Scott M. Seaman, "Updated Social Inflation Survival Guide: The Dangerous Triple Barrel Threat of Social Inflation, Economic Inflation, and Greenflation in a Judicial Environment Swarming With Reptiles and Raining Nuclear Verdicts," (JD Supra May 2, 2023), available at https://www.jdsupra.com/legalnews/updated-social-inflation-survival-guide-2705745/. *See also* Scott M. Seaman & Jason R. Schulze, *Allocation Of Losses In Complex Insurance Coverage Claims* (12th Ed. Thomson Reuters 2024) at Chapters 19 and 20.

B. ESG/Sustainability

The Biden Administration and many states continued to advance ESG criteria on a "whole of government" basis. The U.S. Securities and Exchange Commission (SEC) issued its final climate-related disclosure rule in March, which is less onerous than the proposed rule due to receiving thousands of comments. The effective date has been deferred while numerous cases challenging the rule remain pending. SEC investment rules, which allow for (but do not require) fiduciaries to consider ESG factors, are now in effect.

In September, the SEC announced it was disbanding its Climate and ESG Task Force, but it has continued to investigate and penalize parties. One such example is Invesco Advisers, which received a US $17.5 million civil penalty for disseminating misleading statements about the percentage of company-wide assets under management that integrated ESG factors in investment decisions.[v]

Prior decisions by the U.S. Supreme Court in *West Virginia v EPA*[vi] (striking down a rule promulgated by the EPA to address carbon dioxide emissions), *Sackett v. EPA*[vii] (narrowing the federal government's authority to regulate bodies of water and upending a Biden administration rule), and *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*[viii] (striking down affirmative action admissions policies used by both Harvard and UNC, effectively barring the consideration of race as an independent factor in university admissions) have imposed some speed bumps on the ESG and DEI superhighways. The anti-ESG movement continues to have traction, particularly in states with Republican governors.

The first Trump Administration rolled back regulations substantially, but the Biden Administration responded by increasing the regulatory burden to a record level. In 2021, for example, the Biden Administration promulgated over 3,250 regulations in contrast to 81 laws passed by Congress, meaning agencies accounted for over 97 percent of new laws adopted in the United States. It has

been estimated that regulatory compliance and the economic impact of regulation exceed US $1.9 trillion annually.

A trilogy of cases decided by the U.S. Supreme Court in 2024 limited the power of administrative agencies that includes and extends well beyond ESG and DEI:

I. In *Loper Bright v. Raimondo,*[ix] the Court eliminated *Chevron* deference, which sometimes required courts to defer to the interpretations of statutes by the agencies administering them, even when a reviewing court reads the statute differently.

II. In *SEC v. Jarkesy*,[x] the Court required administrative agencies to adjudicate matters involving the imposition of civil fines in federal court as opposed to "in-house."

III. In *Corner Post v. Board of Governors of the Federal Reserve System,*[xi] the Court held that the default six-year statute of limitations for challenging federal agency actions begins to run when the plaintiff is injured by a final agency action (*not* when the final agency action is published), allowing decades-old regulations to be challenged.

Notwithstanding these decisions, government agencies remain immensely powerful and enjoy significant advantages over regulated entities. However, companies challenging regulatory action may prevail in a higher percentage of cases than the 30 percent historical track record.[xii]

For a comprehensive review of ESG, *see* Scott M. Seaman's and Jason R. Schulze's *Allocation Of Losses In Complex Insurance Coverage Claims* (12th Ed. Thomson Reuters 2024) at Chapter 21.

C. Artificial Intelligence

Insurers are using AI in a variety of ways with respect to underwriting, pricing, fraud investigation, claims evaluation and handling, and other activities. However, this is not without risk, as AI and algorithms may create or amplify biases, resulting in discrimination toward members of protected classes and infringement on intellectual property rights.

AI systems may malfunction and create or magnify errors resulting in financial losses, property damage, bodily injury, personal injury, and advertising injury (including appropriation of another's name or likeness, unreasonable publicity, portrayal in a false light, defamation, violation of privacy rights, etc.). AI claims may implicate a variety of insurance coverages, including general liability (particularly Coverage B), cyber, errors and omissions, D&O, crime, intellectual property, product liability, employment practices, and media liability policies.

The New York State Department of Financial Services (NYSDFS) adopted a ***final*** circular about the "Use of Artificial Intelligence Systems and External Consumer Data and Information Sources in Insurance Underwriting and Pricing," signaling the department's enforcement priorities.[xiii] The NYSDFS circular follows the Colorado Division of Insurance release of its Algorithm and Predictive Model Governance Regulation (AI regulation) governing life insurance;[xiv] the California Insurance Commissioner's Bulletin 2022-5 on Allegations of Racial and Unfair Discrimination in Marketing, Rating, Underwriting and Claims Practice by the Insurance Industry;[xv] and the Texas Department of Insurance Commissioner's Bulletin #B-0036-20 entitled "Insurer's use of third-party data."[xvi] Additionally, fifteen states have adopted the NAIC Model Bulletin entitled "Use of Artificial Intelligence Systems by Insurers," issued in December 2023.[xvii]

In November 2024, the California Privacy Protection Agency issued a notice providing that the public comment period for its latest rulemaking package proposing expansive draft rules regulating technologies fueled by artificial intelligence will run through January 14, 2025, with a public hearing the next day. The

proposed rulemaking package includes updates to existing regulations and proposed regulations for cybersecurity audits, risk assessments, automated decision-making technology, and insurance companies.[xviii]

Part II: Claims Activity, Cases, and Developments

We examine specific insurance developments, cases, and claim types from 2024 below.

