

Key Takeaways – Coverage College 2024

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Thank you for participating in Coverage College® 2024. We've gathered key takeaways from each course, which can be found below.

If you have any questions, please feel free to contact any one of our presenters.

Opening Panel: Tips for a Successful and Ethical Mediation

Patricia B. Santelle | Chair Emeritus, White and Williams LLP (Moderator)

Hon. Annette M. Rizzo | Mediator/Arbitrator/Court-Appointed Neutral, JAMS

Robert G. Devine | Partner, White and Williams LLP

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Christopher Konzelmann | Partner, White and Williams LLP

Four Key Steps for Success in Mediation:

- **Preparation:** Position/tailor the process to your matter in considering selection of mediator, timing of mediation, information to be shared, and goals. Providing competent representation to your client requires legal knowledge, skill, thoroughness and preparation. Attorneys have an ethical obligation to keep clients promptly and reasonably informed and to provide information so that clients can make informed decisions.
- **How to Get the Best Result:** Know how to mediate/negotiate. Understand the differences/benefits/ disadvantages as between in-person versus remote/hybrid mediations and joint versus individual sessions. Consider preparing/presenting a strong opening statement and maintain engagement throughout the mediation. Understand the impact of insurance in a liability mediation and liability in an insurance coverage mediation.
- **Learn Effective Problem-Solving:** Challenges such as difficult parties, multi-party scenarios, and reaching an impasse can delay the mediation process if you are not prepared to deal with them; having the ability to problem-solve using unique solutions quickly and efficiently is far more likely to result in a successful mediation.
- **Engage in a Post-Mediation Process:** Don't give up if the mediation session does not result in a settlement. Keep your client and the mediator engaged post-mediation.

A View from The First State: Overview of Delaware Courts and Key Developments in Coverage and Underlying Litigation

Rochelle Gumapac | Partner, White and Williams LLP

Timothy S. Martin | Partner, White and Williams LLP

- **Getting to Know the Delaware State Judicial System:** There is only one appellate court but multiple trial courts, including the Chancery Court and the Complex Commercial Litigation Division (CCLD), where most coverage cases are litigated.
- **Impact of U.S. Supreme Court Decision in Purdue Pharma:** A 5 to 4 majority rejected the bankruptcy plan because it included a third-party release of the Sackler family. This jeopardizes Delaware's increased share of the settlement as a result of the Sacklers' additional contribution.

- **Delaware Asbestos Litigation:** Has slowed down as the jurisdiction has fallen out of favor with the plaintiffs' bar.
 - **Recent Coverage and Other Litigation Developments:** Involve claims arising out of Paraquat and Zantac.
 - **Recent Marketplace Amendments:** Restores market practices impacted by recent Chancery Court decisions including merger agreements, new penalties for breaches and governance agreements.
 - **Choice of Law:** In the D&O coverage context, Delaware courts apply Delaware law if the insured is a Delaware corporation.
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PFAS Coverage Litigation: Emerging Lessons From an Emerged Risk

Robert F. Walsh | Partner, White and Williams LLP

Lynndon K. Groff | Counsel, White and Williams LLP

- **Overview of PFAS:** Per- and poly-fluoroalkyl substances are a class of several thousand individual types of synthetic chemicals that have a strong carbon-fluorine bond which resists breaking down in the environment and pose a serious risk of bodily injury and potential property damage claims.
 - **Underlying PFAS Liability Claims:** Litigation is proceeding in the AFFF MDL, Ohio C-8 MDL, Kidde bankruptcy, deceptive marketing suits, government enforcement actions, and other venues/forms of action.
 - **Coverage Litigation:** A number of insureds are litigating coverage in multiple jurisdictions. In addition to battles over jurisdiction, forum, and choice of law, key issues being litigated include pollution exclusions, number of "occurrences," allocation, whether certain risks constitute insured risks, "trigger," and "knowledge-based defenses."
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Mass Tort Bankruptcies After Purdue, Kaiser, and LTL – Implications for Insurers

Frank J. Perch, III | Counsel, White and Williams LLP

Siobhain Minarovich | Partner, White and Williams LLP

- **Major Implications for Insurers:** For decades, the insurance industry has experienced the impact of bankruptcy on asbestos claims – today major bankruptcies also involve opioids, talc, and revived child sexual abuse claims.
 - **Features of Mass Tort Bankruptcies:** The debtor-insureds can reorganize while keeping the doors open, build a trust funded by bankrupt entity and potentially its insurers, funnel all claims and future claims to the Trust and allow for more equitable distribution of payments to the claimants. By pursuing mass tort bankruptcy, organizations are able to reorganize, address liabilities and distribute payments. However, insurers' interests are affected by the plan and trust structures.
 - **Key U.S. Supreme Court Bankruptcy Decisions in 2024:** *Purdue Pharma* (5-4 majority rejects nonconsensual third-party releases) and *Kaiser Gypsum* (endorsing broad standing for insurers in bankruptcy proceedings) will have implications for future mass tort bankruptcies/exposures and the role of insurers in mass tort cases.
 - **Recent/Pending Bankruptcies:** involve additional key issues such as the "Texas Two-Step" and whether "financial distress" is a requisite condition.
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Emerging Issues in Pennsylvania Bad Faith Claims

