Insurance Litigation in Sweden

A study of commercial insurance disputes in Swedish courts during 2018 – 2022.

Introduction

Setterwalls has made a study of all disputes relating to business insurance heard by the Swedish courts during 2018-2022. The study covers, among other things, the outcome of the individual disputes; the outcome of the specific disputed issues; general statistics such as how successful insurers are in recovering their legal costs; and the duration of the disputes. The statistics and the data are much more comprehensive than the study suggests at first glance.

The statistics cover civil cases in general courts that were concluded during the research period where all parties are legal entities, and where at least one is an insurer. The statistics cover coverage disputes and recourse disputes. In this report, we present a sample of the statistics.

Since the basis for the statistics has been partly obtained from third parties, we cannot guarantee that the data is complete or entirely accurate. We also want to emphasize that the presentation of the results is based on a selection and, in some respects, on assumptions. The categorization of various issues also relies on an analysis and an assessment of the content of judgments collected.

About Setterwalls

Setterwalls is one of Sweden's largest and leading law firms with approximately 315 employees. The firm has offices in Stockholm, Gothenburg, and Malmö, which are the main legal and financial hubs in Sweden. We offer our clients a full range of legal services and our teams are tailor-made to achieve our clients' specific goals.

Our clients come from all over the world, and we are proud to offer advice with seamless interaction across our different practice areas to ensure that we remain a leader in all areas of business law. We are proud to have an excellent reputation among clients and colleagues, with top rankings from institutions such as Chambers and Partners, Who's Who Legal and Legal 500.

Setterwalls' insurance team has extensive expertise in virtually all areas of insurance law, as well as in contentious matters and in regulatory matters. Setterwalls' insurance practice covers all areas of dispute work, and we assist our Swedish and international clients in complex claims and large insurance disputes. Setterwalls' insurance lawyers have, on several occasions, acted as counsel in insurance-related disputes in the Swedish Supreme Court.

Setterwalls' insurance experts are frequently engaged as lecturers in a number of different areas of insurance law and also contribute to law reviews on the subject. Our insurance practice works in close cooperation with Setterwalls' other practice groups in insurance-related matters such as the real estate, construction and competition teams. Setterwalls has a broad international network of contacts with foreign law firms for cross-border matters.

Our experts' extensive experience of assisting clients in insurance-related matters, has given the team has a good understanding of the Swedish and international insurance markets. The study and the preparation of this report are part of our efforts to be the leading Swedish firm in terms of market understanding.

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>
> Chambers Europe

> **Skilled lawyers who have great knowledge of the insurance business.**
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An overview of insurance litigation in Sweden

General characteristics of the legal system

The legal system in Sweden follows first and foremost a civil law tradition, where statutes serve as the primary source of law. Alongside statutes, other significant sources of law include their preparatory works, case law, and legal doctrine. In some areas of law, however, case law serves as the primary source. As a member of the European Union, Sweden is bound by the regulatory framework of the EU as well.

The Swedish Code of Judicial Procedure

The Swedish court system consists of general courts, administrative courts, and special courts. Insurance disputes are adjudicated in the general courts. There are three tiers of general courts: district courts, courts of appeal and the Supreme Court. The system is structured in such a way that leave to appeal is required for a higher-tier court to consider an award from a lower-tier court. Leave to appeal is often granted by the courts of appeal, especially in complex commercial cases. Leave to appeal is very rarely granted by the Supreme Courtand then only for cases with precedent value.

Swedish judges are general practitioners, and they do not specialize in civil cases or insurance law. However, most insurance law-related disputes are concentrated to a few general courts because of where the largest Swedish insurers are domiciled.

The rules on litigation in general courts are set out in the Swedish Code of Judicial Procedure (Sw. rättegångsbalken). The Code of Judicial Procedure provides guidance on matters such as the initiation of a lawsuit, the presentation of evidence, the conduct of hearings, and the issuance of judgments. The proceedings before the court involve a combination of written submissions and oral argumentation.

Litigation in Sweden can be quite demanding in regard of both time and, depending on the outcome, money, as Swedish law applies the “loser pays-principle”. Generally, a case lasts roughly between two and three years including proceedings in the court of appeal. In this report, we have outlined the average adjudication time for insurance litigations in each court tier.

