

PLUS Podcast: What's Ahead in the World of Private Company Claims?

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And with that, I'd like to turn it over to Elan Kandel.

Elan Kandel: Great. Thank you so much, Tyla. Again, my name is Elan Kandel. I'm a member of Bailey Cavalieri's Insurance Coverage Group. My practice emphasis is limited to professional liability and management liability, insurance claims, and coverage litigation.

And with that, I will turn it over to today's co-moderator, my colleague, James Talbert.

James Talbert: Yes, my name is James Talbert. I work with Elan, and I'm co-moderating, and I, like Elan, focus my practice on directors and officers liability insurance, professional liability insurance, and coverage litigation, and, I'm going to pass it to Jennifer Bergstrom to introduce herself.

Jennifer Bergstrom: Thanks James. I'm Jennifer Bergstrom, and I'm the Vice President, Management Liability Product Lead for Sampo International. In this role, I'm responsible for reviewing and analyzing coverage requests from brokers and clients, collaborating with brokers and clients to develop coverage suites across our commercial management liability products, developing a training curriculum for our underwriters, and identifying areas of innovation to foster business growth and retention, among other things.

Before joining Sampo, I spent seven years at Hiscox in various roles, initially in a claims role, and most recently as the Vice President: Management Liability Product Head. Prior to Hiscox, I spent some time at Marsh in a placement broker role, and prior to that at CNA in a claims role handling management liability claims.

Before joining CNA, I spent seven years as a coverage attorney for various Chicago-based law firms.

And with that, I'll pass it over to Anne.

Anne Ray: Hi, I'm Anne Rae. I am Senior Counsel of Professional Liability Claims at Bowhead Specialty Underwriters. I was at another carrier prior to this and was a partner at a large law firm before moving into the insurance industry. And with that, I'll pass it over to Matt.

Matthew Schweiger: Thanks, Anne. My name is Matt Schweiger. I'm an AVP of Claims with Core Specialty Insurance. I oversee our Management Liability Group, which mostly involves D&O and EPL claims. I've been in the world of claims for seven years. Prior to that, I was a practicing coverage attorney, and I'm very much looking forward to our discussion today.

Elan Kandel: Thanks so much, Matt. Again, this is Elan Kandel. Before we begin today's presentation, we're going to talk about certain developments that we've seen in 2023, and how those developments might impact the litigation as well as other claims that we potentially expect to see in the new year in 2024.

Just by way of example, we'll talk about how enhanced state and federal rulemaking in certain areas, along with the attendant increase in regulatory enforcement in those particular areas in 2023, might impact types of claims, as well as the frequency of certain types of claims that we expect to see in 2024.

We'll also talk about how the swelling of bankruptcy filings in 2023 may also have potential myriad implications as to the types of claims that we may see in 2024. And then last but not least, we'll speak about DEI and AI, everyone's favorite topics, and we'll talk about how we believe we might actually start seeing some private company claims involving DEI and AI with increasing frequency in 2024.

There are also some other more granular topics that we will talk about throughout the course of today's presentation. And with that, let's get down to the topics themselves, and I will turn it over to my co-moderator, James.

James Talbert: Thanks, Elan. So, the first topic that I want to talk about is one that I feel like has just been at the front of mind for a long time. I've been getting an uninterrupted string of claims involving the False Claims Act and the Foreign Corrupt Practices Act and other federal investigations and enforcement actions in 2023.

I'm not sure if you know that's a small sample size and it may not be representative, but I want to try to understand if that is indicative of a broader trend. And if we can expect to see more of the same in 2024. If so, and Anne, I know you have been keeping tabs on these sorts of claims and you're well versed in DOJ/FTC actions. So, I thought you'd be a perfect person to talk to about this.

Anne Ray: Thanks, James. I will start by talking for a minute about the False Claims Act because, you're right, the FCA investigations and referrals are on an upward trend. FCA recoveries in 2022, which was the last year for which data was available, totaled 2.2 billion dollars.

77 percent of those recoveries involved healthcare and life science industries. Government-initiated FCA actions are also rising relative to whistleblower actions. Several recent FCA enforcement actions against the private equity sponsors of health care providers have resulted in large judgments or settlements.

For example, in *United States ex rel. Medrano v. Diabetic Care doing business as Patient Care America*, the DOJ alleged that Patient Care America submitted improper claims for reimbursement to Tricare. The DOJ further alleged that the company's controlling stakeholder, a private equity firm, that managed and controlled Patient Care America and participated in the charged misconduct.

