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Alerts

Part Six: Reviewing Key U.S. Insurance Decisions, Trends, & Developments

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Insights for Insurers

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This is the sixth installment of our series of articles reviewing some of the key trends and developments currently impacting the U.S. insurance industry.

Lead Paint

Coverage issues relating to the $400 million-plus lead paint abatement fund involving three lead paint manufacturers are being addressed in three separate coverage actions. The courts have reached different conclusions in each on motions for summary judgment.

First, a California trial court ruled, in *Certain Underwriters at Lloyd's of London v. ConAgra Grocery Products Company*, that California's willful acts insurance law precluded coverage for public nuisance claims against the insured based on its predecessor's promotion of lead paint. Evidence in the underlying liability litigation established that the predecessor had actual knowledge that lead paint on residential interior surfaces posed a public health hazard.

In the subsequent coverage litigation, the court rejected the insured's attempt to be "insulated from" that knowledge, as well as its argument that the scienter findings in the underlying litigation were insufficient to meet the willfulness standard of California Insurance Code §533, which provides that an "insurer is not liable for a loss caused by the willful act of an insured." According to the court, the fact that senior managers of the predecessor company were not proven to have knowledge of the relevant hazards made no difference, because under §533, an entity's employees' collective knowledge "is what matters." The case is on appeal.

Next, in *Sherwin-Williams v. Certain Underwriters at Lloyd's of London*, the court rejected the insurers' arguments that Sherwin-Williams either expected or intended the damages. It nonetheless granted summary judgment to the insurers on the grounds that the abate fund does not constitute "damages" under the policies. Finally, in *Certain Underwriters at Lloyd's, London v. NL Industries*, the court denied the insurers' motion for summary judgment based on similar grounds.

Opioids Coverage

In the wake of the nationwide opioids epidemic, various state and local governments sued numerous entities involved in the manufacture, sale, distribution, and prescription of opioid pharmaceutical products. Facing staggering potential liabilities, these entities have turned to their insurance companies for coverage under CGL and other policies.

There have been several significant settlements reached in the past several months. These include pharmaceutical distributors' $215 million settlement with two Ohio counties, the distributors' $1.179 billion settlement with the State of New York and its participating subdivisions, Johnson & Johnson's $230 million settlement with the State of New York, and a $26 billion global settlement between drug distributors and a group of state attorneys general in the National Prescription Opioid MDL.

November 2021 was a key month in the litigation, as the Oklahoma Supreme Court overturned a $465 million judgment that Johnson & Johnson sustained in the nation's first opioid trial. Also, a California judge handed a complete victory to drug manufacturers after the nation's second opioid trial. The third trial did not go well for defendants, with pharmacy companies CVS Health, Walmart, and Walgreens being found liable for contributing to an opioid abuse epidemic in two Ohio counties. This marked the first time a jury has weighed in on the controversial "public nuisance" legal theory at the heart of many similar suits nationwide in the context of opioids.

In terms of coverage decisions, a lower Delaware court ruled, in *Rite Aid Corp. v. ACE American Insurance Co*., that general liability insurers must defend their policyholders in litigation filed by government entities seeking to recover for amounts that they allegedly spent to provide health, emergency, and other services to citizens addicted to prescription opioids. However, the Delaware Supreme Court started 2022 by reversing the lower court and holding that there is no duty to defend because the governmental suits for economic damages were not "for" or "because of" personal injuries.

In *Acuity v. Masters Pharmaceutical Inc*., the Court of Appeals of Ohio previously ruled, among other things, a prescription drug wholesaler was entitled to a defense finding a potential connection between the wholesaler's actions and the damages suffered by the government. The issue currently is before the Ohio Supreme Court.

In October 2020, the Ninth Circuit held that a doctor's professional liability policy did not cover an opioid-related wrongful death claim. The insured doctor had admitted that he willfully violated federal controlled substances laws, which resulted in the death of a Nevada woman. The court held that the policy's exclusion for any willful violations of law "clearly applied" to the claim.

