



## Alerts

### Key Insurance Cases and Developments - 2022 In Review

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*Insights for Insurers*

After a brief abatement due to pandemic-related litigation delays and court closures, social inflation returned with a vengeance replete with numerous nuclear jury verdicts. Although a case in any state is capable of resulting in a nuclear verdict, Georgia, Pennsylvania (Philadelphia), California, New York, Illinois (Cook, Madison, and St. Clair counties), South Carolina (for asbestos litigation), Louisiana, Florida, Missouri (St. Louis), New Jersey, and Texas have been characterized as problematic jurisdictions by the American Tort Reform Foundation in its 2022-2023 Judicial Hellholes report.

With economic inflation at a 40-year high in the United States, insurers found themselves looking down the dangerous double barrel of social inflation coupled with economic inflation, presenting underwriting and claim challenges. Although inflation has been tempered to some degree by the rate raising activities of the Federal Reserve System, some economists are concerned about the potential for a recession or stagflation. Social inflation does not appear to be slowing down.

ESG remains an overriding issue for insurers and their policyholders and has given rise to greenflation. Covid-19 business interruption, cyber and privacy, hurricanes, and forever chemicals were major subjects for litigation and claims.

#### ESG/Sustainability

The Biden administration and many states continue to push ESG on an "all of government" basis. The U.S. Securities and Exchange Commission proposed an onerous climate-related disclosure rule and its announcement of enforcement results for 2022 makes clear it is stepping up enforcement activity with respect to ESG. The U.S. Department of Labor announced a final rule, styled as Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, promulgated by the Employee Benefits Security Administration that allows retirement plan fiduciaries to consider ESG factors in investment choices. The U.S. Department of Justice announced the formation of an Office of Environmental Justice to target corporate polluters causing harm in underprivileged communities.

The U.S. Supreme Court, in the *West Virginia v. EPA* case, struck down a rule promulgated by the U.S. Environmental Protection Agency (EPA) to address carbon dioxide emissions from existing coal and natural gas-fired power plants,

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ruling the agency exceeded its authority under the Clean Air Act. This may delay, but is not likely to derail. the EPA's efforts.

Although ESG momentum continues, there has been some backlash. For example, several states have proposed or passed legislation in the form of boycott bills that prohibit states from doing business with institutions that discriminate against companies in specified industries or bills prohibiting state from employing ESG considerations in their investment decisions. Two Los Angeles California trial court decisions struck down laws relating to composition of boards of directors on equal protection grounds. *See generally* S.M. Seaman & J.R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* (Thomson Reuters 11th Ed. 2023) at Chapter 19.

## COVID-19 Business Interruption Coverage Litigation

By October 1, 2022, more than 3,260 COVID-19 coverage cases had been filed throughout the United States, with approximately 2,124 involving business interruption, 1,927 extra expense, 1,833 civil authority, 256 ingress/egress, 125 contamination, 98 event cancellation, and 91 sue and labor. More than 475 cases were filed as putative class actions and 834 cases include allegations of bad faith. At the trial court level, insurers have prevailed in almost 80 percent of rulings on motions to dismiss in state courts and in more than 95 percent of the rulings by federal courts, mostly on the grounds that the virus claims do not involve "direct physical loss or damage" to property as required under most U.S. policy wordings, governmental orders do not constitute loss of property, and/or virus exclusions preclude coverage. Insurers have prevailed on the majority of summary judgment rulings as well.

Insurers have prevailed in decisions before the U.S. Courts of Appeal for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. Insurers also have prevailed in appeals before State Supreme Courts in Iowa, Massachusetts, Ohio, South Carolina, Oklahoma, Washington and Wisconsin. Policyholders were handed a victory in the Vermont Supreme Court allowing a lawsuit to go forward. Insurers have prevailed in the majority of state intermediate appellate court decisions to date. Many cases and appeals remain pending, but few new business interruption filings are expected as the contractual limitations period has expired under most first-party policies. None of the legislative proposals seeking to provide coverage by fiat or creating a government-backed fund have become law. Although there is a long way to go, the insurers overall have done well so far.

## Cyber

For twelve consecutive years, the United States has experienced the highest average costs of a data breach of any country at \$9.44 million. Remote work, which exploded during the Covid-19 pandemic, increased the average costs by \$1 million, where it was a factor in the data breach. Ransom attacks and state sponsored cyber-attacks remain key concerns for insurers and policyholders, and supply chain attacks have become a growing challenge.

A New Jersey trial court ruled that a hostile/warlike action exclusion in various property policies did not prohibit coverage for the NotPetya cyberattack launched by the military arm of the Russian Federation government against Ukraine because such an exclusion only intended to exclude "traditional" forms of war. Another coverage action in Illinois was settled in advance of trial. U.S. insurers continue to assert historic war exclusions bar coverage, but are including newer exclusions in policies. On the last week of 2022, the Ohio Supreme Court handed a significant silent coverage victory to insurers in a ransomware case.

The vast majority of cyber coverage decisions to date involve silent cyber claims (i.e., claims under traditional first-party, third-party and crime/fraud policies). However, decisions under cyber policies are now being rendered with no clear trend of decisions.

## Privacy

The United States still lacks an encompassing federal law comparable to the GDPR, but several states enacted their own data privacy and security laws. Data breach notification laws are in place in all 50 states (which have varying rules and definitions as to the definition of breach, the extent of any exemptions, and the timelines for providing notice to affected



individuals). There are now at least five different comprehensive state privacy laws and 25 different state data security laws in the United States. California leads the way with the most comprehensive data privacy and security laws, which goes into full effect in January of 2023. Illinois' biometric privacy act continues to generate cases, liabilities, and requests for insurance coverage. Early 2023 decisions from the Illinois Supreme Court on the applicable statute of limitations and its determination that a separate claim accrues each time a private entity scans or transmits an individual's biometric identifier or information in violation of section 15(b) or 15(d) of the act likely will lead to additional privacy act litigation.