That case ultimately settled for 21 million dollars. The FCA will likely continue to be a potentially significant source of liability for private equity firms focused on health care. The Foreign Corrupt Practices Act is also seeing a spike in activity. 2023 was a banner year for the FCPA penalties. The Department of Justice and Securities Exchange Commission obtained over 520 million dollars in total fines and penalties related to FCPA violations, making 2023 one of the top dozen highest grossing years with regards to enforcement penalties in the nearly 50-year history of the FCPA.

Foreign governments and other branches of the U.S. Government recovered an additional nearly 50 million dollars in global settlement amounts related to those FCPA enforcement actions. In addition, the U.S. Government announced charges against 11 individuals for FCPA and FCPA-related conduct.

James Talbert: These two laws in particular, the FCA and the FCPA, and actually also one, I think we may also want to discuss later on, antitrust. These are laws that I always perk up when I see these come across my desk because they're almost always very significant sources of exposure. My experience is

just my experience, but I rarely see these sorts of claims go away for very little money.

And so, this is something that I think is important. I like to keep tabs on this. Based on what you're telling me, it sounds like we can expect further enforcement. And I understand that the DOJ in particular is getting more aggressive about bringing actions on its own to enforce the FCA in 2023. I know they brought many more actions of their own accord than they had in prior years. And this is concerning to me because I know these are very significant sources of exposure.

Anne Ray: I think that's a fair assessment of the situation that we've been dealing with and will likely continue to be dealing with going forward.

While we're talking about enforcement, I think it's also worth mentioning the Corporate Transparency Act, which is a new act that became effective January 1st of this year, 2024. The act had been proposed many times over the years to prevent terrorist financing but was finally enacted in 2021. And now we're just seeing it come into effect.

Along with its implementing regulations, the Corporate Transparency Act mandates that certain U.S. legal entities and foreign entities registered to do business in the United States report their beneficial ownership information, or BOI, to the U.S. Department of Treasury's Financial Crimes Enforcement Network, or FinCEN.

This is a sweeping change to corporate formation rules. It provides federal authorities with a new tool to investigate money laundering and other illicit uses of the U.S. financial system. This brings the United States in line with at least 30 other countries that have implemented some form of central registry of BOI.

And the BOI will be available not only to federal law enforcement but also under certain circumstances to state, tribal, and foreign law enforcement. Penalties for willful violations of the CTA are punishable by 500 dollars a day and up to 2 years imprisonment. Like you mentioned, some of the other areas to focus on include antitrust, the DOJ and FTC pursue an aggressive merger enforcement agenda with merger guidelines and filing requirements. Companies can still close deals if they structure them to essentially go the distance and have solid litigation strategy, but those deals are going to be scrutinized heavily.

FTC enforcement is generally focused on financial services, web services, and telecom providers. Robocalls and illegal telemarketing are also areas the FTC

has targeted with multiple initiatives. It appears to be expanding its efforts to include voiceover internet protocol providers, which allow foreign robocalls to enter the United States, as well as lead generators that obtain and sell purported consent from consumers to telemarketers.

James Talbert: Right, and the FTC is headed by Lina Khan, who was appointed, I think, early in the Biden administration, and she's always been very, active and interested in taking a more active role in regulating trade. I know she focuses particularly on antitrust and had previously always thought of antitrust as something that would be primarily or, only of interest to public companies.

I've been thinking of the quintessential monopoly cases like Mont Bell, et cetera. There are many circumstances where antitrust enforcement will implicate private company as well. We deal with a fair number of policies issued to private equity firms.

And there has been a fair amount of antitrust enforcement related to private equity acquisitions recently, and it appears that this will continue through 2024 and 2025. Who knows? Because there will be a new administration. But this increasing leverage of antitrust laws seems to be something that's going to remain steady.

Elan Kandel: And just, James on that note on the expected frequency that we might expect to see in 2024, I would just note that although this is really beyond the scope of today's presentation, which is really just focused on talking about the types of claims that we would expect to see in this year, there are obviously some pretty significant coverage issues associated with many of the claims that we were going to speak about. And I think that's obviously a subject for another day, but I think folks should be mindful of that as well when listening to this podcast.

And, who knows, maybe we'll do another podcast just talking about as a follow up the coverage issues associated with what we're talking about today. But. Yeah. Just wanted to throw that out there so folks wouldn't lose sight of the coverage angle as well.