Big Payouts For Sexual Abuse, Gas Well Leaks, And Flint Water Crises

Major payouts for sexual abuse cases continued in 2021. This is not unrelated to the social inflation factor of shrinking defenses (statutes of limitations) in the context of sexual abuse claims. Sexual abuse claims forced the Boy Scouts of America ("Boy Scouts") to seek Chapter 11 protection under Chapter 11 of the U.S. Bankruptcy Code in February 2020. Recently, Chubb insurers reached a settlement in the Boy Scouts' bankruptcy proceedings in which it would pay $800 million into a fund for victims of sexual abuse. The Boy Scouts' proposed plan would create a $1.8 billion pool for settlements of the claims, funded by the national organization local councils, and the Boy Scouts' insurer Hartford. The total fund will exceed $2.7 billion.

In March 2021, the University of Southern California announced an $852 million settlement of state court lawsuits from more than 700 alleged victims of Dr. George Tyndall, a former gynecologist at the school accused of abusing his patients for decades. The University previously reached a $215 million settlement of a proposed class action in February 2020 that covered approximately 18,000 alleged victims of Tyndall.

The U.S.A. Gymnastics received approval of its Chapter 11 plan from an Indiana bankruptcy judge in December after reaching a $380 million settlement with all major stakeholders, including its insurers, sexual abuse claimants, and the U.S. Olympic & Paralympic Committee. Insurers agreed to pay a total of $339 million and the Olympic Committee committed to pay more than $34 million.

The U.S. Court of Appeals for the Seventh Circuit, applying Illinois law, ruled that allegations that the insured school district had violated Title IX by failing to protect two female students from sexual misconduct by a male student fell within the scope of a sexual misconduct exclusion that applies to "any actual or alleged sexual misconduct or sexual molestation of any person."

In other major settlements, Southern California Gas ("SoCalGas") and its parent, Sempra Energy, agreed in September to pay up to $1.8 billion to resolve claims by more than 35,000 victims of the 2015 Aliso Canyon gas leak. If approved, the settlements would resolve claims by tens of thousands of property owners who sued the utility after one of SoCalGas' natural gas storage wells leaked nearly 100,000 tons of methane and other substances into the atmosphere in 2015.

A Michigan federal judge in November gave final approval to a $626 million settlement over the Flint water crisis, rejecting numerous objections to the deal, which will provide payments to more than 100,000 people affected by the city's contaminated water.

Long-Tail Claims & Allocation

Allocation of losses among insurers and policyholders continues to be a driving issue in long-tail claims. *Pro rata* allocation continues to be the majority approach and is superior to the "all sums" allocation alternative. Maryland's high court unanimously held that a commercial general liability insurer was responsible for only a *pro rata* share of a $2.7 million judgment against its insured based on a worker's bodily injury due to exposure to asbestos at the now defunct insured's property. The worker, who developed mesothelioma decades after his asbestos exposure, argued that the policy's all sums language supported joint and several allocation, allowing him to collect the entire judgment against a single insurer. Joining the majority of states that have considered the issue, the court held that damages for continuous injury must be allocated on a *pro rata* basis across all insured and insurable periods triggered by the worker's injuries. The court stated that all sums allocation is inconsistent with the policy requirement for bodily injury to occur "during the policy period."

The Ohio Supreme Court rejected the application of an all sums allocation for a product defect property damage claim where there was no evidence that the injury was over time. Under the facts of that case, the court stated that "the operative contract language is not the reference to policy coverage for 'those sums' but rather to injury or damage 'that takes place during the Policy Period.'" There was "no reason to allocate liability across multiple insurers and policy periods if the injury or damage for which liability coverage is sought occurred at a discernible time. In that circumstance, the insurer who provided coverage for that time period should be liable, to the extent of its coverage, for the claim." The court distinguished cases where it applied all sums allocation, noting that those cases involved progressive environmental pollution and asbestos bodily injury claims.

In the long-running Montrose environmental coverage litigation, the California Supreme Court adopted a vertical exhaustion requirement, allowing the policyholder to access coverage under any excess policy upon exhaustion of directly underlying excess policies for the same policy period. Relying on the policies' "other insurance" clauses, the court rejected the horizontal exhaustion method advocated by the insurers, noting that none of those clauses clearly or explicitly states that Montrose must exhaust insurance with lower attachment points purchased for different policy periods.