A. Climate Change and Weather-related Claims

The greatest impact that climate change has had on insurance claims has been its impact on the frequency and severity of weather events. California, Florida, and Louisiana have experienced the greatest impact on insurance availability and pricing due to weather-related events.

In the wake of several insurer insolvencies, Florida enacted two statutes interposing litigation reform impacting first-party claims, particularly with respect to claims involving roof damage,[xix] and creating a US $2 billion reinsurance program.[xx] California regulators are working to afford insurers greater latitude in setting premiums after at least three major insurers announced last year that they would stop or limit writing homeowner’s policies in California.[xxi] The hurricane activity in 2024 is expected to yield a large number of claims.

The Hawaii Supreme Court determined that insurers had no duty to defend Aloha Petroleum in two climate-change-related cases.[xxii] The court ruled in favor of the policyholder on the occurrence issue, determining that an "accident" includes a policyholder’s reckless conduct. It ruled in favor of the insurers on the pollution exclusion issue, determining greenhouse gases are "pollutants" as defined in the policies’ pollution exclusions even while applying pro-policyholder positions such as holding pollution exclusions only apply to "traditional" environmental pollution.

Despite all the climate change activities and underlying litigation, this represents only the second substantive U.S. decision on coverage for climate change or global warming claims and the first addressing the application of any pollution exclusion. Previously, in *AES Corp. v. Steadfast Ins. Co.*, the Virginia Supreme Court held that an insurer had no duty to defend against a lawsuit remarkably similar to the underlying action in *Aloha*.[xxiii] In *AES,* the court concluded that AES’ actions were not an "accident" because climate change was the "natural or probable consequence" of AES’ emissions. The difference in outcome reflects a difference in legal standards between Virginia’s "natural or probable consequences" standard and Hawaii’s "practically certain" test for determining whether there is an occurrence.

B. Bankruptcy Decisions Involving Mass Tort Liabilities

Numerous developments and decisions related to mass tort liabilities and coverage claims occurred in 2024, but we examine some developments in the context of policyholder bankruptcies below.

The U.S. Supreme Court ruled in *Truck Exchange v. Kaiser Gypsum C*o. that an insurer paying asbestos claims against a debtor in bankruptcy is a party in interest that must be afforded an opportunity to raise issues and participate in proceedings that may impact their interests.[xxiv] Previously, many courts denied insurers standing where a Chapter 11 plan of reorganization contained an "insurance neutrality" provision. As the Court properly recognized, such provisions are not a substitute for an insurer’s right to be heard.

In *Harrington v. Purdue Pharma,* the Court ruled that the United States Bankruptcy Code does not authorize a release and injunction as part of a plan of reorganization under Chapter 11 that effectively would have discharged claims against a non-debtor (members of the Sackler family) without the consent of affected claimants. As a result, the US $6 billion settlement of OxyContin opioid claims was invalid, notwithstanding that more than 95 percent of voting opioid claimants voted to support the plan. The decision has parties scrambling to find workarounds in non-asbestos mass tort bankruptcies and has some questioning the validity of consensual releases.

The U.S. Court of Appeals for the Third Circuit affirmed the dismissal of the second Chapter 11 case involving Johnson & Johnson's talc liabilities early in the year.[xxv] A couple of months later, J&J (through its Red River Talc unit) filed a third bankruptcy. This time, it filed in the Southern District of Texas and avoided efforts to force the action to proceed in New Jersey. It claims to have the support of approximately 83 percent of current asbestos claimants, more than the 75 percent needed for a bankruptcy judge to impose the settlement on all asbestos claimants. The matter is ongoing.[xxvi]

C. COVID-19 Business Interruption Litigation

Since the pandemic, approximately 2,400 COVID-19 business interruption coverage cases have been filed in state and federal courts across the United States. Approximately 476 cases have been filed as putative class actions, and 856 cases include allegations of bad faith. Although many cases remain pending, most have been resolved.[xxvii] No new actions are being filed as the suit limitations period in most first-party all-risk and BOP policies is one or two years.

Insurers have achieved overwhelming success in the litigation. In the last report, insurers prevailed at the trial court level in approximately 69 percent of the 236 rulings on motions to dismiss in state courts across the country and in more than 86 percent of the 740 rulings in federal courts. Over the past year, many have stopped tracking the motions. These victories have been obtained on the grounds that the claims do not involve "direct physical loss or damage" to property as required by the language contained in most U.S. first-party policies or based upon the application of virus or other exclusions. Insurers have prevailed in most summary judgment rulings and in most of the limited number of trials.