Matthew Schweiger: And I would say too, in addition to what James was saying before, these types of claims, FCA, FCPA, antitrust, these are types of claims that you for quite a while seen fall within sublimits or coinsurance or things like that. So, it's not like they're new as large exposures to underwriters,

but they do inherently come with some complicated coverage issues. And the fact that they draw sublimits and coinsurance and things like that.

Yeah, I think James supports your point that they are certainly, high exposure claims when they do come across your desk.

Elan Kandel: Sure. And I'm also thinking of certain policies that many have also had very broad antitrust exclusions several years ago, but the market may not necessarily have caught up to where things are under the Commissioner Khan piece, with respect to the FTC. Matt, you raise excellent points regarding sublimates and, again, just things to bear in mind as you're listening to today's podcast. We haven't lost sight of the coverage angle but again, today's presentation is really just focused on the types of claims that we expect to see.

James Talbert: I wanted to shift briefly, if you'll humor me, to SEC enforcement. And this is, again, one of those things where you think, you know, SEC sounds primarily like a public company concern.

But, of course, it's not. It does implicate private companies. And we actually see quite a bit of SEC investigations. So, I'm interested to know what's going on with the SEC's direction and what we can expect from that agency into 2024.

Anne Ray: That's right, James. SEC enforcement does extend to private companies, including those that are not directly engaged in selling or purchasing securities.

The SEC's authority to investigate and sanction individuals and privately held entities will become even more critical given the commission's recent focus on ESG or environmental, social, and governance disclosures and the soon to be released climate disclosure rules. As public companies seek to demonstrate their ESG bona fides, they may rely on information and disclosures from privately held partners up and down their supply chains.

For instance, in *SEC v. Monolith Resources*, the SEC brought an enforcement action against a private company in connection with its employment contracts, which barred employees from receiving money in connection with any government investigation or proceeding. The SEC claimed that interfered with the commission's whistleblower program. Private funds and their managers will continue to face increased scrutiny as well.

Private funds are definitely a growing focal point for the SEC Enforcement Division. This is largely because of significant growth in the amount of assets

managed by advisors to private funds. It's also based on the unique features of private fund investment that lend themselves to certain recurring issues such as undisclosed conflicts of interest, fees and expenses, valuation and custody and controls around material non-public information.

James Talbert: And Anne, let me just jump in really quickly. I mentioned earlier that Lina Kahn of the FTC was very focused on leveraging the antitrust laws, particularly with regard to private equity.

I would say the same is true of Chairman Gensler of the SEC when it comes to private equity, he is interested in leveraging securities laws to rein them in in certain ways. I think his perception is that there is quite a bit of abuse going on, and additionally, just a lot of non-transparency.

And he's expressed these concerns in the last several enforcement priorities updates the SEC releases each year. And he's been pretty firm in maintaining his focus on the private funds industry. And I think we'll see that continue going forward as well. So, I think you're spot on.

Anne Ray: Yeah, that is accurate as it seems in the last 2 years the SEC has brought more cases in this area than for any other class of registrant to address these concerns. As you mentioned, the SEC adopted the private fund advisor rules in August of 2023. Among other things, those requires additional reporting bars preferential treatment for some investors over others, absent adequate disclosures and imposes new record keeping requirements.

These new requirements appear ripe to serve as fertile grounds for enforcement activity in 2024 and beyond. In fact, the SEC's examination priorities for 2024 indicate that fund advisors experiencing poor performance, significant withdrawals, valuation issues, and managing private funds with more leverage and illiquid assets may experience increased scrutiny.

The SEC is also going to evaluate how private fund managers adhere to contractual requirements on limited partnership advisory committees. And similar structures, including any notification and consent processes. And the SEC intends to continue its historical focus on accurate calculation and allocation by private fund managers of fund fees and expenses at both the fund and investment level.

And this suggests that private fund managers should be mindful of the valuation of illiquid assets, as well as the post commitment period management fees,

potential offsetting of fees and expenses, and the adequacy of fees and expense disclosures.

James Talbert: Thanks, Anne. The SEC's focus on the preferential treatment of certain limited investors over others is something that I've encountered and that's that it's basically when a fund gives a secret better deal to certain limited partners who invest compared to others.

Or extends certain opportunities to some investors but not others. These sorts of things can create conflicts. And additionally, I know private equity is expanding into all kinds of things that it didn't used to be. I think their investments are, it might be majority debt investments at this point, but they have lots of different investments, they're often huge.

And you can see situations where some funds would have investment objectives that would conflict with other funds. That's another concern I think that they have. It is a bit of the Wild West when it comes private funds. And I think the SEC is trying to rein that in to the extent possible, and they're making some headway in that regard.

