LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Biggest General Liability Rulings In The First Half of 2022

By **Shane Dilworth**

Law360 (June 17, 2022, 12:20 PM EDT) -- The first half of 2022 was rife with important rulings for carriers and policyholders in disputes concerning coverage for opioid public nuisance actions, putative class actions over the collection of biometric information and environmental contamination, as well as the consideration of evidence outside of pleadings and policies.

Here, Law360's Insurance Authority takes a look at the most crucial rulings so far this year.

Insurers Win Big in Opioid Battles

Just 10 days into the new year, the Delaware Supreme Court handed three Chubb units a massive win that relieved them of their duties to defend Rite Aid in public nuisance suits over the opioid epidemic. In a 4-1 ruling, the state's high court found that damages sought by two Ohio counties did not arise "because of" bodily injuries and that the pharmacy was therefore not entitled to a defense.

Scott Seaman of Hinshaw & Culbertson LLP told Law360 that the majority opinion, by Delaware Chief Justice Collins J. Seitz Jr., properly found that the counties' alleged injuries were economic damages that are not covered.

Michael Miguel of McKool Smith PC, who represents policyholders, said the ruling is extremely important for guidance since it came from the First State.

"Unfortunately, Delaware carries a pretty big drink of water with other jurisdictions because so many entities, no matter where they're located, are Delaware corporations," Miguel said. "Opioid insurers are going to be looking very favorably about trying to find a way to get Delaware for that decision."

Then, in April, a California federal judge issued another insurer-friendly decision in an opioid coverage dispute against AIG and a Chubb unit. Interestingly, U.S. District Judge Jacqueline Scott Corley was persuaded by the dissenting justice's view in Rite Aid that the claims brought against McKesson Corp. were "because of" bodily injuries.

However, Judge Corley found that McKesson was still not entitled to a defense from its insurers since it was not unexpected that the prescription pain medications would have been used for unintended purposes. She concluded that injuries stemming from the illicit use of opioids are not accidental, and therefore not covered, based on the amount of pills McKesson distributed into the market.

Jodi Green, special counsel for Miller Nash LLP, told Law360 that she was surprised by the ruling and explained that "federal and state courts in California tend to broadly interpret the duty to defend."

Judge Corley's ruling, when looked at in combination with a California Supreme Court's decision in Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co. and the finding in Travelers Prop. Cas. Co. of Am. v. Actavis Inc., has some legal experts suggesting that the Golden State may be a dead jurisdiction for policyholders in opioid coverage disputes.

In Ledesma, California's high court held that an occurrence can be based on a subsequent unexpected event. In Actavis, an appeals court found that an opioid maker's sale of the painkiller was not an accident that constituted an occurrence.

"Whatever you think of the decision, it is not likely to be the last word on California law on the duty to defend opioid cases." Seaman said.

McKesson recently asked the Ninth Circuit to review Judge Corley's ruling.

"In my opinion, the Ninth Circuit's decision will hinge on how well McKesson is able to distinguish prior decisions, specifically Actavis, and enunciate that the complaints at issue allege more than purely intentional conduct," Green said.

The cases are Ace American Insurance Co. et al. v. Rite Aid, case number 339,2020, in the Delaware Supreme Court and AIU v. McKesson Corp., case number 3:20-cv-07469, in the U.S. District Court for the Northern District of California.

Policyholders Winning BIPA Defenses

Trial judges in Illinois were very friendly to policyholders in the first half of 2022, with insured companies prevailing in four of seven rulings addressing insurers' obligations to defend putative class actions under the state's Biometric Information Privacy Act, or BIPA. The law requires employers to obtain workers' consent if it collects biometric data and inform them how the information is stored and discarded.

A wave of putative class actions have been filed by employees accusing companies of violating the statute by not telling them how their fingerprints or hands are being scanned when clocking into work.

Coverage disputes have followed, with the focus of the cases centering on whether insurers have no duty to defend under a number of common exclusions in commercial general liability, or CGL policies. Specifically, courts have ruled on the applicability of the recording and distribution exclusion, employment-related practices exclusion and access or disclosure of private information exclusion.

The number of coverage cases swelled following the Illinois Supreme Court's ruling last year in West Bend Mutual Insurance Co. v. Krishna Tan Schaumburg Inc. In that case, the state's highest court said a tanning salon's insurer must defend it against a BIPA class action and that an exclusion for violations of statutes prohibiting the sending, transmitting, communicating or distributing data was inapplicable.

Angela Elbert of Neal Gerber & Eisenberg LLP, who represents policyholders, told Law360 that the landmark Krishna ruling is important since the justices applied a rule known as "ejusdem generis" — a Latin phrase meaning "of the same kind" — to interpret the exclusion at issue.

The exclusion listed the Telephone Consumer Protection Act and CAN-SPAM Act, but not BIPA. And the Illinois justices said BIPA is distinguishable because, unlike those other two statutes, it does not govern a specific method of communication.

Joshua A. Mooney of Kennedys told Law360 that the use of ejusdem generis and other canons of law "suggest that the viability of established general liability exclusions are limited at best. Mooney, who represents insurers, went on to say that the Illinois federal court rulings are not precedential.

"Given that insurance is a matter of state law, they are not binding," Mooney said. "Real precedential decisions will be rendered by the Illinois appellate courts and the Illinois Supreme Court."

Of the four trial court rulings to cut in policyholders' favor since Krishna, Elbert said the most important was U.S. District Judge John F. Kness's March 1 ruling in Citizens Insurance Co. of America et al. v. Thermoflex Waukegan LLC et al.

"It's a trifecta win," Elbert said, explaining that Judge Kness found that none of the three exclusions relied upon by the carrier — an exclusion similar to that in Krishna, plus others for employment-related practices and access or disclosure of private information — were applicable. "I think it's the best BIPA coverage case of the year."