Insurers have prevailed before every U.S. Court of Appeals. In 2024, the courts of last resort of Alaska, California, New Jersey, and New York joined the courts of last resort in Connecticut, Delaware, Iowa, Louisiana, Massachusetts, Nevada, New Hampshire, Ohio, Oklahoma, South Carolina, Washington, and Wisconsin in ruling in favor of insurers. Policyholders' sole state high court victory was before the Vermont Supreme Court. Insurers have prevailed in most state intermediate appellate court decisions to date as well.[xxviii] Although policyholders may prevail in a small number of cases and jurisdictions, it is fair to declare that insurers have won the COVID-19 business interruption coverage war.

D. Cyber and Privacy

For the past 14 years, the United States has had the highest average costs for data breaches worldwide. Most reported coverage decisions involving cyber issues have been so-called silent cyber decisions – decisions under traditional general liability, first-party, and crime/fraud policies.

The intermediate New Jersey appeals court affirmed the trial court decision in *Merck & Co. v. Ace Am. Ins. Co.*, holding that the 2017 cyberattack from malware known as NotPetya carried out by hackers acting on Russia's behalf was not barred by the hostile/warlike action exclusion.[xxix] The New Jersey Supreme Court agreed to review the decision, but the case was settled before the court had an

opportunity to issue a decision. Insurers are adding updated War Exclusions, many of which are modeled on London forms.

In mid-2023, the U.S. Securities and Exchange Commission adopted rules requiring registrants to disclose material cybersecurity incidents they experience. Additionally, they must annually disclose material information regarding their cybersecurity risk management, strategy, and governance.[xxx]

The United States lacks an encompassing federal law comparable to the European Union's General Data Protection Regulations. Approximately 20 states have comprehensive privacy laws. There are sectoral laws in the states, such as NYSDFS Part 500 on cyber covering insurance companies and general cybersecurity laws in New York and Massachusetts. Laws in Texas, Montana, Florida, and Oregon went into effect in 2024, and more are scheduled to become effective in 2025. All 50 states have data breach notification laws.

On July 11, 2024, the New York State Department of Financial Services (NYSDFS) adopted a final circular about the "Use of Artificial Intelligence ("AI") Systems and External Consumer Data and Information Sources in Insurance Underwriting and Pricing." This Circular was issued as guidance to the insurance industry and imposes significant obligations on insurers using artificial intelligence systems or external consumer data and information sources for underwriting and pricing. The Circular signals NYSDFS' enforcement priorities.[xxxi] Insurers must comply with other AI-applicable legal requirements, which may vary by state.

The NYSDFS circular follows the Colorado Division of Insurance release of its Algorithm and Predictive Model Governance Regulation (AI regulation) governing life insurance; the California Insurance Commissioner's Bulletin 2022-5 on Allegations of Racial and Unfair Discrimination in Marketing, Rating, Underwriting and Claims Practice by the Insurance Industry; and the Texas Department of Insurance Commissioner's Bulletin #B-0036-20 entitled "Insurer's use of third-party data." An additional fifteen states have adopted the NAIC Model Bulletin entitled "Use of Artificial Intelligence Systems by Insurers," issued in December 2023. This means insurers regulated by these states must comply with the terms of the model bulletin under the state's authority to prevent unfair trade practices regarding their own developed models and third-party models.

The requirements of the model bulletin require: minimally instituting a robust, written AI governance structure documenting the use of AI systems through the insurance life cycle from product development through implementation to claim administration; ongoing monitoring and updating; ensuring that there are no discriminatory, excessive, or inadequate insurance rates through the use of AI and machine learning; adopting controls to mitigate AI risk of adverse consumer outcomes; and developing testing and verification of AI models. Insurers are required to complete due diligence on providers and have comprehensive contracts in place regarding data security, data usage, data sourcing, auditing, and testing. Insurers should expect that regulators may ask them to demonstrate compliance with the above requirements through any regulatory audit, investigation, examination, or enforcement action.

Numerous rulings have been rendered under the Illinois Biometric Privacy Act (BIPA), demonstrating the broad scope of the act. The amendments to BIPA in 2024 benefit businesses by allowing them to obtain written releases by electronic signature and limiting damages by restricting litigants to a single claim per section of the statute.[xxxii] The statutory damages remain harsh and still pose significant challenges for companies handling unauthorized biometric data.

Earlier coverage decisions were favorable to policyholders. However, insurers have prevailed in some recent Illinois Appellate Court decisions based on the "violation of law" exclusion and under cyber policies based upon the underlying class action not involving a loss resulting from a data breach, security failure, or extortion threat. The U.S. Court of Appeals for the Seventh Circuit held an exclusion for the access or

disclosure of confidential or personal information precluded coverage, but a statutory violation exclusion did not.[xxxiii]

E. PFAS/Forever Chemicals

Per- and polyfluoroalkyl substances (PFAS), often referred to as "forever chemicals," have been around since at least the 1940s and have been used in so many products they are said to be ubiquitous. Thousands of PFAS cases are pending across the United States, and numerous eye-opening settlements have been reached. Governmental regulators arrived late to the scene but are now locked and loaded in regulating PFAS chemicals. Numerous states are suing manufacturers and others for contaminating drinking water and damaging natural resources and are seeking to bar the use of these chemicals.