Dispositive civil proceedings

In Swedish civil litigation, the adversarial system predominates. Court decisions are based on the arguments and evidence presented by the parties. The court is also bound by the motions of the parties, and the court is not authorised to impose additional relief or remedies beyond what the parties have specifically sought. Due to the Swedish principle of immediacy (Sw. Omedelbarhetsprincipen), the court may only consider arguments and evidence presented during the main hearing. Depositions are not allowed. Written witness statements are only allowed if the parties have agreed to use of such evidence and the court finds it appropriate.

The legal framework for insurance contracts

The Swedish Insurance Contracts Act (the "ICA") (Sw. försäkringsavtalslagen) is the primary legislation governing insurance contractual relationships. With the exception of reinsurance, the ICA applies to all categories of insurance contract. The ICA is predominantly compulsory to the benefit of the policyholder and some of its provisions operate as implied terms of the insurance policy.

With the exception of interests contrary to public policy, insurers are generally free to determine what risks they insure, but there are limitations in how they insure them. For instance, insurance clauses obligating a policyholder to act in a certain way to qualify for coverage may be subject to restrictions as to how the insurer is able to limit its liability due to the policyholder's non-compliance with the insurance policy.

There is no codified principle of utmost good faith under Swedish insurance law, although the contracting parties have a general duty of loyalty. This duty is to some extent reflected in the ICA through the provisions governing the policyholder's pre- and post-contractual duty to disclose information to the insurer.

Interpretation of insurance contracts

The method of construing insurance contracts, as set out by the Supreme Court, includes several interpretive aspects. The wording is of primary importance. Where the wording is open to different interpretations, guidance can be sought from the systematics of the insurance contract. If the purpose of a clause can be determined, it too may be relevant for the interpretation. Courts may also, to some extent, consider market practice and what objectively would be a "sensible and reasonable" provision. Which one of the interpretive factors that is of decisive importance must, however, be determined in each individual case.

Available remedies for breach of an insurance policy

Remedies available for breach of an insurance policy are set out in the ICA. In the event of a breach by the policyholder, the insurer may cancel the insurance policy and/or reduce the indemnification, in part or in full.

Breaches of an insurance policy that give rise to remedies often involve a degree of bad faith on the part of the policyholder, including misrepresentation and non-disclosure as well as increases in risk; non-compliance with safety requirements; intentional breach of duty to mitigate; and fraudulent, intentional, or grossly negligent acts or omissions resulting in causing or increasing a loss.

Sweden does not have a developed concept of 'bad faith' regarding the insurers' handling of claims. It is theoretically possible for an insurer to be liable for damages for breach of contract where the insurer intentionally or negligently denies a claim. With very few exceptions, and none applicable to insurance claims, liability for damages under Swedish law does not include punitive damages (even though such damages are insurable).

Burden of proof

The burden of proof under Swedish law is supposedly assigned with regards to several considerations, including the parties' ability to secure evidence concerning the disputed fact. In practice, it is often the case that the policyholder has to prove the applicability of insuring clauses and the insurer has to prove the application of exclusion clauses and limitations of liability due to the policyholder's breach of the insurance policy.

Time bar

The statute of limitations of the ICA requires the policyholder to bring legal action against the insurer within ten years from the date of the insured event. Such event is, for property insurance, the occurrence of the property damage and, for liability insurance, when the policyholder receives a claim for damages. If a claim has been notified to the insurer within the ten-year period, the policyholder always has a six-month period in which to bring legal action from the date of the insurers' final decision on coverage.

Insurers can reduce the limitation period in non-consumer (business) insurance and may prescribe that the policyholder must notify the claim to the insurer within one year of the insured event. In addition, the insurer can order the policyholder under a business insurance policy to commence proceedings within one year from such order.

A policyholder that fails to comply with the time frame outlined above loses the right to indemnification.

Venue and choice of law

As explained above, insurance disputes are adjudicated in general courts. Save for some consumer disputes, there are no special procedures or venues dealing with insurance (or reinsurance) disputes. Arbitration clauses in insurance and reinsurance agreements are both common and enforceable, although not for consumer insurance (save for certain types of group insurance).

