International Casualty Predictions 2024

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1. New life in old PFAS and opioid claims yet

Coverage discussions surrounding long-standing claims notifications arising from the use of/exposure to PFAS (perfluoroalkyl/polyfluoroalkyl substances) and opioid related exposures will move forward in 2024 after years of stasis. On PFAS, the latter half of 2023 saw settlements progressing and accelerating in relation to the first phase of the Aqueous Film-Forming Foams (AFFF) Products Liability Litigation in North Carolina. Those settlements will lead to distributors and manufacturers of AFFF products calling on their insurance carriers for coverage. The settlements will also naturally prompt a shift of focus from the current wave of water supplier plaintiffs to the next wave of individual plaintiffs. At the same time, in the long running opioids saga, the US Supreme Court heard oral arguments in December on whether Purdue Pharma's Chapter 11 Plan of Reorganization is appropriate (focusing on whether the Plan can survive with the non-consensual third-party releases that the Sackler family has insisted on in exchange for their contribution of billions of dollars to the plan). If the plan is again approved, Purdue and its creditors committee will then look to progress the extant coverage disputes with its foreign (Bermudian and European) insurance carriers that have been sitting in abeyance as the plan worked its way through the US bankruptcy system.

2. The glyphosate debate, and litigation, seems set to continue

Prospective regulation and litigation will continue to keep glyphosate on the agenda for insurers in the next year. Glyphosate is the world's most widely used herbicide, despite the World Health Organisation describing it as "probably carcinogenic" in 2015. In the US, recent awards of $175mn and $300mn in compensatory and punitive damages against Bayer in California to those bringing claims in relation to its weedkiller, Roundup, will cause apprehension for manufacturers of like products and their insurers. However, proposed legislation in the US may prevent similar claims in the future. Pre-emption measures in the Agricultural Uniformity Labelling Act would make the Environment Protection Agency the sole US authority on pesticide labelling and packaging requirements, reducing states' capacity to implement their own restrictions and subsequent prospect of litigation. While there are no significant examples of glyphosate litigation in Europe, an ongoing class action in Australia involving 800 plaintiffs may change that, with a judge-only decision likely to be more persuasive than decisions in US jury trials.

3. Aloha to climate change exclusions

The evolution of climate change litigation means the prospect of a claim for damages against a defendant for its contribution to climate change is no longer far-fetched. The immediate risk to liability insurers is the exposure to defence costs for this type of litigation, as seen in the claim brought by Aloha Petroleum against its insurer under its commercial general liability policy. The claim follows the insurer's refusal to pay costs incurred in Aloha's defence of the underlying action relating to the alleged impact of fossil fuel production on the Earth's climate and communities in Hawai'i. One key question currently before the Hawai'i Supreme Court is whether greenhouse gas emissions constitute "pollutants" for the purposes of the pollution exclusion. We would expect liability insurers to start addressing this uncertainty through the use of exclusions specific to climate change.

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4. Biodiversity risk will move centre stage in 2024

While it may have been waiting in the wings of the ESG space in 2023, we predict the spotlight will fall on biodiversity risk this coming year. This is based in part on the publication in September 2023 of the recommendations of the Taskforce on Nature-related Financial Disclosures, providing companies and financial institutions with a risk management and disclosure framework to report and act on nature-related issues. Biodiversity risk also sits in the slipstream of climate change risks and will benefit from a general increase in awareness, despite being a separate risk focused on the direct harm we cause our environment and nature. For liability insurers, new laws and regulation will widen the scope for claims and litigation risks. But the big question is whether we will follow other jurisdictions, such as New Zealand, Canada and Colombia, in giving legal personhood to natural objects, such as rivers and forests. The risk of reputational harm should also not be underestimated.

5. Social inflation will grow in Europe

While social inflation has been somewhat of a paper tiger in Europe in recent years, we may now see it start to affect insurance pricing across the continent. Some of the key drivers associated with the phenomenon, such as punitive damages and civil jury systems, remain largely irrelevant in Europe. However, the implementation of the Representative Actions Directive increases the likelihood of class actions across an increasing number of claim types. Public sentiment on issues such as greenwashing, climate change and corporate mismanagement will generate increased awareness of and claimant involvement in class actions. Although third party litigation funding in Europe may be the subject of further regulation, this is indicative of an expected increase in its use. These factors are all consistent with increasing social inflationary trends, and insurers will need to be mindful of their exposure.

6. Regulation of European litigation funding will progress

Formal proposals for the regulation of third-party litigation funding in Europe will become clearer in 2024. In October 2022, the European Parliament made recommendations to the Commission for the introduction of minimum standards for funders, including a limit on sums that could be paid from settlements or damages to funders. Progress has been slow, with the Commission needing to balance the desire to prevent abusive claims with the crucial role that funding can play in promoting access to justice. By comparison, the UK's litigation funding market remains largely self-regulated on a voluntary basis, with funders currently focused on the implications of the Supreme Court's decision in PACCAR. Our guess is that the regulation in Europe, when it comes, will be relatively light touch, so as not to strangle the growth of mass actions for consumer claims now provided for by the Representative Actions Directive.

7. Bermuda renewal pricing will remain hard in light of polycrisis

Several macro-economic global factors, combined with weak investment and the absence of new capital, will mean that Bermuda re/insurance renewal pricing will continue to harden in 2024. Issues such as high inflation, the lingering effects of COVID-19, extreme weather events, the war in Ukraine and escalating tensions in the Middle East are affecting investment appetite. Despite the Bermuda market being historically robust when faced with unexpected events, the complex and interconnected nature of the current global landscape will continue to pose a unique risk. We expect that underwriters' efforts to maintain profitability will mean that renewal pricing in the next year will continue the upwards trend.

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