General Liability Cases To Watch In 2024
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The first half of 2024 is poised to produce some significant commercial general liability coverage decisions, including a potential ruling from the U.S. Supreme Court on an insurer's fight for standing in an asbestos bankruptcy settlement.

Federal appellate courts are to hear arguments on some hotly contested issues as the U.S. Supreme Court will tackle an insurer's standing to object to a bankrupt policyholder's asbestos injury settlement and the Third Circuit will address the duty to defend a hotel accused of sex trafficking. Experts will also be watching an ongoing coverage dispute involving PFAS, or forever chemicals, in a Michigan federal court, and the Ohio Supreme Court is expected to issue a ruling on whether carriers must cover Sherwin-Williams' portion of a

$305 million lead paint settlement.

Here, Law360 looks at the cases to watch for in the early months of the new year.

Justices to Decide Insurers' Standing Rights

In October, the U.S. Supreme Court granted Farmers unit Truck Insurance Exchange Co.'s petition to review a Fourth Circuit ruling finding it had no standing to challenge Kaiser Gypsum Co.'s settlement of asbestos claims in a bankruptcy proceeding. Truck Insurance petitioned the high court in May, arguing that the Fourth Circuit's decision from February incorrectly found it lacked standing to object to Kaiser Gypsum's reorganization plan under the U.S. Bankruptcy Code and Article 3 of the U.S. Constitution.

Under Section 1109(b) of the Bankruptcy Code, a creditor can object to a reorganization plan if it adversely affects its interests. But the Fourth Circuit panel agreed with a lower court that Truck Insurance wasn't a "party of interest" to the bankruptcy proceedings. The panel also said the insurer lacks standing under Article 3, which requires a party to suffer a concrete injury to pursue claims for damages.

In its petition to the high court, Truck Insurance argued that the settlement between asbestos injury claimants, Kaiser Gypsum and its sister company did not include anti-fraud provisions for claims that would be covered by its policies, which provide $500,000 per occurrence limits and no aggregate.

Experts say that though disputes between insurers and bankrupt entities are not new, the case is interesting due to the

current conservative majority on the nation's highest court and Truck Insurance's arguments of fraud and collusion in the reaching of the agreement.

Micah Skidmore, an insurance recovery partner at Haynes and Boone LLP in Texas, told Law360 that the Supreme Court likely took up the case because it involves how people access the courts. He also said, however, that he is unclear what Truck Insurance wants the justices to do.

"It's really not clear what they want the court to find," he said. "Truck Insurance is saying there's a conflict in the circuits that this court should weigh in on, but at the very most, that's going to mean that the Supreme Court is going to clarify what the standard is under Section 1109."

Skidmore said the justices' ruling will likely equate to an advisory opinion without a redressable injury.

"Courts are typically interested in standing questions," he said, "but the record here doesn't appear to support an argument or idea that Truck Insurance has articulated something that really needs correction."

Policyholder attorney Michael John Miguel of McKool Smith told Law360 that the legal implications of what the high court decides are unclear. A "potential conclusion," he said, "is that the insurers are trying to reinsert themselves into the coverage process, even in a bankruptcy situation, where they may have lost some of that ability."

"In a bankruptcy like Kaiser Gypsum, asbestos injury plaintiffs are still coming out of the woodwork," he said. "However, it's not the people that work there anymore; the claims are brought by kids who were exposed when it was on clothes that were brought home. So, we're not talking about liquidated losses. We're talking about ongoing losses."

Carrier-side attorney Rishabh Agny of TittmannWeix told Law360 he's intrigued to see what the high court says, explaining that the potential of an insurer providing coverage for a fraudulent claim as part of a mass tort settlement should make it a party in interest to a bankruptcy plan.