Choice of forum, venue and applicable law clauses in insurance contracts are normally both recognised and enforceable, provided that they comply with EU regulations on the law applicable to contractual obligations and on jurisdiction, recognition and enforcement of judgments.

The statistics

According to the statistics, an insurance dispute exists when an insurer makes a claim or is the recipient of a claim in a court case.

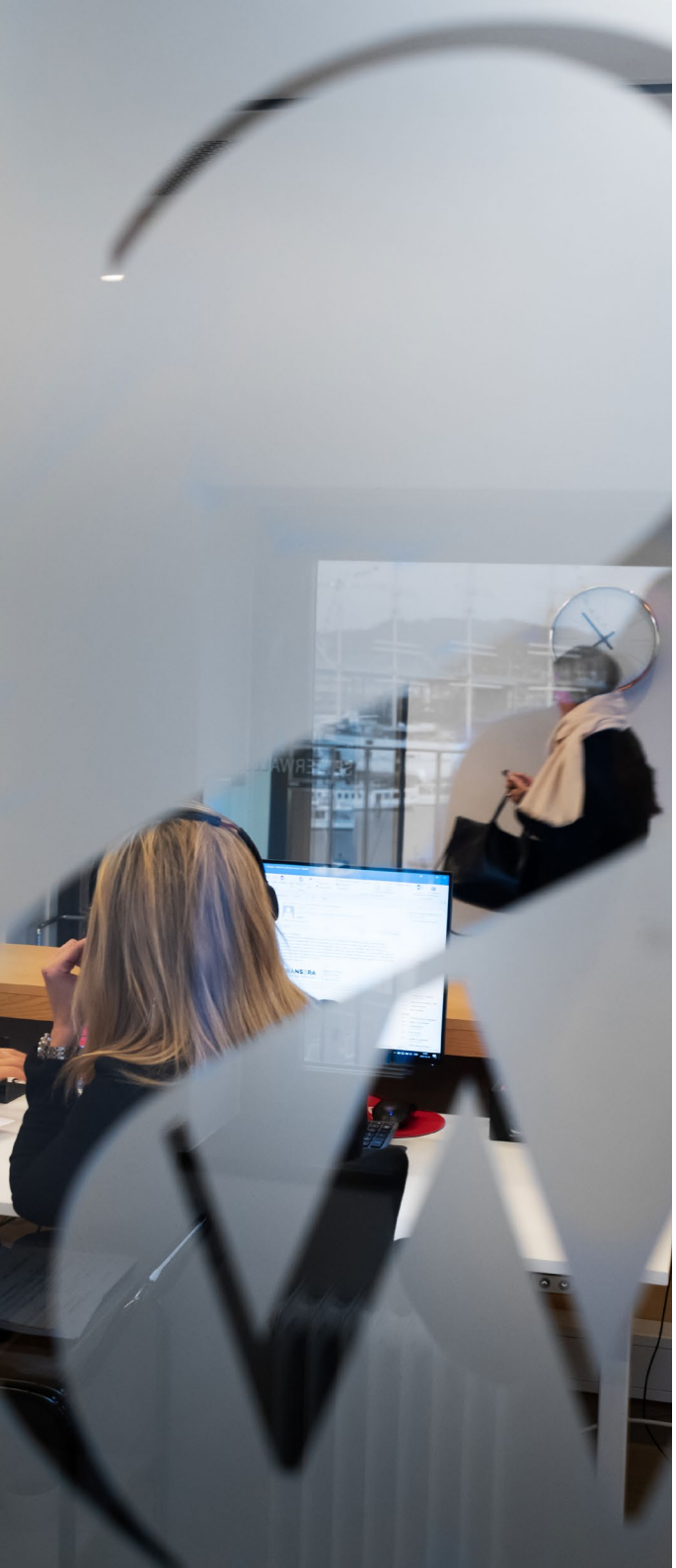
A single case may therefore contain several insurance disputes. For example, this is the case when two insurers bring an action for recourse for the same event, where the insurers have indemnified the policyholder for different losses. Another example is where a policyholder brings a coverage claim against two different insurers in the same court.