Traditionally, Florida courts did not allow contribution claims among liability insurers for defense costs; however, Fla. Stat. § 624.1055 was enacted to expressly provide that courts shall allocate defense costs among liability insurers that owe a duty to defend the policyholder against the same claim, suit, or other action "in accordance with the terms of the liability insurance policies." The statute does not apply to motor vehicle liability insurance or medical professional liability insurance.

On November 23, 2021, the Montana Supreme Court weighed in on long-tail claims in *National Indemnity Co. v. State of Montana*. National Indemnity, which was the State of Montana's general liability insurer from 1973 to 1985, sought to resolve coverage issues arising from asbestos bodily injury and death claim which alleged the State failed to warn of asbestos dust conditions at vermiculite mining and milling operations in and around Libby, Montana Mine run by W.R. Grace & Company and its predecessors. The lower court entered a judgment against National Indemnity for nearly $98 million.

On the duty to defend, the Montana Supreme Court ruled that National Indemnity did not breach its duty at the time the State initially tendered the Libby Mine claims because the State defended the claims through its self-insurance program, hired its own counsel, managed the litigation, made its own defense decisions, and took the position with the insurer that the matter was "under control" and nothing was left to be done. The court ruled that when the State subsequently requested a complete defense, National Indemnity breached its duty to defend by agreeing to pay only its *pro rata* share of defense costs. The court reasoned that, under Montana's "mixed-action rule," an insurer is required to defend the entire action as long as one count is covered. National Indemnity was not in breach when it later offered to pay 100% of the defense costs conditioned on a right of recoupment because Montana law permits carriers to seek recoupment in certain circumstances. The court held that the insurer was estopped from asserting coverage defenses concerning claims for which it had not provided a full defense as of the date settlements of those claims were approved by the trial courts. As to claims for which the insurer had offered to provide a full defense or that were not reduced to judgment before the insurer initiated the declaratory judgment action, the insurer was not in breach of the duty to defend and, therefore, not estopped from asserting the coverage defenses.

The court held that the underlying injuries resulted from an "occurrence" because the State did not objectively intend or expect injuries to be sustained as a result of its actions. Further, the known loss doctrine did not bar coverage because the doctrine applies only to a loss that the insured either knows of, planned, intended, or is aware is substantially certain to occur. Additionally, the court determined the "sudden and accidental" pollution exclusion did not bar coverage as the exclusion applies only to discharges of pollutants by the insured and not to discharges by third parties such as the mine owner.

Applying the "cause theory" to determine the number of "occurrences," the court found that the cause of the claimants' injuries was the State's separate failure to warn of the hazardous conditions at the Libby Mine and not its singular decision to withhold the results of its workplace inspections and not advise workers of the hazards. The court rejected the notion that each claimant's individual injury constituted a separate occurrence and remanded the issue to the trial court to determine the exact number of occurrences.

The court held that the State (which was self-insured for decades) was not required to share *pro rata* responsibility for settlement and defense costs that the insurer had paid under the policy. The court found it would be wrong to "giv[e] double effect" to the 'during the policy period' language as limiting both the trigger and the scope and extent of coverage." The court held that "[a] Claimant exposed either during or prior to the Policy period may, despite a lack of manifestation of injury during the Policy period, be covered under the Policy as long as it can be determined, even retroactively, that some injury did occur during the policy period as a result of the State's failure to warn." The court remanded the additional factual findings regarding injuries sustained during the policy period from exposure that occurred prior to the policy period.

As an aside, Nevada joined the majority of jurisdictions in permitting an insurer to recoup defense costs on non-covered claims pursuant to a reservation of rights.

- Part One: Environmental, Social, and Governance (ESG)
- Part Two: Social Inflation
- Part Three: COVID-19 Business Interruption Coverage Litigation
- Part Four: Civil Unrest, Riots, And Strikes
- Part Five: Cyber Security and Privacy Insurance Claims

[1] *Certain Underwriters at Lloyd's of London v. ConAgra Grocery Products Company*, CGC-14-536731, Cal. Super. Ct., San Francisco Cty. (February 2020).