PFAS claims present numerous coverage issues. Several decisions have ruled on the applicability of various forms of pollution exclusions with mixed results. A variety of specific PFAS exclusions are included in policies of more recent vintage. Many claims potentially implicate legacy policies. In 2024, additional regulations were enacted, underlying claims and settlements continued, and additional coverage claims were initiated. For a detailed discussion of PFAS regulations and coverage issues and developments, *see* Scott M. Seaman & Gar Lauerman, "An Updated Primer on PFAS/Forever Chemical Claims: Regulation, Litigation, Large Losses, and Insurance Coverage Issues." (JD Supra November 15, 2024), available at https://www.jdsupra.com/legalnews/commentary-an-updated-primer-on-pfas-3830973/.

F. Traditional Environmental and Asbestos Claims

Notwithstanding the various emerging claim types, traditional asbestos and environmental claims continue to dominate, with over 1,300 Superfund cleanup sites and 22 percent of the U.S. population residing within three miles of them. Approximately US $1 billion from the Infrastructure Investment and Jobs Act was allocated to the cleanup of 49 Superfund sites. Claims-made policies and issues are more dominant in environmental claims today than decades ago. There have been several coverage decisions rendered recently, but none have changed the course of coverage litigation.

G. Opioids

The opioid epidemic costs the United States approximately US $1 trillion annually. Approximately 3,000 state and local government entities have been seeking to recover the costs of public services associated with opioids from drug manufacturers and distributors. Overall, policyholders have not fared well in seeking coverage under general liability policies – an approach utilized more recently.

In 2024, a Florida federal court held that insurers of Publix Super Markets were not required to defend the grocery chain in 60 lawsuits brought by public entities because the underlying suits seek economic loss, not damages "because of" bodily injury.[xxxiv] A Delaware trial court ruled that insurers were not required to defend CVS against 218 opioid-related suits brought by municipalities, third-party payors, and medical providers on the same grounds, relying on the 2022 ruling of the Delaware Supreme Court in Rite Aid.[xxxv]

H. Lead Paint

Coverage issues relating to the US $400 million plus lead paint abatement fund resulting from a long-pending case in California against three lead paint manufacturers have been subject to three separate coverage actions, with the insurers prevailing in California and the policyholder prevailing in New York. In the *Sherwin-Williams* case, the Ohio Supreme Court heard oral argument in October 2023, but the case remains undecided.

I. Construction Defect

There were a couple of cases of note in this commonly litigated area. The first is the Washington Supreme Court ruling that coverage for repairs to a condominium's roof components was available under the resulting loss exception to the policy's faulty workmanship exclusion.[xxxvi] The second is *Cornice & Rose International LLC v. Acuity*, where the Seventh Circuit, applying Illinois law, reversed the district court's decision in favor of the insurer that found faulty workmanship qualifies as an occurrence only if it damages something other than the project itself.

The Seventh Circuit noted that an intervening decision of the Illinois Supreme Court in *Acuity v. M/I Homes of Chicago, LLC*, 234 N.E.3d 97, reh'g denied (Jan. 22, 2024), overruled prior appellate court decisions and suggested the insurer owes the architectural firm a defense.

J. Sexual Misconduct Claims

A decision by an intermediate New York appellate court reversed the dismissal of a declaratory judgment action brought by Chubb against the Archdiocese of New York.[xxxvii] The court ruled that Chubb's complaint sufficiently alleges that recovery would fall outside the scope of its duties to defend and indemnify if the Archdiocese had knowledge of its employees' conduct or propensities. The insurers cited media reports, admissions by church leaders, investigations by 20 state attorneys general, and the underlying lawsuits themselves as evidence that the church "knew about the sexual abuse of minors, failed to stop it, covered it up, and then lied about it."

The appeals court found that Chubb's complaint also sufficiently pled a noncooperation defense. The insurer said it requested but did not receive information from the Archdiocese about its policies and practices concerning the handling of allegations of sexual abuse by clergy and its knowledge of the scope and pervasiveness of sexual abuse by clergy. The appeals court said a third Chubb claim based on the known loss doctrine was not viable.

In *Rockefeller University v. Aetna Casualty & Surety Co.*,[xxxviii] the intermediate appellate court affirmed the trial court's ruling that the policyholder stated a cause of action for breach of the implied covenant of good faith and fair dealing. The bad faith cause of action alleges the insurers frustrated the purpose of the policies at issue, including the failure to promptly resolve claims stemming from the 2019 Child Victims Act, ignoring plaintiff's requests for copies of decades-old policies, failing to issue coverage decisions, refusing to pay any settlement of the underlying claims, refusing to properly investigate the underlying claims, and pressuring plaintiff to discontinue this action.

