

Insurance Group Of The Year: Covington

By Jennifer Mandato

Law360 (February 14, 2024, 2:02 PM EST) -- Covington & Burling LLP cemented an appellate court victory for Merck in a \$1.2 billion dispute over the applicability of a war exclusion in the health giant's property policies this past year, topping a remarkable list of wins that earned the firm a spot as one of Law360's 2023 Insurance Groups of the Year.

Covington led litigation from the outset, as Merck sought coverage against 32 property insurers, including units of AIG and Chubb, for losses from the 2017 NotPetya cyberattack being blamed on the Russian government and hackers.

In May 2023, a New Jersey appeals court panel affirmed a lower court's decision that the "hostile/warlike action" exclusion in policies issued to Merck is not applicable to the multinational pharmaceutical company's claims stemming from the cyberattack.

Serving as a prime example of why policyholders want Covington on their side, the Merck action flexed the group's coverage litigation capabilities, which rallied to move the case forward from its initial status conference in 2019, said Anna P. Engh, co-chair of the insurance recovery group and lead counsel in the action.

The New Jersey Supreme Court agreed to review the case, but all the insurers settled prior to oral arguments at the outset of the new year, Engh shared. Thus, the appellate court decision in Merck's favor stands as precedent on the scope of a war exclusion in a cyber setting.

Engh maintained the courts will now see less litigation over whether a war exclusion bars coverage for cyber events going forward, as insurers have since rewritten their war exclusions to be clearer in applicability.

The insurance recovery group, comprising more than 100 attorneys, is considered one of the firm's "crown jewels," co-chair Marty Myers told Law360.

Covington secured another significant victory in January 2023, this time at the summary judgment stage in the Delaware Superior Court, for real estate investment trust Seritage Growth Properties in its bankruptcy proceeds with Sears.

The court agreed that two excess directors and officers insurers must defend Seritage and its executives



from underlying bankruptcy litigation accusing them of siphoning billions of dollars from Sears, finding the adversary proceeding was either a securities claim or a non-securities claim, both covered, and that it fell within the insurers' policy period.

"The decision gives policyholders a basis to argue, and courts to accept, that despite D&O insurers' insistence to the contrary, there are circumstances under which a related claim provision may not require a later related claim to be deemed made at the time of the earlier claim," Matthew Schlesinger, partner in Covington's insurance practice group and lead attorney for action, told Law360.

The group prided itself on standing at the forefront of emerging matters, as it advised on the first-ever purchase of a coral reef insurance policy in the United States in November 2022. Myers, lead attorney for the project, said this new area of coverage is generated both by climate change and insurer interest in developing new products.

The policy is a "parametric insurance policy," which essentially removes an insurer's defense lawyer from the equation in the event of a loss, according to Myers.

"The loss is triggered by a specific, scientifically verifiable event," he said. "And if that event occurs, the policy pays the entire limit, regardless of the amount of damage, quantum or potential coverage issues."

Covington represented The Nature Conservancy in an effort to provide funding for coral reef repair and restoration across Hawaii immediately following hurricane or tropical storm damage. Others are attempting to replicate the policy around the world, seeking to develop new parametric products for other resource-intensive areas, like mangroves in Malaysia, Myers shared.

Myers said that on account of the group's continued success, it needs a greater scale to accommodate the volume of work both underway and brewing.

"We're a highly selective, highly collaborative group," he said.

The co-chairs boasted that the firm has not had a single partner leave for another policyholder firm in more than 20 years, showcasing Covington's "remarkable stability."

As the largest policyholder practice in the nation, Covington stands alone as the go-to firm for the largest, bet-the-company coverage matters, the firm said.

In addition to Merck, Seritage and other notable clients, Covington is currently representing Tyco Fire Products LP and Johnson Controls International PLC in the nation's largest perfluoroalkyl and polyfluoroalkyl substances, or PFAS, coverage dispute, co-chair Benedict M. Lenhart said.

"Clients bring us, consistently, their largest, most complex, most important matters," Lenhart told Law360.

--Additional reporting by Emily Enfinger. Editing by Dave Trumbore.