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Litigation Townhall: From High Exposure to Technology: Emerging Issues in Insurance
Litigation**

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The world seemingly continues to change and move at a blistering pace in almost every capacity. We see this on our Facebook pages (did not exist prior to 2004); Twitter feeds (did not exist prior to 2006); LinkedIn pages (did not exist prior to 2002, only becoming more well known in the last decade); Snapchat (did not exist prior to 2011) TikTok (did not exist prior to 2016) and ChatGPT (did not exist prior to 2022/2023). Political instability, demographic instability in certain parts of the world and changes in how we consume and process information are a constant reminder that things continue to change in ways that are difficult to foresee or plan for in the medium and long term. Over the horizon projections of the medium and long term future of any societal foundation, including insurance and the law, are never easy and often fraught with peril.

The purpose of this paper and accompanying presentation will be to address several emerging issues in the insurance industry, from the perspective of in-house counsel and management, as well as how these issues may play themselves out for practitioners. The presentation will also focus on what keeps our panel up at night.

For any insurer, high exposure, “bet-the-company” litigation (“BTCL”) will always be at the forefront of important considerations in the industry. It is not difficult to see why when there is a constant stream of news concerning high-value jury verdicts throughout the United States. Some recent examples include: On April 25, 2023, a court in California awarded \$2,276,000,000 in a matter styled *Jane Doe v. Church of Jesus Christ of Latter-Day Saints*; a \$1,200,000,000 verdict in a Texas case styled *Doe v. Jackson*, with the verdict rendered on August 9, 2023; a April 27, 2023, \$860,012,006 dollar verdict in another Texas case styled *Flores v. Bigge Crane and Rigging*; an Ohio court handed down a \$787,000,000 verdict on August 15, 2023 in a matter styled

Estate of J.B. v. Longwood Forrest Products, Inc; and a \$557,106,000 verdict in a matter styled *Johnson v. Fudge* out of Texas from March 3, 2023.¹ Of the ten apparent largest verdicts in the country for 2023, as of the date of the submission of this paper in September, 2023, five (5) were from Texas and seven (7) were personal injury cases.²

From the standpoint of managing high exposure claims litigation, or “BTCL”, there are several considerations that should be addressed proactively and early. It goes without saying that making sure the right internal team is on the litigation is a critical consideration. The typical claim is not normally a potential BTCL for your insured. However, it is important to not wait until the unexpected claim emerges to think through the process of who, from an internal perspective, will be in charge of the claim and which team members will be responsible for day-to-day monitoring and handling of the claim. Do you have the appropriate personnel in place to effectively process and handle a claim that has BTCL potential?

Selection of appropriate defense counsel is also a critical component of the process. Has your panel counsel handled a matter as large as the new claim or the potential claim that may be unexpectedly received? What is the level of your counsel’s trial experience? Does counsel have the subject matter expertise to handle the BTCL, despite acceptable past performance in other unrelated matters? Does counsel have the internal resources to handle a case of the scope of the BTCL? Is local or “local-local” counsel needed because of the specific location where the lawsuit is pending? Is potential counsel familiar with this venue? All of these considerations are prerequisites to securing the best possible defense team to address the issues inevitably presented by high exposure or BTCL claims. If the matter is in the pre-suit phase, selection and retention of consulting experts to obtain an early analysis of the potential exposure is also an issue that cannot be underestimated in importance. Does your company have investigators and/or subject matter experts that it has used in the past that it can call on for purposes of a rapid response to a new claim? This list of questions is not exclusive and each insurer must develop their list of priorities to address the realm of potential issues and claims that may unexpectedly crop up in the context of the applicable lines of coverage.

From a boots-on-the-ground perspective, organizing the response to new, catastrophic loss claims so that there is a clear delineation of when attorney-client privilege and work product privileges definitively attach is a critical consideration. This is where the subject matter expertise of the selected counsel is tremendously important. Many insureds that could be subject to potential BTCL have defined response procedures and policies that they will follow. However, a one-size-

¹ See, Largest jury verdicts of 2023 from ALM Law.com Verdict Search, September 6, 2023 (based on cases reported to VerdictSearch), at [VerdictSearch - Legal Research for Civil and Criminal Court Cases, Verdicts and Settlements in the United States](#).

² Of the ten cases, only two appeared to be commercial cases. The remainder were personal injury related cases. It should also be noted that in the *Doe v. Church of Jesus Christ of Latter-Day Saints* matter, at the time of the verdict the plaintiff’s stepfather was the only remaining defendant in the matter, which alleged sexual abuse against him. The church had settled its claims prior to trial. There may be other examples of verdicts that are non-collectible, reversed on appeal or limited due to some potential cap on damages. However, the sheer size of the verdicts, especially involving single plaintiff fatalities or personal injuries is always a cause for concern.

fits-all internal policy adopted by an insured may prove to be problematic from a privilege perspective where the window for gathering information before an opposing counsel is speaking to potential witnesses (who could be employees of your insured) may be narrow.