A single insurance dispute may involve several disputed issues. For example, an insurance dispute may raise issues of whether the requirements of an insuring clause are met as well as the applicability of an exclusion clause and/or whether the claim is time-barred. A single insurance dispute may therefore give rise to many insurance-related issues of interest.

Although the statistics show how insurers have fared in an insurance dispute generally, the research primarily focuses on the outcome of the dispute's individual issues. As an example, the study has not analysed the progress of a dispute from start to finish when the dispute has also been adjudicated in a higher-tier court. This means that if an insurer won in a lower tier court but lost in the court of appeal, the data in the lower-tier court case is still presented (separately). Also, the study does not consider the situation if a higher-tier court were to overturn a lower-tier court's judgment for procedural reasons.

Furthermore, the research focuses on analysing the outcome of individual issues. In other words, the statistics do not contain information on an issue if it has not been examined in substance by the court in its judgment. For example, an insurer may have invoked several arguments for non-coverage, but the court ends up only ruling on one of them and therefore finds it sufficient to dismiss the coverage claim. In such cases, the other arguments are not recognised in the statistics. For example, the statistics do not tell us how often insurers invoke arguments, but it will tell us how often arguments are examined by the court, and how successful insurers are in such examinations.

Another starting point for the study is that it does not question the court's descriptions of the various topics subject to assessment. For example, in rare cases, it has been unclear whether an insurance clause is an exclusion clause or a clause regarding the policyholder's obligation (i.e. clauses concerning fair presentation and security regulations etc.). In those cases, the study has accepted the court's description. Overall, there are very few cases where the categorisation of the courts could possibly be questioned.



General limitations of the research

Selection of insurers

Insurers that were included in the Swedish Financial Supervisory Authority's company register as of 9 March 2022, according to the following criteria*:*

(a) "Insurance Companies"

(i) Nationwide Insurance Company – Non-Life Insurance

(ii)Larger-Size Local Insurance Company

(b) "Insurance Companies — Foreign"

(i) Foreign insurance companies with branches in Sweden

Main criteria for selection of cases

(a) Cases finished during the years 2018-2022.

(b) Civil cases

(c) Only cases in which at least one insurer is party. This means that the statistics do not include certain cases in which insurers have exposure, e.g., when a party that is not an insurer makes a claim against a party with a liability insurance.

(d) Only cases in which the parties are legal entities. This means that the statistics do not include, for example, consumer insurance or recourse claims against private individuals.

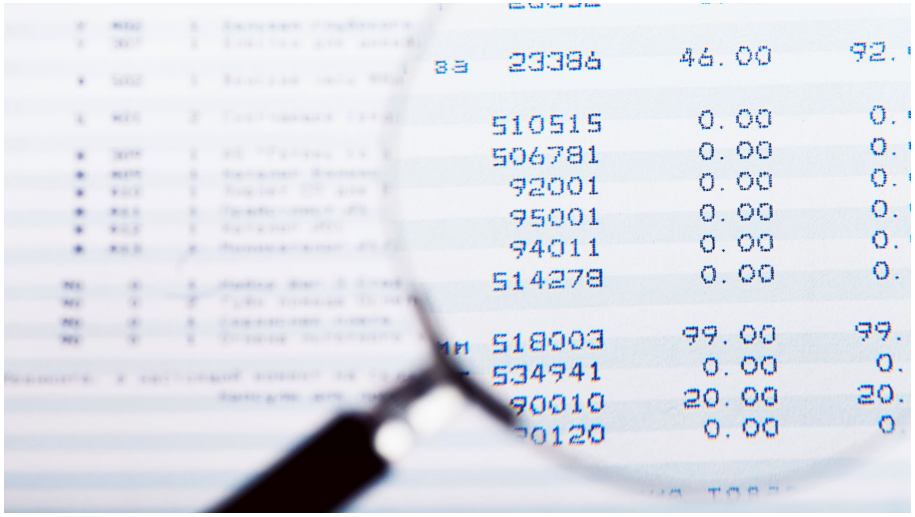
(e) Only coverage disputes and recourse claims. This means that the statistics do not include, for example, cases in which the insurer is in dispute with a supplier or cases concerning procedural issues.