Elan Kandel: Yeah, this is Elan. And again, that's an excellent point you made James. And for many years, the various different commissioners the SEC has as always, I feel like they've been focused on private funds for quite some time. Now, I will just say that, most recently in the respect to the latest rulemaking with respect to certain disclosure requirements and other rules relating to private funds, there is a litigation challenge to those rules.

And I believe it's pending in the circuit court in the 5th circuit right now to be precise. And I think we can expect to receive a ruling as to whether or not the SEC exceeded its rulemaking authority I believe in May, so May of 2024. So pretty soon. And we'll see how the court responds.

James Talbert: So that was extremely helpful. Thank you so much, Anne. I think you gave us a nice roadmap about what we can expect with regard to some of the most significant kinds of regulatory enforcement actions that we tend to see. I want to shift gears a little bit, and I'm going to rely on our other panelist, Matt Schweiger, to help walk us through some of the developments with regard to claims arising out of M&A activity. Generally, I'm aware of kind of a depression in overall M&A activity in '22 and '23. I'm not sure where the market's headed though, but I do know that it's very common for suits to spring out of deals, including private company deals. And so, this is a topic that's of interest to me.

And so, Matt, I'll defer to you.

Matthew Schweiger: James, you're 100 percent correct that M&A is a major corporate event, obviously, is a driver of claim activity. So, over the last couple of years, M&A has been down. You would think that most of that would probably be good news from a claims perspective and that you're not having these major corporate events companies change hands, complicated deals that are going to result in claims.

That said, to the extent deals have been going through those deals have probably gotten more creative and creativity could unfortunately result in more claims down the road. Just a couple examples of things that we've seen reported, there's the use of dividend recapitalization is also known as leverage dividends, which is essentially fairly simply just using debt to finance a dividend as opposed to using corporate cash.

James Talbert: It's a really controversial technique, I think. It's essentially my experience with handling private equity sorts of claims has taught me that it's one of three exits that funds often use, they'll either go for an IPO, an M&A deal, or a dividend recap.

And given the interest rates and the instability, IPO has been down and so has M&A. This is a more controversial one because you're essentially sucking money out of the company often to benefit just a portion of the shareholders, right?

Matthew Schweiger: So, it's risky in 2 perspectives, really.

You're loading more debt onto the company. So, you are creating probably a higher insolvency risk for the company. And 2, you're preferencing a class of shareholders over another, which, the shareholders who get the short end of the stick are, potential claimants if you're using a device like that to, like you said, generate an exit for private equity or other owner.

So, it's certainly a controversial tactic. Another type of tactic that's being used are earn out provisions, which essentially ties the 2 companies together, or the buyer and the seller together for a longer period of time. It's a lower upfront payment.

And then based on performance or other metrics that are met, there can be additional payments down the line. And of course, disputes can arise over whether the numbers are accurate, and those goals are being met, whether

someone's acting in good faith to try to meet those goals, just all sorts of claims that can arise from those types of provisions.

James Talbert: Yeah, that's interesting. It seems like there are more opportunities for a dispute to arise if they have this continuing relationship down the road.

Matthew Schweiger: I can tell you personally, I've seen that allegations that the group that takes over the company is not acting in good faith to meet the goals.

They're essentially fudging the numbers to try to avoid paying out on the earn out provisions, which is wholly foreseeable results of these arrangements, unfortunately.

But these are kind of landmines, waiting out there for us to the extent the higher interest rate environment has caused companies to resort to these over the last couple of years to generate M&A activity.

We may see these coming down the road, and from a claims perspective, we're always lagging in terms of claims.

James Talbert: Yeah. I know there's quite a bit of demand for M&A activity. And I think we've got that probably coming in some form or another. Whether it's these sorts of creative deals, or if we've got alternatives to M&A, like the dividend recap, I think there's probably some additional deal making to be done in 2024, and I'm sure it will have the consequence claims lagging behind them.

Matthew Schweiger: Yeah, 100 percent agree. 100 percent agree.

I know there's a lot of money out there looking for a home. And so, to the extent M&A activity does increase, even if it's more traditional, that of course could lead to claims for the reasons I was saying, just because M&A is a significant event and tends to draw an attorney's attention, which results in the claims.

Elan Kandel: Yeah. And certainly um, you know, on that point, in the private company context it's somewhat unusual, particularly in the lower end of the market, to see IPO's just in general. So, we're used to seeing M&A activity in a bit of a different matter than you would otherwise see in the public company context.

