



## News

### Law360 Reviews: Top Insurance Cases in 2023 and Trends to Watch in 2024

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Bessie Daschbach and Scott Seaman were recently featured in a series of *Law360* stories that reviewed various insurance-related developments, including the top insurance rulings from 2023 and cases and trends to watch for in 2024:

#### ESG

##### Read it: [The Top Environmental Insurance Trends Of 2024](#)

Insurers faced increased push-back against environmental, social, and governance (ESG) business activities in 2023. Daschbach explained that Texas and North Dakota passed new legislation in 2023 that prohibits insurance companies from using ESG considerations to set rates.

Although the impact of this legislation may not be that far-reaching, she suggested that people should be prepared for the market impact of any legislation being passed in other states in 2024.

Daschbach told *Law360*:

"Any such legislation will most certainly have market effects to the extent it impedes insurers' ability to calculate risk in a given market and to the extent that, in turn, leads insurers to step out of any such market. This could be particularly bad news for consumers in markets already in crisis — California, Florida, Louisiana."

#### Property Insurance

##### Read it: [The Top Property Insurance Decisions Of 2023](#)

The Nevada Supreme Court ruled in September that a Las Vegas mall could not get business interruption coverage for losses during the COVID-19 pandemic, adding to the list of policyholder virus defeats in 2023.

A dozen state supreme courts have favored insurers, and all federal circuit courts have ruled on the side of carriers, except the D.C. circuit court, which has not ruled

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#### Service Areas

Environmental

Insurance Agents & Brokers  
Liability

Sustainability & ESG



Seaman explained:

"In view of the number of cases and appeals pending, litigation likely will continue in earnest over the next couple of years before beginning to wind down. Policyholders will still pick up some wins, but it is unlikely that the trajectory of the litigation will tip in their favor."

He said insurance companies have largely succeeded in pre-trial and jury decisions even when policyholders have managed to pass the dismissal stage.

View [Seaman's LinkedIn post](#) on this article.

## Read it: [Property Insurance Cases To Watch In 2024](#)

Similarly, insurance attorneys are now turning towards high courts in California and New York as the majority of top federal and state courts have ruled against policyholders' claims for coverage of losses due to the COVID-19 pandemic.

Seaman told *Law360*:

"It likely is too late for policyholders to change the overall trajectory of COVID-19 [business interruption] coverage litigation, but cases pending before the California and New York high courts represent opportunities for policyholders to score victories in two of the largest states in terms of COVID-19 coverage activity."

However, he adds how insurers have the stronger arguments against coverage for pandemic-related losses:

"Decisions holding the presence of COVID-19 does not constitute direct physical loss or damage are supported by the time-tested requirements of direct physical loss, by the policy language, and by California and New York rules of construction."

View [Seaman's LinkedIn post](#) on this article.

## General Liability

### Read it: [Biggest General Liability Rulings From 2023's Second Half](#)

#### ***Vizio Inc. v. Arch Insurance Co.***

In the case *Vizio Inc. v. Arch Insurance Co.*, a Ninth Circuit panel ruled Vizio's failure to obtain consent from an excess insurer freed the carrier from covering the \$17 million settlement. Seaman told *Law360* that the dispute reminded him of the line from the film, "Cool Hand Luke," "what we've got here is a failure to communicate."

"Television producer Vizio failed to communicate and obtain consent from its customers to sell their information as required under state and federal privacy law, which is what created the underlying liabilities and resulted in a \$17 million settlement.

Vizio also failed to communicate with its excess insurer and obtain its consent prior to agreeing to settle the matter. Its failure to obtain the excess insurer's consent is the reason the Ninth Circuit ruled it did not have insurance coverage for the settlement. So it is failure to communicate and obtain consent all the way around."

Seaman added that the ruling reinforced how important it is to understand the meaning of the word "incorporated" when it is used in follow-form excess policies, which use the same language as the primary policy. He explained:

"First, by its express terms, the excess policy 'followed form' to the primary policy, meaning that it 'incorporated' the terms of the primary policy, including a consent to settle provision.



Second, Vizio's attempt to justify its failure to obtain consent is based upon a misunderstanding of California insurance regulations incorporated into a policy."

Seaman mentioned that the policyholder was relying on California's Fair Claims Settlement Act, which requires an insurer to act on a claim within 40 days of receipt to prove a violation of the insurance policy. However, this only applies after providing "proof of claim," which requires evidence supporting the magnitude or amount of the claimed loss.

### ***St. Paul Fire and Marine Insurance Co. et al. v. Bodell Construction Co.***

In November, Hawaii's high court stated that insurers do not have the right to recover costs incurred in defending against claims after a court finds they are not covered. St. Paul Fire and Marine Insurance Co. argued against paying Bodell Construction Co.'s defense costs, while Bodell claimed the commercial general liability policy does not cover it.

Seaman said courts nationwide are split on whether an insurer can recover non-covered defense costs through reserving rights without an express provision in the policy:

"The better-reasoned rule is to allow it. Recoupment is a useful hammer when a policyholder is being unreasonable, but it is hardly a panacea for insurers."

However, he predicted that the decision would not likely impact outside of Hawaii because there is case law on the reimbursement challenge in many states. Seaman also mentioned that the issue is becoming less important as more policies contain express provisions addressing reimbursement.

View [Seaman's LinkedIn post](#) on this article.

## **Read it: General Liability Cases To Watch in 2024**

In the case *Certain Underwriters at Lloyd's London et al. v. Sherwin-Williams Co.*, an appeals court found that Sherwin-Williams was entitled to coverage for its portion of a \$305 million lead paint settlement.

Seaman said it will be interesting for insurers to watch how the Ohio Supreme Court rules in early 2024:

"Insurers may well prevail on the expected or intended argument because there were rulings from the underlying California state court suit about Sherwin-Williams' knowledge of the risks of the dangers of lead paint.

Also, based upon what the Ohio Supreme Court ruled in the context of coverage for opioids claims, the justices may agree with the insurers on the 'damages' issue."

View [Seaman's LinkedIn post](#) on this article.

## **Media Coverage Summary**

- "[The Top Environmental Insurance Trends Of 2024](#)" was published by *Law360* on January 1, 2024 (*subscription required*).
- "[The Top Property Insurance Decisions Of 2023](#)" was published by *Law360* on January 1, 2024 (*subscription required*).
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- "[Biggest General Liability Rulings From 2023's Second Half](#)" was published by *Law360 Insurance Authority* on January 1, 2024 (*subscription required*).
- "[General Liability Cases To Watch in 2024](#)" was published by *Law360 Insurance Authority* on January 1, 2024 (*subscription required*).