The policyholder argues that defendant insurers' wait-and-see scheme placed great financial strain on it, resulting in the self-funding of over US $700 million in settlements and defense costs from the limited unrestricted portion of its endowment, lost investment opportunities and endowment income, additional debt, increased debt service costs, and attorney's fees to enforce plaintiff's rights in this action.

Additionally, the complaint sufficiently alleged facts demonstrating defendant insurers' gross disregard of plaintiff's interests as required to state a claim for breach of the implied covenant of good faith and fair dealing. The trial court also properly denied the insurers' motion to dismiss the cause of action for violation of the General Business Law § 349(a), which prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in the state."

The Court of Appeals for the Eighth Circuit affirmed a ruling that there was no coverage under an automobile policy for a claim that the plaintiff contracted a sexually transmittable disease from having sex in a car as it did not involve bodily injury arising out of the "ownership, maintenance, or use" of the automobile.[xxxix]

K. Exhaustion, Recoupment, and Defense Costs

The deterioration of California law on exhaustion continued with the California Supreme Court's decision in *Truck Ins. Exch. v. Kaiser Cement & Gypsum Corp.*[xl] The court reversed the Court of Appeals' decision to apply horizontal exhaustion due to the language within the "other insurance" clauses and held that an excess insurer owes an indemnity obligation to the insured as soon as the directly underlying primary policy has been exhausted, regardless of whether other primary policies for other policy periods have been exhausted.

The court found that the subject "other insurance" clauses did not speak to whether the insured must exhaust insurance with lower attachment points purchased for different policy periods. The Northern District of California upheld an anti-stacking provision that stated, "no additional limits or coverage will be available for the 'occurrence' or offense under any additional years" in *Lee v. State Farm Gen. Ins. Co.*[xli] The court found this provision, coupled with the definition of "occurrence," meant that injuries occurring across multiple years resulted in coverage for only the first year.

In *National Fire & Marine Ins. Co. v. Glencrest Healthcare & Rehabilitation Centre Ltd.*, the District Court for the Northern District of Illinois held that an insurer for an operator of a skilled nursing facility must cover the portion of a $225,000 wrongful death damages award exceeding a $100,000 self-insured retention even if the operator is insolvent and cannot pay the retention.[xlii] In *Pharmacia Corp. v. Arch Specialty Ins. Co.*, the court held that an excess D&O insurer had no coverage obligation because although the underlying insurers had paid their policy limits, they had not "admitted liability," as required by the excess policy language.[xliii]

In *Great American Fid. Ins. Co. v. Stout Risius Ross, Inc.* (predicting Michigan law), the court affirmed the district court's ruling that the insurer was entitled to recoup amounts paid for defense after the underlying complaint was amended to remove the common law misrepresentation claims, which were the only potentially covered claims, even though the policy contained no express recoupment provision.[xliv]

In *Murphy-Brown, LLC v. Ace American Ins. Co.,* [xlv] the court held that a policyholder's defense costs should be presumed reasonable where the insurer breached its duty to defend. This presumption may be rebutted by reference to various factors described in the North Carolina Rules of Professional Conduct that bear on the reasonableness of attorney fees, including:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

In *New York Marine and General Ins. Co. v. Heard, No. 23-3585* (9th Cir. Nov. 2024), the Ninth Circuit affirmed a ruling in favor of the insurer in its dispute with actress Amber Heard that she had no right to independent counsel in a defamation suit by her ex-husband, Johnny Depp. There was no conflict of interest between New York Marine and Heard. Cameron McEvoy's attorneys litigated the defamation case in Virginia, were members of the Virginia bar, and were bound by Virginia's, and not California's, ethics rules.

Unlike California, Virginia's ethics rules provide that a lawyer appointed by an insurer owes a duty only to the insured, not to the insurer. New York Marine fulfilled its duty to defend under the Policy. The district court correctly dismissed Heard's breach of an implied covenant claim as Heard has failed to plausibly allege facts establishing the withholding of a benefit due under the Policy.

L. D&O and Securities Law

D&O and securities litigation raged forward in 2024. Special purpose acquisition companies (SPAC)-related litigation continues with respect to both traditional securities and breach of fiduciary class action lawsuits. While greenwashing claims continue, AI-washing claims have been added to the mix of D&O activity. Plaintiffs have asserted dozens of pandemic-related securities actions, which have produced mixed results.