The statistics

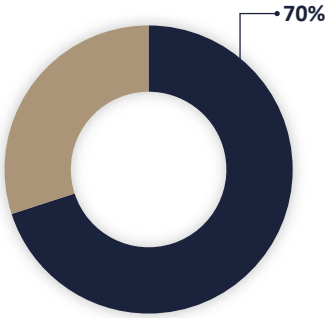
How successful are the insurers?

The research shows that insurers are successful in general courts, and especially in the district courts, where the insurers won in 70 percent of the litigated disputes. The corresponding figure is 61 percent for the courts of appeal and 62 percent for the Supreme Court (the statistical basis is, however, more limited for the higher courts). The statistics cover both cases where the insurer is the defendant (coverage disputes) and cases in which the insurer is the claimant (recourse claims).

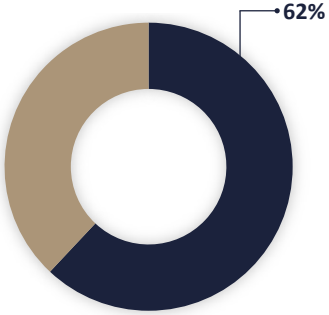
There can be several reasons for the success factor. Insurers are relatively accustomed to litigation. It is likely that insurers, whose business is to assess risks, predominately litigate matters where they have a strong position. As will be presented below, a large proportion of the disputes are settled. Another factor may be that insurers in general can be considered to have an advantage in terms of knowledge of insurance issues and insurance law. Nor can it be ruled out that insurers enjoy a certain advantage as authorities in their field.



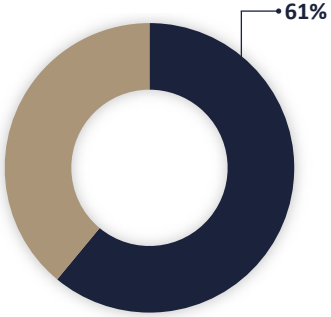
How often do insurers win?



District courts



Courts of appeal



The Swedish supreme court

Settlements

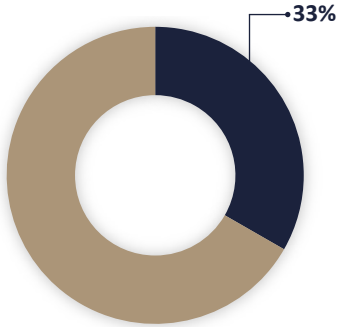
The purpose of the research is to provide an approximate picture of the number of cases in which the parties reach a settlement in coverage and recourse disputes, and in dispositive civil cases in general.

A Swedish court may close a case in different ways. When the parties have reached a settlement agreement the court may, at the request of the parties, confirm the settlement in a judgment. Sometimes the parties may not want a court settlement to be made public. If so, they may instead ask the court to write off the case from its ledgers (and manifest their out-of-court settlement by way of contract). Although a court case may also be written off for other reasons, it can be assumed that many of the cases that ended in this way are due to the parties reaching a settlement.

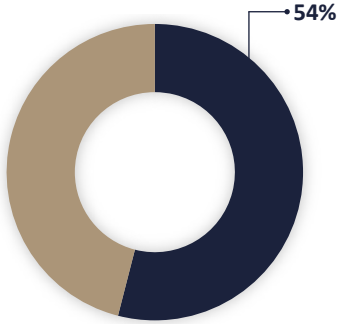
The statistics under this heading have pooled together cases ended in a settlement confirmed by the court and cases written off. As mentioned, there can be other reasons for cases being written off rather than them being settled out-of-court. The results of the research are therefore uncertain. A hypothesis is that cases being written off in coverage and recourse disputes are more likely to be the result of out-of-court settlements in comparison to civil cases in general.

The statistics support the assumption that insurance disputes are settled to a greater extent than civil cases in general. Assuming that this is correct, there are probably several reasons for it. One may be that the insurers, who deal with risk issues on a daily basis, are well placed to assess whether a dispute should be adjudicated or not.

How many of dispositive civil cases in general are settled?*



How many of the insurance disputes are settled?