"To the extent that it's a party that may have to pay claims, I think there should be some level of involvement," he said. The case is Truck Insurance Exchange Co. v. Kaiser Gypsum Co. Inc., case number 22-1079, in the U.S. Supreme Court. 3rd Circ. to Examine Trafficking Defense Obligations

The Third Circuit is to hear arguments on whether a Pennsylvania federal judge correctly found three insurers were not required to defend a Philadelphia hotel and its owner accused of participating in sex trafficking. In a March ruling, U.S. District Judge Chad F. Kenney handed early wins to Samsung Fire & Marine Insurance Co., Nationwide Mutual Insurance Co. and Ace Property & Casualty Insurance Co., finding public policy prohibits the insurers from defending the Roosevelt Inn and its owner, UFVS Management Co. LLC, for criminal acts.

Four women say in a separate lawsuit that they were victims of sex trafficking while at the Roosevelt Inn and accuse the hotel and its owner of failing to prevent the scheme despite clear signs of such activity. The insurers filed a suit in Pennsylvania federal court, seeking an order saying they have no defense obligations because the hotel and its owner engaged in conduct that violated Pennsylvania's Human Trafficking Law.

"We're going to see a lot more of those types of claims, and insurers will have to evaluate whether those claims are covered," TittmannWeix's Agny said.

McKool Smith's Miguel said the judge erred when finding that public policy grounds allow insurers to shrug off their duty to defend.

"I see this as an attempt by the insurance industry to erode the long-standing test, mostly found in their own policy language, of the circumstances under which someone is entitled to a defense," he said. "General liability policies throughout the '60s and '70s have always provided a defense against allegations if they trigger coverage, even if they are groundless, false or fraudulent. What the lower court did, in my judgment, is assume liability, but that's not what you buy a duty to defend for. You buy a duty to defend to help you defend against it, to prove that the activity didn't happen."

Haynes Boone's Skidmore said there should be a duty to defend because the victims did not accuse Roosevelt Inn and its owner of engaging in criminal conduct.

"I'm surprised that the carrier would have the gall to say that this is not covered, because no one's saying the insured engaged in criminal conduct," he said. "If they had, that would be something else, but that's not what this is about. This kind of activity happens, unfortunately, and it's reprehensible, but it doesn't mean that the property owner has engaged in criminal conduct that would vitiate the policy."

The case is Samsung Fire & Marine Insurance Co. Ltd. et al. v. UFVS Management Co. LLC et al., case number 23-1988, in the U.S. Court of Appeals for the Third Circuit.

"Forever Chemicals" Coverage Row Continues

Activity in a long-running coverage fight between footwear maker Wolverine World Wide Inc. and three insurers, including Travelers Indemnity Co., in the last half of 2023 revived the attention of legal experts interested in disputes involving perfluoroalkyl and polyfluoroalkyl substances, commonly known as forever chemicals. In August, a special master sanctioned Travelers, ordering the insurer to pay attorney fees and produce unredacted documents after failing to satisfactorily comply with Wolverine's discovery requests.

According to court documents, Wolverine lodged the dispute against Travelers and other insurers in Michigan state court in 2018 over their refusal to defend and indemnify the footwear maker against underlying suits that stemmed from the use and disposal of chemicals at its leather tannery. Wolverine initially requested the documents at issue from Travelers in December 2021.

Special master Paula J. Manderfield's August sanctions ruling as well as a December decision requiring Michael Ungaro, an attorney and claims handler for Travelers, to testify at a deposition thrust the case back into the PFAS coverage spotlight.

Carrier-side attorney John Ewell of Cozen O'Connor told Law360 that the insurance industry and its counsel are certainly watching coverage disputes involving PFAS.

"As of today, there are virtually no substantive decisions addressing coverage for PFAS," he said. "Coverage for PFAS contamination will be an issue of first impression in nearly all jurisdictions."

Ewell said coverage disputes will undoubtedly involve questions on bodily injury because studies are revealing that most people have levels of PFAs in their blood.

"Since most people already have some level of PFAs in the bloodstream, how high must PFAS levels in the blood be to constitute 'bodily injury'?" he said. "This adds an interesting wrinkle to the 'bodily injury' requirement."

He also said to "expect the interpretation of the pollution exclusion to come back around as PFAS coverage litigation ramps up."