In Re: Overstock Securities Litigation, the Tenth Circuit held a fully disclosed corporate transaction cannot be "manipulative" under the Exchange Act as the conduct must be aimed at deceiving investors as to how other market participants have valued security.[xlvi] In *Ghio v. Liberty Ins. Underwriters*, the Connecticut trial court ruled there was no coverage for restitution.[xlvii] In *Jasper v. Chubb Nat'l Ins. Co.*, the California appellate court ruled that repayment of the defense costs by Chubb to Maxim did not constitute "restitutionary damages" or the return of something wrongfully received.[xlviii]

In *Bridlewood Estates Property Owners Assoc. v. State Farm General Ins. Co.*, (applying California law), the court determined coverage may be available, under a D&O policy's liability endorsement, to a community association for a claim arising from funds misdirected due to fraudulent payment instructions in a spoofed email. The court held that because the non-payment happened due to the association's treasurer's alleged negligence, the vendor's claim for non-payment arose out of the "wrongful acts" of the treasurer.[xlix]

Numerous decisions addressed policy exclusions. *In Re: Walker County Hospital Corporation* (applying Texas law), the court held that a claim by the hospital acting as debtor-in-possession against its former CEO was not barred by the insured vs. insured exclusion as it fell within the bankruptcy carve-back.[l] The Second Circuit ruled that the contractual liability exclusion barred coverage in *Paraco Gas Corp. v. Ironshore Indem., Inc.* (applying New York law).[li] In *Daileader v. Certain Underwriters at Lloyds London Syndicate 1861*, the court denied injunctive relief, holding the policyholder failed to show a likelihood of success on the merits because the policy's insolvency exclusion appeared to apply.[lii]

In *Towers Watson & Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, the court held the bump-up exclusion in a D&O policy precludes coverage for the US $90 million paid in settlement of claims relating

to Tower's January 2016 merger with Willis Group Holdings.[liii] The court determined the underlying actions alleged inadequate consideration. Towers Watson is "an entity" under the policy whose acquisition is covered by the exclusion; and the settlements represent an effective increase in consideration for the merger.

In *Beazley Ins. Co. v. Foster Poultry Farms* (applying California law),[liv] the court held that an antitrust exclusion in a D&O policy bars coverage for lawsuits alleging violations of antitrust, consumer protection, and unfair competition laws, as well as unjust enrichment. The court also determined payments by the policyholder in excess of amounts paid by the primary insurer pursuant to a settlement agreement with the policyholder did not erode the primary policy based upon the excess policy language.

InterMune v. Harkonen involved long-standing litigation regarding InterMune's CEO and board member, W. Scott Harkonen, M.D., who was convicted of wire fraud stemming from a 2002 press release that misrepresented clinical study results.[lv] After the exhaustion of appeals, the excess D&O insurers demanded repayment in arbitration proceedings based on a fraud exclusion barring coverage for loss arising from deliberate criminal or fraudulent acts if established by a final adjudication.

The arbitration panel concluded the insurers could recoup millions of dollars in defense costs advanced, which ultimately InterMune repaid to the insurers. InterMune's bylaws and indemnification agreements required all executives seeking advancement to repay any funds eventually determined to be not indemnifiable. Although the CEO was afforded indemnification to the fullest extent permitted by law, Section 145 of the Delaware General Corporation Law only empowers corporations to indemnify directors and officers if the indemnitee acted in good faith, not contrary to the best interests of the corporation, and where there was no reasonable cause to believe the person's conduct was unlawful.

The Court of Chancery held that Harkonen's felony fraud conviction foreclosed his ability to satisfy Section 145's standard of conduct requirement because bad faith was a subsidiary element of the crime. The court concluded the settlement, which the CEO himself agreed to, had been tailored to reflect only sums attributable to the wire fraud count. As such, indemnification was unavailable, and the court ordered Harkonen to repay the full amount advanced for the settlement.

M. Transactions Insurance

Transactions insurance, including representation and warranties, tax, and litigation insurance (judgment preservation insurance for plaintiffs and adverse judgment insurance for defendants) appears to be issued in a larger percentage of M&A transactions and in many large cases. M&A activity has been down recently, so the claims volume has been manageable, and only a few coverage decisions have been reported.

N. Reinsurance

Several decisions addressed arbitration and panel-related issues, but there was a paucity of substantive reinsurance decisions of general interest rendered in 2024.

Part III: A Look Ahead to 2025

All the claim types discussed above are expected to be subject to additional decisions in 2025, with more decisions on anticipated cyber-specific policies. Insurers are preparing for the economic and regulatory impact of the November 5, 2024, elections in the United States.

The election of President Trump, coupled with a Republican majority in the U.S. Senate and U.S. House of Representatives, has a significant impact on policyholder exposures and insurer claim experience, investment activities, and underwriting activities. The Senate majority is sufficient to facilitate the confirmation of many of President Trump's cabinet appointees but is too small to avoid the 60-vote filibuster needed to move legislation forward in the Senate absent some bipartisan support. The slim House majority will allow President Trump to avoid partisan investigations and to pass some legislation through reconciliation. President Trump will have to make more than 4,000 appointments throughout the federal government.

The second Trump Administration is expected to usher in a more business-friendly environment with the preservation of the 2017 tax cuts that are scheduled to expire, as well as additional tax cuts and credits. Insofar as this proves correct, insurers *qua* businesses may experience some direct tax savings and tax cuts targeted at businesses. When coupled with regulatory rollbacks, this could foster entrepreneurship and innovation, increasing the demand for business insurance.