Early analysis of risk-sharing opportunities is also critical. Again, this is where client or industry specific expertise is critical to gain a quick understanding of opportunities, as well as pitfalls. If there are potential parties that may share in potential exposure, getting them “to the party” as soon as possible is critical. In a similar vein, the idea of seeking alternative means for potential resolution of claims is essential from both an in-house and outside counsel perspective. Opportunities for arbitration, both binding and/or non-binding, may be present and worth examining depending on the nature of the claim and the posture of the case.

These considerations are all necessary in light of the types of claims that insurers and insureds are seeing emerge. In its 2023 “Annual Litigation Trends Survey – Perspectives From Corporate Counsel” the law firm of Norton Rose Fulbright, LLP taking into account survey responses from more than 430 general counsel and in-house litigation leaders, based in the United States and Canada, found several of following trends based on late 2022 responses:³

- Employment and labor claims were on the increase and the most common concern for the short term future.
- Cybersecurity, data protection and data privacy issues were being experienced by a broad segment of the respondents, including related litigation.
- Environmental, Social and Governance (ESG) concerns were increasing with a significant portion (28%) of respondents expecting litigation in the coming years.
- Class action activity and risk paralleled the broader litigation landscape with employment and labor being the most common type of class action activity experienced in 2022. It marked the most common leading area of future concern, followed by cyber security, data protection and data privacy. ESG was ranked third in terms of concern.
- There was concern with evolving regulations and increased regulatory scrutiny. Health care, including life sciences and retail were the leading industries in this area.⁴

Several additional statistics contained in the Norton Rose Fulbright, LLP Report deserve mention. Forty-two percent (42%) of respondents said cybersecurity, data protection and data privacy will be the most concerning area for their organization in 2023. Of the respondents stating ESG as an

³ See, [2023-litigation-trends-survey.pdf \(nortonrosefulbright.com\)](#). Information contained in the report is referenced in this paper with the permission of Norton Rose Fulbright LLP.

⁴ *Id.*, at p. 4.

area of concern, thirty-seven percent (37%) stated that they were concerned with class actions in the year ahead.⁵

From a purely insurance-related perspective, some of the areas noted in the Norton Rose Fulbright, LLP Report are germane to the general claims handling considerations discussed above (cybersecurity, regulatory requirements, etc). However, there are industry specific considerations that were not reflected in the report. Artificial intelligence (AI) has become a point of focus during the past several years and will continue to be moving forward. There is no dispute that the ability to automate certain items, and do so effectively on a company-wide scale, will permit companies to differentiate themselves. The impact of data from devices will continue to scale up the ability to gather data on the insurance purchasing customers, which should permit the introduction of new products and potentially personalized pricing that shakes free of the actuarial models that have previously been utilized. Underwriting is a prime example where AI will likely completely supplant the traditional insurer model for policies for personal and small business products. On the horizon, there will continue to be less direct interaction between insurer and typical customer than ever before. Usage based insurance (UBI) can be expected to gain wider traction in the years ahead, as insurers adapt to individual behavioral patterns as the foundational element of insurance, versus the traditional annual renewal model. However, these issues may present privacy concerns that lead to changes in the litigation landscape as well.

The continued impact of climate change, including catastrophic weather events is seeing insurers take steps now to limit or lessen exposure in the near and medium term. Allstate Corp., State Farm, Farmers and AIG have all publicly announced that they have stopped writing new policies in California for homeowners. In July 2023, AMGuard Insurance and Falls Lake Insurance announced that not only were they not writing new homeowners' policies, but they were also exiting the California market entirely, cancelling existing policies. Other insurers are limiting issuance of new policies or placing restrictions to limit exposure to losses. Similar to the situation in California, 2023 has seen several insurers pull out of Florida including Farmers (but only Farmers specific policies), Bankers Insurance, Centauri Insurance and Lexington Insurance, as well as a group of smaller insurers. While the situations in Florida and California do have some distinct differences, the effect is the same – a resultant hole in the available market caused by external pressures. These types of issues will continue to arise as companies analyze exposure and potential loss exposure. However, this may present opportunities to fill the void in the markets where traditional, larger carriers have long dominated the market. From a litigation perspective, companies are clearly moving away from risk, including the costs associated with litigation in bad forums.

On the heels of the 2020-2021 world wide pandemic, the insurance industry continues to address the fact that the predictability of markets, the foundation upon which the industry is built, is no longer predictable. That reality is where insurers currently are attempting to determine what comes next. The COVID-19 pandemic brought the lack of predictability as a front and center consideration and that is likely to be the continuing theme moving forward.

⁵ *Id.*, at p. 5.