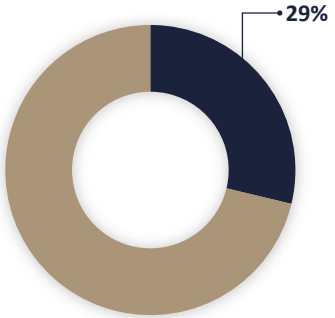
*Source: Domstolsverket (The Swedish National Courts Administration Agency)

Leave to appeal

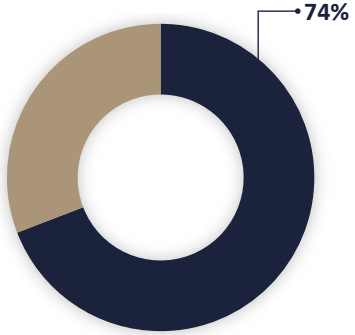
Leave to appeal is a critical step in Sweden's legal system for contentious civil cases. To get upper-tier courts in Sweden to examine cases, it is necessary get permission. This process increases the chances that only cases of importance or interest reach higher courts. All the cases in the study, as well as dispositive civil cases in general, require leave to appeal.

The research shows that insurers are indeed highly successful in being granted leave to appeal. Leave to appeal is granted in as many as 74 percent of the cases, compared with approximately 29 percent of civil cases in general. There can be several explanations for the high success factor. As the study has shown that insurers are generally successful when cases are litigated, it is reasonable assumption that the outcome was not obvious. Insurance is also an important factor in society, and it is not uncommon that insurance clauses are drafted similarly with several insurers. The outcome of an individual insurance dispute may therefore have an impact on the entire insurance market. Consequently, it can be assumed that a fairly high degree of the insurance disputes has precedent value.

How often is leave to appeal granted by the courts of appeal in civil cases in general?*



How often are insurers being granted leave to appeal in the courts of appeal?



*Source: Domstolsverket (The Swedish National Courts Administration Agency)

Coverage disputes

Coverage disputes encompass (i) disputes over insuring clauses and exclusion clauses; (ii) breaches of the insurance contract (as set out by the ICA), i.e., duty of fair presentation and increase in risk, safety regulations, deliberate acts, late notice, and untruthful information during claims handling; (iii) quantum issues; (iv) time bar issues; and (v) other issues such as the insurer's duty to notify limitations on coverage. The diagrams follow on the next page.

The research shows the frequency of the various issues in coverage disputes. When analysing the results of the research, it is important to bear in mind that the statistics only cover issues ruled upon by the court. This means that the study does not tell us how often the issues were argued (any argued issue might, for various reasons, ultimately not be ruled on by the court).

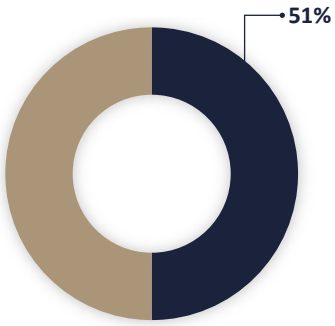
The statistics show that there are relatively few rulings on exclusion clauses. The low number is probably not explained by insurers not invoking exclusion clauses. Instead, the main explanation seems to be that it is rarely necessary for courts to rule on such clauses because the claim could be dismissed on other arguments (e.g., not covered by the insuring clause, or time-barred).

An interesting observation is that the provision in the ICA concerning the policyholder's failure to notify loss (not to be confused with the time-bar provision) and obligation to participate in the claims handling, has not been ruled upon by the courts in any case during the research period. One of several possible explanations for this may be that the application of the provision requires that the policyholder's omission has resulted in loss to the insurer, which in many cases can be difficult to prove.

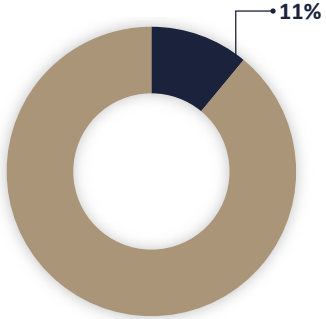
The issue of when a policy's insuring clause is met may sometimes involve several clauses, e.g., when and where the insured event has occurred. Such division is, to a certain extent, arbitrary. The study showed it to be

exceedingly rare for a dispute to involve more than one such split insuring clause. Therefore, to avoid a potentially misleading result on the number of court rulings on insuring clauses, the research reports all such situations as one disputed issue. However, regarding exclusion clauses, the statistics present them separately in all instances.