But I think you and James make some excellent points about, perhaps more as you put it more, and James put more, creative types of M&A activity that we can expect to see in 2024 that, perhaps policyholders and underwriters alike should think about when you're negotiating these policies going forward. As well as, when you're taking into account various policy language, as well as premium.

Matthew Schweiger: Exactly. Yeah. M&A's always a significant risk. While it's typically good news for the sellers of the company, for the insurer of that company, it's often bad news because there's something coming at you down the road.

Elan Kandel: Okay now that we've spoken about M&A, why don't we I think we alluded to it when we were talking about the downside, perhaps, of dividend recaps. And one of the downsides, of course, being loading the company with additional debt, which could potentially lead to insolvency.

And I thought there were some interesting stats that I really hadn't given a whole lot of thought to until I saw them the other day. And with respect to insolvency, Jenny, maybe we can talk a little bit about some of those stats and what we saw in 2023 and maybe some predictions for 2024 given the rise in insolvencies.

Jennifer Bergstrom: Sure, absolutely. Yeah, so like you said, Elan, insolvencies are certainly on the rise, and we would expect to continue to see them into 2024. According to S&P Global, there were more U.S. Corporate bankruptcies in 2023 than all of 2022 or 2021 as companies continue to struggle with high interest rates and a tight labor market.

Yeah, it's incredible. The S&P Global recorded 591 corporate bankruptcies for 2023, which compares with 373 for all of 2022 and 408 for all of 2021. That's still well below the 639 that were recorded in 2021 when the pandemic forced many companies into Chapter 11, but still really high for 2023.

The top three industries, interestingly, for corporate bankruptcy filings in 2023 were consumer discretionary, industrial, and healthcare. We would expect the increase in number of consumer and commercial filers seeking bankruptcy protection to continue into 2024, given the runoff of pandemic stimulus, increased cost of funds higher interest rates, rising delinquency rates, and near historic levels of household debt.

In fact, commercial Chapter 11 filings were up 20-22 percent in January 2024 compared to where they were at in January 2023, and all commercial filings were up 21 percent in January 2024 compared to January 2023. So, you are still seeing that increase in bankruptcy filings into 2024 thus far.

As far as claim activity goes, given the lag time between bankruptcy filing and the D&O related lawsuits, I would caution that we're certainly not out of the woods for 2023, filings and definitely not out of the woods for 2024 as it's really just begun. But in addition, I would expect we could potentially see lawsuits by minority shareholders against a private equity firm who, following the restructuring of a portfolio company to the detriment of the minority shareholders, or perhaps you just see the private equity firms coming in and doubling up some of those more distressed and struggling private companies.

Elan Kandel: Yeah, those are all, you know, good points. The one other thing that came to mind as you were speaking, Jenny, about the fact that we haven't necessarily seen a lot of these bankruptcies turn into adversary proceedings, which, would potentially trigger coverage under the D&O coverage parts of these private company policies, is that we really, we, and again, this is not a coverage presentation, but certainly generally speaking, when a company goes into bankruptcy there is an effort to exercise the purchasing--the extended reporting period, which, in some cases could be as long as six years.

And so, Jenny, to your point, given the rise, I'm not saying that we're at 2008 levels, although it is interesting that when you look at the types of, or the sectors I should say, that are where we see an uptick in bankruptcy filings. It's not really in the financial sector as it was, perhaps in 2008, during the Great Recession, it really seems to be more across the board, so to speak.

And in looking at what risk insurers have on their books, I think you really need to do more of a widespread wholesale review of the risks you have on the books and see how those, to the best of your ability, admittedly, it's more difficult in the context of private companies, but to see how those companies are doing.

On the stats you mentioned, which I thought were very interesting, Jenny. Drilling down a bit more on those stats in terms of the number of filings, as I understand, I think it's the SPG Global also broke those numbers down a bit more. And in 2023, with respect to the private equity sector, PE-backed filings, in other words, filings involving portfolio companies, hit a record in 2023.

I believe there was about 104 that were filed, and interestingly, 64 of them were in health care. And again, you touched upon it when you were talking about PE

a minute or two ago, but certainly in the context of those portfolio company bankruptcies, you have again, you've got, the portfolio company that is the one filing for bankruptcy. But you have a PE firm that obviously has not filed for bankruptcy. And so, you have a potential pocket defendant that inevitably, I shouldn't say inevitably, that shows you how cynical I become. But let's just say most likely, there will be a trustee out there that will eventually be hunting for dollars, so to speak from the PE firms.