It is not clear what impact a change in administration will have on social inflation. Civil justice reform was not part of the agenda of the first Trump administration and was not a focus of either President Trump or Vice President Harris during their campaigns. In any event, the most impactful tort reform measures require action at the state level.

Although a substantial decrease in the overall regulatory burden is expected, additional regulations may be promulgated in areas such as cyber and AI. Economists have a wide range of views concerning what to expect regarding economic inflation.

ESG is expected to be a target for substantial regulatory rollbacks and budget cuts. There likely will be revisions to and elimination of various ESG-focused rules promulgated by various agencies, including the climate disclosure rule. Green investment strategies may be impacted if the incoming Trump Administration reverses the Biden Administration's 2022 final rule that allows (but does not require) employee retirement plan advisers to consider ESG factors in their investment choices.

Regardless, companies will have to comply with international and state regulations. For example, the European Union's ESG disclosure requirements mandate U.S. based company compliance beginning in 2026. California also has a climate risk disclosure rule, and other states have ESG laws. In late September, the California climate bills became law and mandate large companies doing business in the state disclose their value chain emissions (something deleted in the final SEC rules) and report on climate-related financial risks.

Importantly, regulatory rollbacks do not prevent companies from being responsible actors concerning environmental, social, and governmental considerations for business or responsible corporate citizenship reasons. Demands from various stakeholders, such as employees, supply chain partners, customers, and communities, will factor into companies' ESG strategies and activities.

The general expectation is that D&O exposures related to compliance and enforcement risks spurred by government agency action will decrease. The more difficult question is whether and to what extent there will be additional scrutiny and action from states and private actors that could form the basis of D&O claims. Some posit, for example, that there could be an increase in demand for books and records from

shareholders. President Trump will likely pick up where he left off in his first term by deregulating banks and other financial institutions and easing restrictions on lenders.

The incoming Trump Administration is expected to be more supportive of Bitcoin and cyber currency. The "war on the gas and oil industry" will be replaced with greater fracking freedom and "drill baby drill," albeit in an environmentally responsible manner. President Trump may seek to claw back many of the clean energy tax credits in the Inflation Reduction Act, but insofar as Congressional approval is required and businesses are relying on such credits, sunsetting may be more likely. A dramatic shift in the Consumer Financial Protection Bureau is expected under the Trump Administration, which will likely replace its current leader and shift away from some of the bureau's policy and enforcement activities.

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[i] This article is based upon a commentary entitled "2024 Key Insurance Decisions, Trends & Developments & A Look Ahead To 2025," which first ran in *Mealey's Coronavirus Report*, Vol. 5, # 9 (Nov. 2024).

[ii] *See* Scott M. Seaman, "Updated Social Inflation Survival Guide: The Dangerous Triple Barrel Threat of Social Inflation, Economic Inflation, and Greenflation in a Judicial Environment Swarming With Reptiles and Raining Nuclear Verdicts," May 2, 2023, available at https://www.jdsupra.com/legalnews/updated-social-inflation-survival-guide-2705745/.

[iii] *See* "Global Trends and Politics Legal system abuse is rampant what insurers can do and how reinsurers can help" Munich Re (November 16, 2022), available at https://www.munichre.com/en/insights/economy/legal-system-abuse-is-rampant-what-insurers-can-do-and-how-reinsurers-can-help.html.

[iv] *See* U.S. Chamber of Commerce Institute for Legal Reform, Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System (Nov. 22, 2022), available at https://instituteforlegalreform.com/research/tort-costs-in-america-an-empirical-analysis-of-costs-and-compensation-of-the-u-s-tort-system/.

[v] *See* https://www.sec.gov/newsroom/press-releases/2024-179.

[vi] 142 S. Ct. 2587, 2616 (2022).

[vii] 143 S. Ct. 1322, 1344 (2023).

[viii] 143 S. Ct. 2141, 2176 (2023).

[ix] 144 S. Ct. 2244 (2024).

[x] 144 S. Ct. 2117 (2024).

[xi] 144 S. Ct. 2440 (2024).

[xii] Scott M. Seaman, "A Trilogy of U.S. Supreme Court Decisions Empower Regulated Entities to Challenge Agency Regulations and Actions" (JD Supra July 11, 2024), available at https://www.jdsupra.com/legalnews/commentary-a-trilogy-of-u-s-supreme-2933599/.

[xiii] https://www.dfs.ny.gov/industry-guidance/circular-letters/cl2024-07.

[xiv] https://drive.google.com/file/d/1dlPKJCDo76iHfJZDopQEhTDCmKbuYnNI/view.

[xv] chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/upload/BULLETIN-2022-5-Allegations-of-Racial-Bias-and-Unfair-Discrimination-in-Marketing-Rating-Underwriting-and-Claims-Practices-by-the-Insurance-Industry.pdf.

[xvi] https://www.tdi.texas.gov/bulletins/2020/B-0036-20.html.

[xvii] chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://content.naic.org/sites/default/files/inline-files/2023-12-4%20Model%20Bulletin_Adopted_0.pdf.