[2] *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London*, 813 F. Supp. 576, 585 (N.D. Ohio 1993).

[3] *Id.* at 587.

[4] *Certain Underwriters at Lloyd's London v. NL Industries, Inc.,* 2020 NY Slip Op 34331(U), ¶ 2 (Sup. Ct.).

[5] *State ex. rel. Hunter v. Johnson & Johnson*, 2021 OK 54.

[6] *People of the State of California v. Purdue Pharma LP et al., No.* 30-2014-00725287-CU-BT-CXC*, (Cal App. Supp. Nov. 1, 2021).*

[7] *In re Nat'l Prescription Opiate Litig.*, 1:17-md-2804 (N.D. Ohio Nov. 23, 2021).

[8] *Rite Aid Corp. v. ACE Am. Insurance Co*., No. N19C-04-150 EMD CCLD, 2020 Del. Super. LEXIS 2797 (Super. Ct. Sep. 22, 2020).

[9]*Ace American Insurance Co. v. Rite Aid Corp*. No. 339, 2020, 2022 Del. LEXIS 9 (Jan. 10, 2022). The court stated: "The question before us is whether insurance policies covering lawsuits "for" or "because of" personal injury require insurers to defend their insureds when the plaintiffs in the underlying suits expressly disavow claims for personal injury and seek only their own economic damages. The Superior Court decided that Rite Aid's insurance carriers were required to defend it against lawsuits filed by two Ohio counties to recover opioid-epidemic-related economic damages. As the court held, the lawsuits sought damages "for" or "because of" personal injury because there was arguably a causal connection between the counties' economic damages and the injuries to their citizens from the opioid epidemic. We reverse. Three classes of plaintiffs are within the scope of the insured's personal injury coverage—the person injured, those recovering on behalf of the person injured, and people or organizations that directly cared for or treated the person injured. To recover under the insured's policy as a person or organization that directly cared for or treated the injured person, the plaintiff must prove the costs of caring for the individual's personal injury. Here the plaintiffs, governmental entities, sought to recover only their own economic damages, specifically disclaiming recovery for personal injury or any specific treatment damages. Thus, the carriers did not have a duty to defend . . . ."

Acuity v. Masters Pharm., Inc., 2020-Ohio-3440, ¶ 53 (Ct. App.).

[11] *National Fire & Marine Insurance Co. v. Hampton*, 831 F. App'x 244, 245 (9th Cir. 2020).

[12] *Id*.

Neth. Ins. Co. v. Macomb Cmty. Unit Sch. Dist. No. 185, No. 20-3510, 2021 U.S. App. LEXIS 23404, at *9 (7th Cir. Aug. 6, 2021).

See S.M. Seaman & J.R., Schulze, *Allocation of Losses in Complex Insurance Coverage Claims*, Chapter 19 (Social Inflation And Sustainability/ESG) (Thomson Reuters, 10th ed. 2021-22).

[15] *Rossello v. Zurich American Insurance Co*., 468 Md. 92, 98 (2020).

Id. at 104.

[17] *Id*. at 123.

[18] *Id*. at 119.

[19] *Lubrizol Advanced Materials, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 160 N.E.3d 701, 702 (Ohio 2020).

Id. at 706.

Id.

[22] *Montrose Chem. Corp. of Cal. v. Superior Court*, 460 P.3d 1201, 1215 (2020).

Id.

Fla. Stat. § 624.1055.

Id.

National Indemnity Co. v. State of Montana, 2021 MT 300 (2021).

Id. at *19.

Id. at *30.

Id. at *36.

Id.

Id. at *50.

Id. at *51.

Id. at *67.

Id. at *62.

Id. at *71.

Id. at *74.

Id. at *77.

Id. at *85.

Id. at *86.

Nautilus Insurance Co. v. Access Medical LLC, 482 P.3d 683 (Nev. 2021).