All things to look out for as we enter the new year with insolvencies on the rise from 2023, and potential implications of those existing insolvencies, and ones on the horizon as well. And so with that, well, why don't we just shift gears a little bit, and I feel like in today's landscape, we've really been talking a lot about, you hear it in the headlines, about both state and, primarily states, introducing a web of privacy litigation as well as, to some extent, at the state level. I guess I'm just wondering, I think in years past, we primarily focused on Illinois and its biometric privacy law, but I wonder, let me ask one of our two native--I guess one of our three, actually, just three of you were in Illinois. But Matt, what are your thoughts given that you were on the ground, so to speak, when Illinois passed its biometric law, what do you think about 2024 and data and privacy concerns in 2024 that insurers and policyholders might see?

Matthew Schweiger: We're not on the forefront of much in Illinois, other than creating liability for corporations.

Certainly, a famous or infamous example of that, creating a liability for companies based on how they collect, and retain, and monitor the biometric information of their employees.

There's been probably entire podcast just on that subject alone, so I won't belabor it. But, just to make a forecast of my own, I think that law 's just the tip of the iceberg in terms of privacy related claims. I think this is really an area that needs a ton of focus.

I think as an industry or private industry, we really need to be focused on this area as a source of risk because the state legislatures are very active at a federal level. Congress hasn't gotten its act together as much, but it's certainly, you could see it as an area where they could potentially come to some agreement and pass some laws.

But, last year, California passed a very comprehensive privacy law, which applies to a whole slew of things, but, really, I guess consumers are right to opt out of data sharing things of that nature, considering the amount of data that

flows back and forth between customers and companies that they interact with nowadays.

That's just a lot of potential liability there. If you zoom out to the federal level, just to circle back to something we talked about before and how active the FTC has been. This is an area that does fall under their purview because consumers are involved. And with an active FTC, I think you're going to see a lot more focus on whether companies are complying with all the privacy laws that are out there. At the federal level, we've obviously had HIPAA for quite a long time.

And now we have more and more state -level laws coming on as well. Big picture, I think this is really just an area where you're seeing more regulation, more laws, particularly at the state level, to a lesser degree at the federal level.

And it's just more ways for companies to find themselves in a mess. And I think privacy claims are going to become more and more common. And, again, not to delve into coverage, but traditionally some of the old, privacy adjacent laws like, the TCPA or the FDCPA, those have been subject of exclusions in the past.

So again, to forecast, I wouldn't be surprised if we start seeing more focus on exclusions in this area, just because it is such a huge source of potential liability.

James Talbert: I'll just jump in there really quick to note that.

These sorts of laws take lots of different forms. Certain states will have much more stringent requirements than others. And there's just, there's a lot of variation. There are a couple models that are starting to gain more traction. But these are not yet mature, tested, litigated regulatory regimes yet. And so that just makes things unpredictable. And I think it remains to be seen how significant these are going to be as far as sources of exposure.

Elan Kandel: And certainly, on that note, though I think we saw in Illinois, as Matt can attest to just a flurry of lawsuits being filed by a lot of the same firms, oftentimes on the same day.

One firm would file over 100 lawsuits, and I would think that particularly those statutes that provide for a private right of action, that we should expect to see that in other states as well. And again, that gets also back to, not to harp on coverage, but I think Matt is absolutely right.

I think the industry as well as policyholders need to do whatever we can to minimize exposure. So that the market continues to stay robust, and talk about sublimits and other things, talk about making sure that claims stay in their respective coverage lane, so to speak, and I guess what I'm getting out there is, quote, unquote, silent cyber and issues related to that. And I'll leave it at that for now.

But all things to think about as we enter 2024. Another thing to think about as we enter 2024 is, I suspect that most of you that are listening to our podcast are probably at home, but query how often you're at home, are you at home 5 days a week during the work week? Or are you at home 2 days a week, or something in between?

And so, on that note, I think now that the pandemic is seemingly, knock on wood, behind us, we've all seen the headlines about downtowns and urban areas being, almost ghost towns, and employers trying to do their best to bring those downtowns back to life, as well as the dispute between the benefits of in-person work versus remote work versus hybrid. And Jenny I'm curious, on the EPL front, have you started to see anything that indicates that, perhaps we can--not finally, I don't want to say finally, but there was that for many folks have been talking about a potential uptick in EPL claims as folks started returning back to work? And I think I'm curious, are we actually seeing that uptick now?

