

BEST'S NEWS

Attorneys, Analysts: Norfolk Southern Likely Facing Years of Claims Over Ohio Derailment **Timothy Darragh** **February 22, 2023**

Norfolk Southern Corp. is already facing at least 10 proposed class-action lawsuits and likely years of claims on its insurance coverage in connection with the Feb. 3 derailment of a train carrying hazardous chemicals in East Palestine, Ohio.

Lawyers and analysts not directly involved in the fallout from the disaster said the details of exclusions in its insurance coverage will matter greatly, but the freight carrier may very well experience a significant impact on its finances and insurance coverage.

About 5,000 people live in the area of the derailment, which forced authorities to release hazardous chemicals to prevent an uncontrolled explosion. Some are reporting lingering impacts of the release on their respiratory systems. Many are concerned about the safety of the region's water supply, with contaminants spilled into a tributary of the Ohio River. They also have incurred expenses relating to air and water testing and the evacuation of the community during the first several days of the disaster, said Michael Miguel, an attorney with McKool Smith.

The freight rail carrier is "going to get hit from all angles," said Miguel, whose practice focuses on commercial litigation, with an emphasis in insurance coverage.

A Norfolk Southern website devoted to testing and cleanup says air and municipal water sources are safe and that removal of contaminated soil is ongoing.

The company declined to address questions about its insurance coverage, saying it cannot discuss matters in litigation.

What is known is Norfolk Southern purchases insurance providing coverage above \$75 million and below \$800 million (up to \$1.1 billion for specific perils) per occurrence and/or policy year, according to its annual report. In addition, it has insurance covering damage to property it owns or has in its custody, or control, it said. This insurance covers roughly 82% of potential losses above \$75 million and below \$275 million per occurrence and/or policy year, it said.

A disaster like this has "tentacles" that can spread widely to many types of insured exposures, said John Andre, managing director, AM Best.

For instance, he said, who is going to want to buy property that might be contaminated? Some claims could be handled in due time, but if it's found the chemicals spread throughout the Ohio River watershed, litigation could last many years, Andre said.

Miguel said Norfolk Southern also might face charges of negligence if federal investigators determine the train, which was carrying hazardous substances such as vinyl chloride, was improperly loaded.

"There was some indication they had forewarning," he said.

The disaster and the insurance impact could be compared to the California electric utility PG&E, he said. The company had to file for bankruptcy in 2019 after being flooded with lawsuits over its alleged failure to maintain equipment that started wildfires ([BestWire, Dec. 18, 2019](#)).

At least 10 federal lawsuits have been filed in the Northern District of Ohio against Norfolk Southern Corp. and Norfolk Southern Railway Co.

Companies that made the component parts of the trains that derailed also will be dragged into the fray, he added.

The National Transportation Safety Board said it is conducting a metallurgical inspection of the wheel set of the tanker that initiated the derailment. A home surveillance camera recorded what appeared to be a wheel bearing in the final stage of overheat failure moments before the derailment, it said.

It also said 11 of the 20 tankers carrying hazardous materials derailed, with some losing their entire payload.

AM Best Senior Industry Analyst Christopher Graham said if Norfolk Southern's first line of insurance can cover current and future claims, there would be no impact on surplus lines carriers that cover the transportation of hazardous materials.

"It is not yet that large of an event that it would affect rates," he said. "It seems to be within any self-insured retention. So if it's not hitting the insurance market, it's not going to affect rates."

On the other hand, if testing indicates a more widespread problem, the company could face claims exceeding its insurance coverage, said Thomas Dawson, a partner at McDermott, Will & Emery in New York.

"If it's a really huge job, like Exxon Valdez where you've got hundreds, thousands of people doing the cleanup of a huge bay in Alaska for years, maybe they don't have enough insurance," he said. "If it's something less than that, it may be contained well within their insurance program, and yeah, it's going to hurt, it's going to be expensive."

The cost clearly falls to the company, as the U.S. Environmental Protection Agency ordered Norfolk Southern to identify and clean up contaminated soil and water resources and reimburse the agency for cleaning services to be offered to residents and businesses to provide an additional layer of reassurance.

"The Norfolk Southern train derailment has upended the lives of East Palestine families, and EPA's order will ensure the company is held accountable for jeopardizing the health and safety of this community," said EPA Administrator Michael Regan. "Let me be clear: Norfolk Southern will pay for cleaning up the mess they created and for the trauma they've inflicted on this community."