Haynes Boone's Skidmore said, "Everyone's on the edge of their seats waiting for an earth-shattering ruling to happen," because the tort issues surrounding forever chemicals are pervasive.

"It just impacts so many different industries and parties that you have to ask the question, 'How is this going to affect the law?'" he said, adding that plaintiffs lawyers and insurance coverage counsel are wondering if PFAS litigation will be the new asbestos. He said the scale and scope of asbestos litigation and COVID-19 business interruption coverage fights changed the scale and scope of how courts look at insurance law.

"In asbestos litigation, there were important rulings that came out about how to construe a pollution exclusion when it wasn't just asbestos in the abstract, it was in a product," he said. "So, the law changed on how courts interpreted the pollution exclusion. Then the pollution exclusion was changed in the policies. So, there's undoubtedly going to be some additional evolution of coverage law based on how these cases get handled, and courts are going to have to think very carefully about how they're going to address those questions, because they do have such a wide potential impact on parties and on the industry."

The case is Wolverine World Wide Inc. v. The American Insurance Co. et al., case number 1: 19-cv-00010, in the U.S. District Court for the Western District of Michigan.

Ohio Justices to Resolve Lead Paint Settlement Coverage

After hearing oral arguments in October on whether an appeals court correctly found that Sherwin-Williams was entitled to coverage for its portion of a $305 million lead paint settlement, the Ohio Supreme Court is poised to hand down a ruling in early 2024.

The issues in the dispute between the lead paint maker and its insurers are starkly similar to coverage fights involving opioids in that they both involve underlying public nuisance suits brought by local governments and the question of whether those suits were brought "because of" bodily injury or property damage. Sherwin-Williams' coverage suit and opioid coverage disputes also share the argument of whether the manufacturers expected or intended to cause injuries based on knowledge about the risks associated with their products.

The Ohio justices said in a September 2022 ruling that Acuity had no duty to defend Masters Pharmaceuticals Inc., a now out-of business drug wholesaler, against suits brought by governments over the costs incurred in responding to the opioid epidemic. In a 5-2 decision, the majority concluded there was no defense obligation because the government suits were not brought "because of" bodily injuries, but rather to recover economic losses, which are not covered by Masters' policy.

Sherwin-Williams' coverage dispute against its insurers, which include underwriters at Lloyd's of London, Zurich and units of AIG and Travelers, began in Ohio state court in 2006. The carriers moved for summary judgment, arguing that Sherwin-Williams' contribution to the settlement is not covered because the counties' damages were not "because of" bodily injuries or property damage.

The trial court judge initially agreed and gave the insurers a win. Sherwin-Williams appealed and a divided Eighth District Court of Appeals panel reversed the ruling in September 2022, just days after the Ohio Supreme Court's ruling in Acuity. The appeals court refused to reconsider its ruling, prompting the carriers to seek review from the Buckeye State high court's justices.

McKool Smith's Miguel described the suit as "an opioid suit in sheep's clothing" because the cases involve nearly identical questions.

"I still think the opioid stuff was decided incorrectly, and that what the governments are doing is standing in the shoes of the policyholder and reimbursing those that are actually injured," he said.

Carrier-side attorney Scott M. Seaman of Hinshaw & Culbertson LLP told Law360, "It will be interesting to see how the court rules." "Insurers may well prevail on the expected or intended argument," he said, 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," he said.

Haynes Boone's Skidmore told Law360 that stripping a policyholder of an insurer-funded defense based on knowledge of a possible risk goes against why manufacturers buy CGL coverage.

"If the knowledge that there could be a claim somewhere down the line is enough to disqualify the insured from having coverage, then nobody will ever have coverage because everyone buys insurance anticipating a claim," he said. "It can't be the threshold for disqualifying someone from coverage because if that was it, then there would be no reason to buy insurance in the first place."

The case is Certain Underwriters at Lloyd's London et al. v. Sherwin-Williams Co., case number 2023-0255, in the Supreme Court of Ohio.