Jennifer Bergstrom: It's interesting, Elan. I was reading a statistic online yesterday, or the day before, and according to the Insurance Office of America, 90 percent of companies with office space plan to return to the office in 2024. And 28 percent of those companies stating that they will threaten to fire employees who don't comply with those policies.

I don't know necessarily if those claims will come to fruition, but I certainly think it is right for employment discrimination claims coming out of that return to office policy or policies that will be put into place specifically with respect to disability or religious discrimination claims.

I know at Sompo, our most frequent type of claim that we see, I believe, is disability discrimination, and that can certainly be some sort of --this is not necessarily the claims that we're seeing, but you can certainly see disability discrimination claims tied to a return to office type policy. I would also note that the EEOC has signaled, as far as the focus for 2024 goes, a focus on long COVID and disability discrimination, as well as pregnancy discrimination, AI and AI-related discrimination.

On the topic of the return to work, I would say disability discrimination and long COVID fall into those categories, but then their other focuses are AI-related discrimination, thinking of AI that screens employees being discriminatory on age or discriminatory on any other protected basis.

And then the Pregnancy Workers Act hasn't gotten to effect and enforced pregnancy laws against discrimination. I would certainly expect to see an active EEOC in 2024, especially given the number of lawsuits they filed in 2023, which was up by 50 percent over the year prior.

There was also a 70 percent increase in ADA litigation filed by the EEOC last year. So really, the EEOC does seem pretty focused, very interested in disability discrimination of all sorts. But with the return to office, I think that could certainly play a role in the types of claims that we will see in the future.

Elan Kandel: All interesting points. And, particularly also on the AI front, as you mentioned, I think we're just beginning to see some of the AI litigation that you mentioned relating to weeding out certain members of protected classes using AI, either intentionally or unintentionally, but nonetheless as alleged by the EEOC, as well as other state and local equivalents, I think you're absolutely right.

I think we should expect to see uptick in that in 2024 as well as in years to come.

Jennifer Bergstrom: I totally agree. And on that note of the state and local equivalents, that made me think of something else. From an EPL litigation standpoint, I would say that in 2024, we would expect to see like we were just talking about, those state and local government laws and regulations playing a key role here, BIPA, GIPA. And then also, more local governments are regulating things like paid leave and wage transparency. We've seen, especially in Washington, where there's been a flurry of class action lawsuits being filed, alleging violations of the state's new pay transparency laws.

And that law, like BIPA, carries with it a private rate of action and statutory damages of up to 5,000 per violation per applicant. It looks like the plaintiff's bar there is really taking, or maybe not even the plaintiff's bar, maybe it's the Attorney General's office who's bringing those suits, but there's that private rate of action with that statute as well.

So, I think we're just starting to see those lawsuits come. And not necessarily Somo, but I think in general.

Elan Kandel: I think also one other thing that I don't think we think about a whole lot in the private company context, is this whole concept of what impact will DEI initiatives have on private company liability, particularly in view of the Supreme Court's decision in the Harvard case. Admittedly, Harvard was a higher education case. It didn't really involve your traditional private employer, but we know that, I'm just thinking, we've already seen a case filed against Morgan Stanley, and these tend to be cases of reverse discrimination case filing.

The case is, it's Myersburg. It was filed in August in the Southern District of New York. I believe it ended up being dismissed. But that's not to say that the dismissal won't be appealed or that we won't see other cases, but I know we look and recall reading the complaint a couple of days ago. And the allegation by Myersburg was that he was terminated and his replacement was an African American female.

And I think he claimed that he was replaced by the African American female as part of the employers DEI program, then, its intentioned DEI program, but it's desire to place some members of protected classes in more senior positions in the context of that program.

And so, we'll see how these so-called reverse discrimination cases come out. Actually, I stand corrected Myers--wasn't, it wasn't dismissed. The case was a state pending arbitration, but I'm aware of a couple other cases. I know there's a class action that was recently filed against a major media company.

And then there have been some other kinds of cases filed by, let's say public interest groups, so to speak. For example, the American Alliance for Equal Rights comes to mind. I know they've been involved in filing a number of suits against employers, private employers as well as public. But in the private company context, I know they filed a lawsuit against the very large law firm, but they are on the flip side. They also filed a lawsuit against a fairly small Atlanta based venture capital fund that was founded by women of color and the court I know recently actually granted a motion for an injunction filed by the Alliance for Equal Rights. And these cases are being filed with increasing frequency. And I think certainly, DEI is a hot topic, and we should expect to see much more of it in 2024.