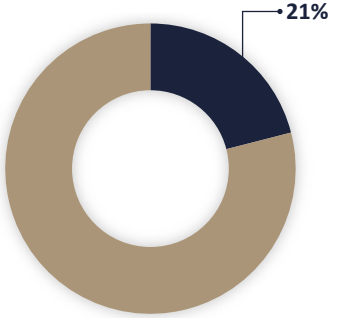
How many of the coverage disputes were concerned with insuring clauses?



How many of the coverage disputes were concerned with exclusion clauses?



How many of the coverage disputes were concerned with breaches of the insurance contract?



Duty of fair presentation and increase in risk, safety regulations, deliberate acts, late notice, and untruthful information during claims handling.

Recourse disputes

The study shows that insurers are successful also as claimants, however not as successful as when they are defendants. An obvious explanation for this is that as claimants, insurers generally carry the full burden of proof. Nevertheless, winning 62 percent of the disputes as claimants can clearly be considered as a satisfying result. Overall, the study supports the notion that insurers' recourse claims are likely to be very profitable, especially considering that out-of-court settlements also contribute to the outcome.

For the purposes of the research, the term "quantum" refers to the calculation of the amount claimed by the insurer in the recourse claim. The study of quantum issues only includes the principal amounts and excludes legal costs and interest. The statistics only comprise cases where the insurers' claims were approved in whole or in part, and only to the extent that the quantum issue was disputed.

The study shows that insurers are indeed very successful in proving quantum. There can be several reasons for this. The insurers' right of subrogation only include the insurance indemnification paid to the policyholder. Consequently, the quantum of recourse claims is founded on a prior handling of a claim, which supposedly included a relatively extensive assessment of the loss with supporting documents. Due to this, recourse claims rarely appear to be inflated. Since calculation of loss is one of the insurers' main activities, insurers are generally experienced and competent in loss calculation. In other words, insurers' quantum claims are, as a starting point, likely to be well founded. Also, it cannot be ruled out that insurers may enjoy a certain advantage with judges because of the insurers' authority in calculating loss.

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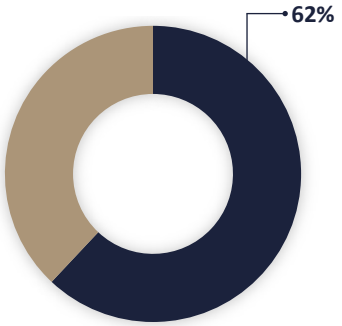
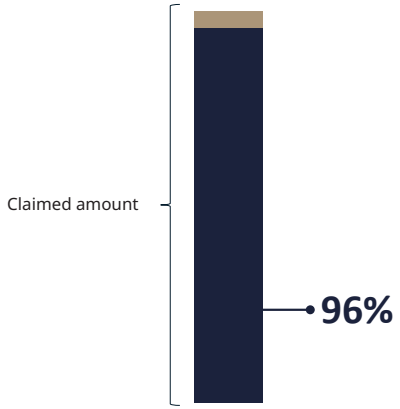
How often do insurers win in recourse disputes?