Edward M. Koch | Partner, White and Williams LLP

Wesley R. Payne, IV | Partner, White and Williams LLP

Marc Penchansky | Partner, White and Williams LLP

- **Whether an Insurer Can be Liable for Bad Faith in the Absence of Coverage:** If the claim alleges bad faith denial of coverage and coverage is correct, there is generally no bad faith claim. Three circumstances under which insurer could still be held liable even in the absence of coverage for an underlying claim: (1) the claim has settled; (2) the claim is barred by the statute of limitations; and (3) the claim is based on more/something other than the correctness of the coverage decision.
- **Considerations Before Initiating Affirmative Litigation Against the Insured:** Pursuing litigation in a bad faith effort to evade a duty or filing a meritless case for leverage against the insured may constitute bad faith.
- **Considerations During Coverage Litigation:** Bad faith can be actionable at any stage in the litigation process, however, during litigation, it requires more than the typical discovery violations. Maintaining a defense with no merit is potentially bad faith. Often bad faith claims are used to resolve first-party claims, but there is potential for a bad faith finding if the carrier asks for a release of bad faith claims as a precondition to paying undisputed insurance coverage.
- **Out-of-State Claimants/Insureds:** while the Pennsylvania bad faith statute does not explicitly address this, several federal courts have ruled that it is only available as a remedy for Pennsylvania insureds.

Emerging Risks: Coverage Issues and Claim Handling

Gabriel E. Darwick | Partner, White and Williams LLP

Tanya A. Mascarich | Counsel, White and Williams LLP

- **Costs of Emerging Risks Implicating CGL Coverage:** Recent indemnity costs include \$10 billion for Talc MDL, \$78 million verdict surrounding Glyphosates, \$5 billion settlement for Vioxx MDL, \$2.2+ billion settlement for Zantac MDL. There are many more examples.
- **Common Coverage Issues:** There are countless but key coverage issues include corporate successorship, "trigger," number of occurrences, allocation and vertical vs. horizontal exhaustion. Recent decisions have addressed these issues in the context of emerging risks.
- **Claims-Handling Conundrums:** Know who is in charge, why it matters and what you can do to enforce your right to control the defense. The duty to defend gives the insurer the right and duty to control the defense, and to do this, you need to know the impact of reservations of rights under the applicable law in your jurisdiction.

Coverage Implications from the Explosion of MDLs

Daniel E. Bryer | Partner, White and Williams LLP

Dirk C. Haarhoff | Partner, White and Williams LLP

- **Multi-District Litigation (MDL):** This process is used where multiple plaintiffs have filed lawsuits against the same defendant(s) for similar reasons. It is not a class action or related case. MDLs exist in both state and federal courts and their purpose is to avoid repetitive discovery, eliminate inconsistent pretrial rulings, and conserve the resources of litigants and the judiciary where there are common issues of fact.

- **Anticipating MDL Claims:** Stay vigilant: get involved early to monitor developments regularly/often, and while analyzing the claims and coverage implications may create more work upfront, there is an opportunity for greater efficiency and fairness in the long run.
 - **What to Do When Your Insured Tenders MDL Claims:**
 - The duty to defend (if any) only extends to covered lawsuits. It is reasonable (and appropriate) for defense costs for uninsured or self-insured periods to be allocated to the insured.
 - The best outcomes are where parties can reach an agreement on how to share in defense of the claims, so it is important to engage the insured.
 - Resolving defense cost sharing issues early creates a more favorable environment for all involved - insurers and defense counsel can work together to protect the insureds, including its potential indemnity exposure.
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Long-Tail Coverage Update

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Victoria Fuller | Partner, White and Williams LLP

Elizabeth L. Ferguson | Associate, White and Williams LLP

- **Underlying Claims at Issues:** Recent decisions in long tail coverage cases have arisen in the context of claims involving asbestos, climate change, lead paint, MTBE, opioids, PCE, priest abuse and wildfires.
 - **Key Coverage Issues:** Recent decisions and/or pending cases to watch address allocation, "claim" for damages, duty to cooperate, duty to defend, number of occurrences/whether there is an occurrence, pollution exclusions, public nuisance claims, recoupment of defense (and indemnity) costs for uncovered claims, and "trigger."
 - **Underlying Claims to Watch:** Coverage litigation has commenced and/or is expected to commence in the context of claims involving baby food, benzene, glyphosate (Roundup), lead cables, microplastics PFAs, talc, Vioxx, and Zantac.
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Insurance Coverage: I Ain't Missing You At All

Randy J. Maniloff | Partner, White and Williams LLP

Nineteen Things That Often Get Overlooked When Handling Liability Claims:

- Pre-tender Defense Costs
- Prevailing Insured's Right to Recover Attorney's Fees
- Duty to Defend and Extrinsic Evidence
- Independent Counsel
- "Any" Insured vs. "The" Insured.
- Coverage for Punitive Damages
- Indemnification For a Party's Own Negligence
- "Pollutant Exclusion" and the "Movement" Requirement
- Choice of Law

- Sending ROR to All Insureds Being Defended
- "Property Damage": Loss of Use
- The Artfully Pleaded Complaint and the "Four Corners" challenge
- Insured Status: "Scope of Employment"
- Emotional Injury as Bodily Injury
- Personal and Advertising Injury Exclusions
- Montrose Endorsement and Strict "Sameness"
- Restitution or Amount Otherwise Obligated to Pay
- The Forgotten Insuring Agreement
- Addressing Independent Counsel Rates

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