The California Supreme Court recently ruled that the right to privacy includes the right to seclusion in a fax blasting case involving Yahoo, an issue upon which U.S. courts are divided.

## Lead Paint

Coverage issues relating to the \$400 million plus lead paint abatement fund (reduced from a \$1.15 billion fund) involving three lead paint manufacturers have been subject to three separate coverage actions. Insurers prevailed at the trial court and on appeal in California in the *ConAgra* case based upon the insured's predecessor having actual knowledge of the harms associated with lead paint when it promoted lead paint for interior residential use based upon Section 533 of the California Insurance Code. In the *Sherwin-Williams and NL Industries* cases, the policyholders prevailed in the intermediate appellate courts in New York and Ohio even though the same underlying judgement was involved.

## Forever Chemicals

Forever chemicals have been around since at least the 1940s and have been used in so many products they are said by many to be ubiquitous. Yet, forever chemicals only recently became one of the most fervent areas for civil litigation. There are now thousands of cases pending across the United States, with some eye-opening settlements such as a 3M settlement of \$850 million, \$70 million by Wolverine, and DuPont's settlement with its spin-off Chemours culminating in the creation of a \$4 billion fund for future liabilities. Over a dozen states are suing manufacturers and others for contaminating drinking water and damaging natural resources.

Governmental regulators in the United States arrived late to the scene. It was not until September 2022 that the Biden administration announced it would designate some forever chemicals as hazardous substances under the nation's Superfund cleanup program. The 2020 National Defense Authorization Act requires the U.S. Environment Protection Agency to get an inventory on PFASs made in and imported into the United States since January 2011. Recently, it was reported that a rule proposed by the EPA would require small businesses to pay over \$863 million to report the production and importation data required as opposed the less than \$2 million previously projected by the EPA. Now, several states have been regulating and/or banning these chemicals.

Some forever chemical coverage actions have been filed with many more to come. Numerous issues will be presented. The early results have been mixed with respect to the application of pollution and hazardous waste exclusions.

In a case involving EtO emissions from a Medline facility, an Illinois appellate court ruled there was no coverage under a pollution liability policy because the discharges had been occurring since 1994, long before the policy's September 2018 retroactive date.

## Opioids

A 2022 bipartisan congressional report found that the opioid epidemic costs the United States approximately \$1 trillion annually. Approximately, 3,000 state and local governmental entities have been seeking to recover costs of public services associated with opioids from drug manufacturers and distributors. The \$26 billion settlement a coalition of state attorneys general reached with Johnson and Johnson and three distributors in 2021 grabbed the headlines.

A California federal judge ruled that Walgreens, a drug store chain, substantially contributed to the public nuisance in San Francisco associated with opioids. The court stated that a subsequent trial will be held to determine the extent to which Walgreens must abate the public nuisance that it helped to create. The tort of public nuisance is a growing concern in



some states, including California.

Opioid coverage litigation has produced mixed results, but many courts have recognized that liability insurance policies do not provide coverage. The Delaware Supreme court led off 2022 by ruling that distributor Rite Aid was not entitled to a defense because recovery was sought for economic damages, not personal injury. Similarly, the Ohio Supreme Court ruled that Masters Pharmaceutical was not entitled to coverage because the local governmental entities are attempting to recover economic losses as opposed to damages because of bodily injury. A California federal court ruled insurers had no duty to defend a drug distributor as the policyholder's over-distribution of opioids led to the foreseeable diversion of prescription painkillers did not arise out of an accident or occurrence. This decision is on appeal. The U.S. Court of Appeals for the Sixth Circuit ruled in favor of insurers handing them an early 2023 victory.

## Construction Defect And Weather-Related Claims

Florida and the gulf coast remain reliable bastions for construction defect and weather-related claims. Florida property insurers have been impacted heavily and, in some cases, have been rendered insolvent. Florida enacted two statutes that interposing litigation reform impacting first-party claims, particularly with respect to claims involving roof damage and creating a \$2 billion reinsurance program mid-year and shut down the problematic practice of assignment of benefits and ended the one-way attorney fees recovery that ran in favor of plaintiffs at a special session at the end of 2022. More tort reform is expected in Florida in early 2023.

## D&O & Securities Law

Delaware passed laws authorizing the use of captive insurance to cover D&O liabilities subject to conditions and permitting enhanced legal exculpation of officers of Delaware corporations. The Delaware Supreme Court declined to apply the "larger settlement rule" for allocation where covered and uncovered matters were involved and decided a related claims case. These decisions underscore the need to refer to particular policy language rather than reliance upon generic standards.

The U.S. Securities and Exchange Commission issued final rules requiring issuers to disclose the relationship between executive compensation actually paid and the company's financial performance and requiring exchanges to establish rules requiring "clawback" protocols where incentive compensation was based on erroneously reported financial information.

Through Q3 2020, the trend of decreased securities class actions continued. Initial public offering activity was down substantially in 2022 and proposed SEC rules and government scrutiny of SPACs may portend a decreased use of SPACs. Nonetheless, new case filings continue. Cyber-attacks, regulatory risks, and health and safety, environmental issues remain prominent areas of concern. Cyber-related securities class actions so far have received mixed success. ESG activities have produced numerous lawsuits in a variety of contexts.

This article is based upon the USA Section that Mr. Seaman and Mr. Hernandez prepared for RPC's *Annual Insurance Review 2023* (January 12, 2023), available at <https://www.rpc.co.uk/perspectives/insurance-reviews/annual-insurance-review-2023/>