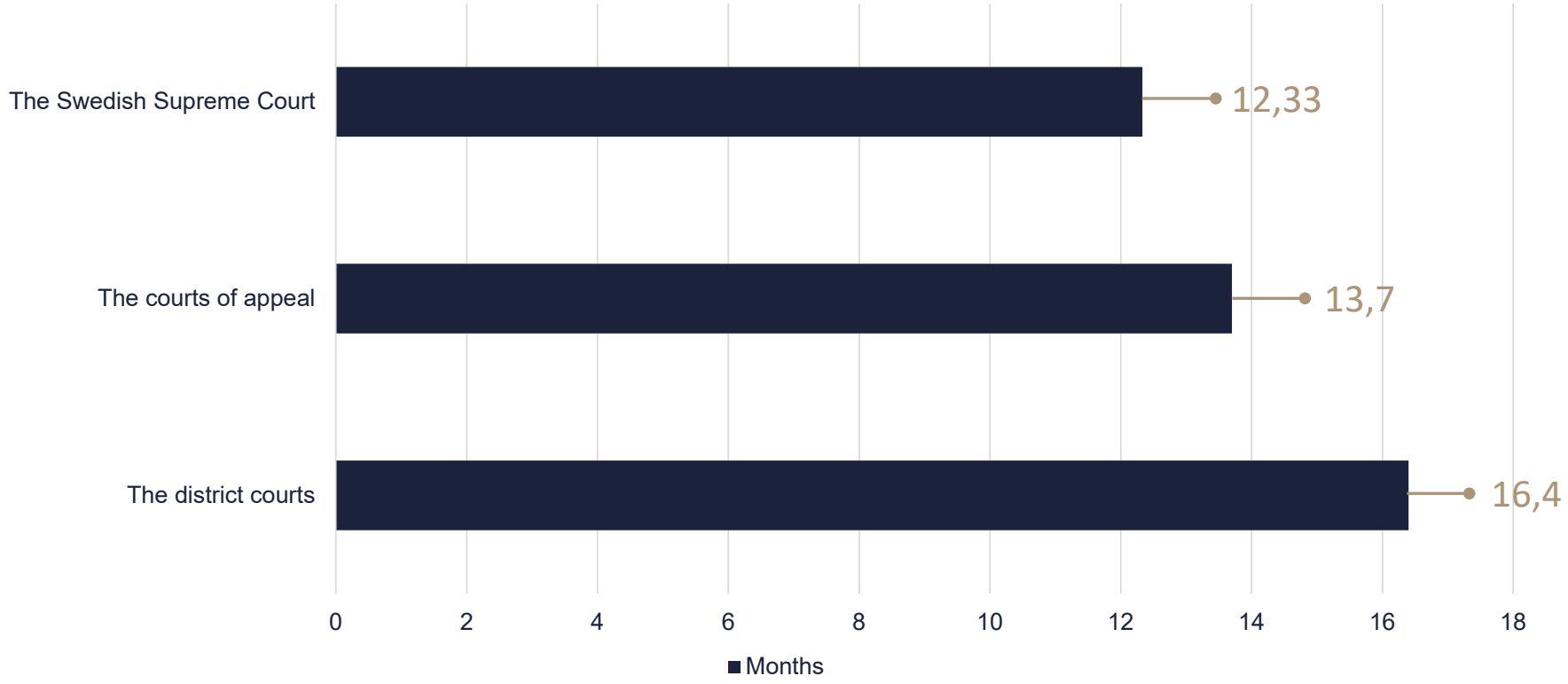
How successful are insurers in proving their quantum claims?



The duration of the disputes

The statistics include how long it takes for an insurance dispute to finish (by means of a judgment). In the (first tier) district courts, the time has been calculated from the filing of an application for a summons or complaint, and in the appellate courts, the filing of the appeal, until the date on which the judgment was rendered. The research shows that the longest average time to adjudicate an insurance dispute is in the district courts, with approximately one year and four months, followed by the courts of appeal (second tier) with an average time of approximately one year and two months. The Supreme Court has the shortest adjudication time of approximately one year. The study shows that an average time to litigate an insurance dispute in the district court and the court of appeal is two and a half years. It is, however, expected that the more complex insurance disputes have a longer adjudication time.

The result is not surprising. However, one should bear in mind that the times to adjudicate a case are an average for the research period from 1 January 2018 to the end of December 2022 and that times can be assumed to have increased, and continue to increase, in recent years. Our next annual report is likely to show a longer average adjudication time, at least for district courts and courts of appeal.



Appreciation from the authors

We would like to thank you for taking the time to read our report. The report presents only a small part of this comprehensive study. Examples of statistics that are not included in this report are e.g. how successful insurers are when invoking specific arguments; the average outcome of insurers' claims for litigation costs; the most frequent insurers in litigated disputes; and the most successful insurers. The data collected is also being further analysed. We are currently collecting data for 2023 and we plan to return next year with our updated report.

We would also like to thank our fantastic colleagues who contributed to the content of this report. Your participation and commitment have been essential.

Please do not hesitate to contact us if you have any questions about the report or the statistics.

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