Mooney said although the disputes are far from over, carriers should pay close attention to the decisions and consider drafting new exclusions that expressly do not cover BIPA liability.

"If this were a football game, I'd say it's the end of the first half, but the score doesn't look good," he said.

Coverage disputes over underlying BIPA class actions are important to policyholders, Elbert continued, saying it is expensive to defend against the underlying suits.

"These cases can put companies out of business and there is now a cottage industry for the plaintiff lawyer's bar to go after every company they possibly can," Elbert said. "Obviously, insurance coverage is really important for policyholders to pursue and general liability is coverage that they've been spending a lot of money on premiums for."

The cases are Citizens Insurance Co. of America et al. v. Thermoflex Waukegan LLC et al, case number 1:20-cv-05980; Citizens Insurance Co. v. Highland Baking Co. Inc., case number 1:20-cv-04997; and Citizens Insurance Co. v. Wynndalco Enterprises, 1:20-cv-03873, in the U.S. District Court for the Northern District of Illinois.

Texas Broadens Use of "Extrinsic Evidence"

In February, the Lone Star State's Supreme Court provided some much-needed guidelines for when courts can go beyond so-called "eight corners" rule when determining if an insurer has a duty to defend. Texas' high court said that in three limited circumstances, a judge performing this analysis can look at "extrinsic evidence" outside the eight corners — meaning the pleadings in a complaint and an insurance policy.

In deciding a dispute between co-insurers BITCO General Insurance and Monroe Guaranty Insurance over the duty to defend 5D Drilling & Pump Service, a unanimous court said judges can consider

extrinsic evidence provided it does not involve the merits of liability, does not contradict the pleadings in an underlying suit against the policyholder and clearly establishes whether there is coverage.

Some legal experts believe the ruling will be the opening bell for more disputes between carriers as to the duty to defend as well as between insurers and their policyholders.

"It's going to open up a new wave of fights here in Texas," Rishabh Agny of TittmannWeix told Law360.

Agny, who represents insurers, explained that the Texas high court's ruling allows insurers, in narrow and specific circumstances, to consider extrinsic evidence to negate the duty to defend when there is a "gap" in the complaint's allegations, which could help limit expensive litigation.

Hinshaw & Culberton's Seaman also applauded the decision.

"The Texas Supreme Court handed the insurance industry an overall victory in this inter-insurer dispute by recognizing an exception to the 'eight corners rule' permitting insurers to rely upon extrinsic evidence in some instances where a plaintiff's complaint contains gaps that bear upon the duty to defend," he said.

Conversely, McKool Smith's Miguel has issues with the ruling, saying it erodes the long-standing principle that unanswered questions of coverage weigh in favor of the duty to defend.

"Entitling the insurance company to look beyond the eight corners, even under the auspices of just determining coverage and not the merits of the case is, in my mind, a significant erosion to the protections of the duty to defend," he said. "The entire purpose of the duty to defend is immediate protection."

"Texas is now going to allow insurers to shirk this responsibility in favor of upfront litigation on limited records to try and prove by extrinsic evidence that there's no possibility of coverage," he continued.

The case is BITCO General Insurance Co. v. Monroe Guaranty Insurance Co., case number 21-0232, in the Texas Supreme Court.

Monthlong Trial Ends With Policyholder Verdict

In late April, a New York state court jury handed a Chubb unit policyholder a win after a monthlong trial in a dispute over coverage for the costs of cleaning up contamination in portions of the Gowanus Canal.

The six-person **jury concluded** that a majority of wastewater discharges by Brooklyn Union Gas, now owned by NorthernGrid, over a 28-year stretch were accidental and are thus covered by Century Indemnity Insurance.

Brooklyn Union had operated three manufactured gas, or MFG, facilities along the canal since the 1800s and discharged wastewater while refining coal tar, a byproduct sold for a variety of uses. The company is seeking to recover the costs of cleaning up the canal for discharges that occurred between 1941 and 1969.

The coverage dispute hinged on whether the discharges were intentional or accidental and if Brooklyn Union provided timely notice of its claims.

Gretchen Hoff Varner of Covington & Burling LLP, who represents NationalGrid, told Law360 it was important to try the case before a jury.

"This verdict demonstrates the importance of policyholders who are willing to stick with a case, even through years and decades of litigation," said Hoff Varner. "Our client knew that it had coverage and faced two decades of litigation and intransigence from the insurer. We really needed a jury who listened to the case to vindicate the client's rights."

The Covington attorney went on to say that part of her job was to help the jurors do a bit of "time traveling" in order to understand the perspective of Brooklyn Union and its employees.

McKool Smith's Miguel, who has followed the case, said that among the obstacles in trying contamination cases involving decades-old discharges are finding pertinent documents and witnesses.

"One challenge is first trying to find someone that has some personal knowledge," he said. "The second one is having an expert that will survey the progression of environmental laws."

Hoff Varner said Brooklyn Union also presented live expert testimony that showcased photographs of the three sites and documents from management meetings.

On June 10, Century filed a motion for judgment notwithstanding the verdict, arguing that the jury's decision should be tossed. The Chubb unit contends there was insufficient evidence presented to the jury that showed property damage at the sites had ended and instructional and evidentiary errors occurred regarding the issue of timely notice.

Century also challenged the jury's allocation amounts awarded for each of the three sites.

Hinshaw's Seaman, who represents insurers, said the case "may not be going away anytime soon" unless the parties settle.

The case is Brooklyn Union v. Century Indemnity, case number 03405/2001, in the New York Supreme Court for New York County.

--Additional reporting by Ganesh Setty, Hope Patti, Laurann Wood and Celeste Bott. Editing by Roy LeBlanc.