[xviii] CPPA Draft Automated Decisionmaking Technology Regulations (Dec. 2023), available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.law360.com/articles/1773762/attachments/0

[xix] 489.147 Prohibited property insurance practices; contract requirements.

[xx] 215.5552 Florida Optional Reinsurance Assistance program.

[xxi] https://www.insurance.ca.gov/0400-news/0100-press-releases/2024/release057-2024.cfm.

[xxii] *Aloha Petro., Ltd. v. Nat'l Union Fire Ins. Co. of Pitt., PA*, 2024 Haw. LEXIS 179.

[xxiii] 725 S.E.2d 532 (Va. Sup. Ct. 2012).

[xxiv] 144 S. Ct. 1414 (2024).

[xxv] *In re LTL Mgmt. LLC*, 2024 U.S. App. LEXIS 18437 (3rd Cir. 2024).

[xxvi] https://www.jnj.com/media-center/press-releases/johnson-johnson-announces-that-its-subsidiary-red-river-talc-llc-has-filed-a-voluntary-prepackaged-chapter-11-case-to-resolve-all-current-and-future-ovarian-cancer-talc-claims.

[xxvii] *See* Penn Law Covid Coverage Litigation Tracker, available at: https://cclt.law.upenn.edu/.

[xxviii] *See* Scott M. Seaman & Jason R. Schulze, *Allocation Of Losses In Complex Insurance Coverage Claims* (12th Ed. Thomson Reuters 2023) at Chapter 21.

[xxix] 475 N.J. Super. 420, 293 A.3d 535 (App. Div.), *leave to appeal granted,* 254 N.J. 522, 298 A.3d 364 (2023).

[xxx] https://www.sec.gov/newsroom/press-releases/2023-139.

[xxxi] *See* John McPherson, Cathy Mulrow Peattie, Scott Seaman, and April Villeverde "NYSDFS Issues Final Circular for Insurers on Artificial Intelligence and External Data Use," (*JD Supra* Aug. 2024), available at: https://www.jdsupra.com/legalnews/nysdfs-issues-final-circular-for-7139110/.

[xxxii]

https://www.ilga.gov/legislation/BillStatus.asp?DocNum=2979&GAID=17&DocTypeID=SB&LegId=152094&SessionID=112&GA=103.

[xxxiii] *Thermoflex Waukegan, LLC v. Mitsui Sumitomo Ins. USA, Inc.*, 102 F.4th 438 (7th Cir. 2024).

[xxxiv] *Publix Super Mkts., Inc. v. Ace Prop. & Cas. Ins. Co.*, 2024 U.S. Dist. LEXIS 195956 (M.D. Fla. 2024).

[xxxv] *In re CVS Opioid Ins. Litig.*, 2024 Del. Super. LEXIS 595 (Super. Ct. 2024).

[xxxvi] *Gardens Condo. v. Farmers Ins. Exch.*, 544 P.3d 499 (Wash. 2024).

[xxxvii] *Century Indem. Co. v. Archdiocese of N.Y.*, 226 A.D.3d 557, 557 (App. Div. 2024).

[xxxviii] 217 N.Y.S.3d 562, 563 (App. Div. 2024).

[xxxix] *GEICO Gen. Ins. Co. v. M.O.*, 109 F.4th 1125, 1127 (8th Cir. 2024).

[xl] 16 Cal. 5th 67 (2024).

[xli] 2024 WL 779606 (N.D. Cal. 2024)

[xlii] 2024 U.S. Dist. LEXIS 183976, at *7 (N.D. Ill. 2024).

[xliii] 2024 U.S. App. LEXIS 1280 (3d Cir. 2024).

[xliv] 2024 U.S. App. LEXIS 8576 (6th Cir. 2024).

[xlv] 2024 WL 4327353 (N.C. Super. Sep. 25, 2024).

[xlvi] *In Re: Overstock Securities Litigation*, 2024 U.S. App. LEXIS 25975 (10th Cir. 2024).

[xlvii] *Ghio v. Liberty Ins. Underwriters, Inc.*, 2024 Conn. Super. LEXIS 1784 (Super. Ct. 2024).

[xlviii] No. H050804 (Cal. App. 6th Dist. Nov. 12, 2024).

[xlix] *Bridlewood Ests. Prop. Owners Ass'n v. State Farm Gen. Ins. Co.*, 2024 U.S. Dist. LEXIS 47593 (S.D. Cal. 2024).

[l] 2024 Bankr. LEXIS 2440 (S.D. Tex. Bk. Ct. 2024).

[li] 2024 U.S. App. LEXIS 14628 (2d Cir. 2024).

[lii] 96 F.4th 351 (2d Cir. 2024).

[liii] 2024 U.S. Dist. LEXIS 40653, at *1 (E.D. Va. 2024).

[liv] 2024 U.S. Dist. LEXIS 151122 (E.D. Cal. 2024).

[lv] 2024 Del. Ch. LEXIS 274.