James Talbert: It's one of those ones that's similar to ESG that I feel like policy holders are caught in the middle of two competing pressures. There are regulators and stakeholders in companies who push hard for adoption. And then there are others. There's a growing backlash and the floodgates haven't exactly been opened, but there are more lawsuits and they're having some traction.

Elan Kandel: Right. And again, I suspect that there are a number of claims out there that are likely working their way through enforcement agencies, such as the EEOC.

And for that reason, they haven't yet appeared on a public court docket, but it's probably only a matter of time before they do so.

Matthew Schweiger: Well, just a point, I would just say, just a point folks to maybe the most high profile example is there was that Starbucks case against a public company, but that was an employment case arising out of that incident in their Philadelphia store where a manager got fired as part of the fallout.

And she recently, earlier this year, got a 25-million-dollar verdict.

Elan Kandel: Exactly.

Matthew Schweiger: So those cases are out there.

Elan Kandel: Yeah, and, again, there's companies of all sizes, have, you know, well-intentioned initiatives and this is just rhetorical, how will those companies respond in the face of what appears to be significant litigation on the very, very near horizon with respect to their existing programs and the like?

Well, I know we're almost out of time. A tangential, but related topic to EPL is what I think we might see in the context of ERISA litigation in 2024.

James, do you have any thoughts on that?

James Talbert: Yeah, I've been looking into trends in ERISA litigation, and it's a bit of a lull just looking back for a moment. It's been a bit of a lull in 2023 compared to 2022 when there was a very large number of ERISA actions brought, but I wouldn't take too much comfort in that.

It's more likely that the serial filers are just preoccupied with a lot of cases filed in the prior year.

Elan Kandel: And you're speaking, I presume, you're really when you talk about the lull in filings, I think what you're referring to are the lull in filings of the, what we call, the excessive fee cases, although that's a pretty--that term really encompasses a very broad number of types of

James Talbert: cases.

Yeah, that's a good point. There are many different sorts of claims that are encompassed within the ERISA rubric. You have individual benefit claims brought by individual employees seeking benefits, you have ESOP disputes.

There are really a wide variety of these sorts of claims. The excessive fee claim is the one most people think about because those tend to be the big class actions that get high-profile coverage. And those are the ones that the most active plaintiffs' firms have traditionally been more interested in.

I would say most people expect to see a continuing drive toward creativity by the plaintiff's bar. In the last couple of years, they've been finding novel ways to make claims. For example, a variation on the excessive fee theory, they've been bringing claims alleging that the plan administrators have not been negotiating drug prices adequately.

And so, they're paying too much for drugs. And the theory essentially is premised on the idea that the plan is the guarantor of the very lowest drug prices. And this is an issue that hasn't been decided yet. Depending how courts come down on it, it could have very significant implications if that duty is established.

There are a number of other interesting issues that are developing in the ERISA world. One is related to the payment of annuities. Annuities are often paid out. They're calculated using mortality tables that can be very old, sometimes 50 years old. And the result is that life expectancy is outdated based on these models and the payments are less than they otherwise would be if the tables were updated.

So, we're seeing more of those sorts of cases. We're also seeing cases arising out of planned forfeitures. If someone forfeits their plan because they leave the company before their benefits passed, there's money left on the table and that flows back to the plan to do, --it may have discretion to do several things with it.

We've seen objections to plans use of those funds that flow back to them, that seems to be a hot area that we may see more activity in.

Elan Kandel: Food for thought, so to speak, and I know there was just a case filed against a very large pharmaceutical company recently involving cost

charged. And the case was filed in its capacity as a health care health insurance sponsor.

And the case involved, the charges imposed by its pharmacy benefit manager on certain drugs. And so that case is still in its early stages. But, just again, rhetorically, but query whether or not that if that case does survive a motion to dismiss, whether or not we will see the plaintiff's ERISA bar not necessarily shifting its focus.

I think probably the better term is to say broadening its focus to move beyond traditional retirement plans and now enter the world of litigation against health insurance sponsors as well. A lot on the table there, obviously a lot that will be happening in 2024 and it will be interesting to see, if we do this podcast again at the beginning of 2025, whether or not a lot of the predicted trends that we expect to see in 2024 will hold true.

Obviously, I think the panel's of the view that there will be an uptick and we will be seeing a lot of these types of claims come to fruition. And if they're not already coming to fruition, they will be in 2024. and if they're only in their very early stages, then, they will certainly be much more advanced as the year goes on.

And so, I think with that, I want to thank our esteemed panel members for their time and turn it over to Tyla.

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