

## Midyear Review: Top Property Insurance Cases To Watch

By Eli Flesch

*Law360 (June 23, 2023, 12:32 PM EDT)* -- Property insurance lawsuits implicating environmental catastrophes and the growing risks associated with climate change headlined the first half of 2023, while ongoing suits over coverage for pandemic losses moved into a critical phase in states' top courts.

Here, Law360 rounds up some of the top property insurance cases to watch in the remainder of the year. From a novel climate change suit in Hawaii that also has major general liability implications, to several pandemic suits in some of the country's most important legal venues these cases continue to interest insurance attorneys.

### Novel Fight Over Climate Suit Coverage In Hawaii

In a case with little precedent, the Sunoco unit Aloha Petroleum is seeking a determination that it's owed coverage from a pair of AIG units for two lawsuits accusing it of knowing that its sale of oil products would contribute to climate change.

In a pre-trial win bid earlier this month, the oil producer pointed to underlying accusations that it "recklessly" or "negligently" caused floods and extreme precipitation, which was enough to suggest that the mere potential for coverage exists. Still, practitioners have noted that there are no specific allegations of property damage in the underlying suits, which were brought by three municipal organizations in Hawaii.

"From a pure insurance standpoint, I think the policyholders have a decent argument here," said Alexandra A. Roje, a partner at Lathrop GPM who focuses on insurance coverage and environmental disputes. "Let's see what the evidence is in the case, but from a duty to defend standpoint, at the outset of the case, you should be defending us."

Roje said Aloha Petroleum's case fascinates her because it touches on many unresolved issues concerning insurance and climate change litigation, such as whether there has been an occurrence that would trigger a commercial general liability policy.

A hearing on Aloha Petroleum's request for a defense is scheduled for Aug. 24.

The case is Aloha Petroleum Ltd. v. National Union Fire Insurance Co. of Pittsburgh, Pa. et al., case number 1:22-cv-00372, in the U.S. District Court for the District of Hawaii.

## **FEMA Faces Risk Pricing Program Battle**

In another suit inextricably linked to climate change, Louisiana is leading nine other states in suing the Federal Emergency Management Agency to overturn the risk pricing program that the nation's top flood insurer has been utilizing since October 2021.

The case is perhaps the most aggressive legal effort to date to roll back a pricing program that FEMA officials have billed as necessary to capture the actual risk of flooding for homeowners seeking National Flood Insurance Program coverage.

"You could see a ruling where the judge says go back to the drawing board," said Thomas B. Alleman of Dykema Gossett PLLC. "That would leave us in the position where if there's another Katrina, if there's another Ian, that you see Congress having to appropriate more money in order to — no pun intended — to keep the NFIP afloat."

Alleman, who focuses on insurance and environmental cases, told Law360 that he considered the suit an attempt to preserve a subsidy that Congress isn't obligated to keep. He also said it was interesting to see the suit filed so quickly after another case brought against FEMA by a Louisiana parish that had filed a public records request seeking more information on Risk Rating 2.0, which has been a bipartisan concern.

In this suit, the states and other entities are arguing that the Risk Rating 2.0 program has made premiums "dramatically more expensive," while foisting those increases on policyholders without their consent, a violation of the Constitution's spending clause.

The case is Louisiana State et al. v. Mayorkas et al., case number 2:23-cv-01839, in the U.S. District Court for the Eastern District of Louisiana.

## **Samsung Unit's Massive Texas Winter Storm Coverage Suit**

In one of the biggest dollar-figure property insurance cases of the year, a Samsung unit is suing Factory Mutual Insurance Co. for more than \$400 million in Winter Storm Uri-related damage to its Texas semiconductor chip manufacturing facility, accusing the insurer of scheming to systematically underpay claims arising from the 2021 storm.

FM Global confirmed coverage under its \$2.5 billion "all risks" policy for \$126 million in damage to the facility directly resulting from freezing temperatures, but refused to cover any other losses under a "lack of services" exclusion, Samsung Austin Semiconductor said in a complaint filed in February in Texas federal court. Insurance suits over the winter storm have picked up this year ahead of two-year deadlines to bring legal action.

Michael John Miguel, a Houston and Los Angeles-based insurance coverage attorney with McKool Smith, said he felt that Samsung's broad approach to the case — reflected in its allegation that FM Global engaged in a systemic underpayment of claims — could potentially hinder its insurance recovery.

"The complaint almost reads like it could be thought of as a class action for everybody who's getting lowballed by FM Global for Winter Storm Uri claims," he said.

Samsung is arguing that the lack of services exclusion, which bars coverage for losses from a lack of

services "caused by an event off the insured location," couldn't possibly apply to its claim. Samsung lost power during the storm only because of circuit breakers at an on-site substation, the company said. The exclusion also contains an exception for when a lack of service directly causes covered physical damage, Samsung contended.

The case is Samsung Austin Semiconductor LLC v. Factory Mutual Insurance Co., case number 1:23-cv-00114, in the U.S. District Court for the Western District of Texas.

### **Top State Courts Weigh COVID-19 Business Interruption Suits**

With federal appellate courts having uniformly ruled against policyholders seeking insurance coverage for pandemic shutdowns, insurance practitioners are now looking to the top courts in California, New York, New Jersey and Nevada for their decisions.

The California Supreme Court in March agreed to consider whether the presence of COVID-19 could fulfill a "physical loss or damage" requirement in property insurance policies, promising to resolve the question for the nation's largest insurance market.

Meanwhile, in the important insurance venue of New York, the Court of Appeals is weighing similar questions, with big implications for businesses that have arbitration provisions in their policies requiring any disputes to be decided by Empire State law.

Scott M. Seaman, a Hinshaw & Culbertson LLP partner representing carriers, said policyholders have fared slightly better on appeal in California than in other states, and that several state court cases and those before the Ninth Circuit were still pending.

"The certified question is fairly narrow, asking whether 'the actual or potential presence of the COVID-19 virus on an insured's property' constitutes direct physical loss or damage," he said. "If the California Supreme Court rules the same way that the vast majority of courts across the country have ruled, it will answer the question 'no.' Mere presence of a virus simply does not constitute direct physical loss or damage."

Still, Seaman suggested the court could cover more ground in its decision.

Nicholas M. Insua, a policyholder-side attorney with Reed Smith LLP, said the lawsuits being heard in the state courts would carry significant implications. He noted the arbitration consequences in the New York suit, and said insurance law in Nevada was less developed than in the other states weighing pandemic suits.

"I think that any development pro-policyholder is going to be important from any of these states," he said.

The challenges for policyholders are formidable. The Vermont Supreme Court is currently the lone state supreme court to have sided with a policyholder. In September, the court revived shipbuilder Huntington Ingalls' COVID-19 coverage suit. Otherwise, high courts in Connecticut, the District of Columbia, Iowa, Louisiana, Maryland, Massachusetts, New Hampshire, Ohio, Oklahoma, South Carolina, Washington and Wisconsin all have ruled against policyholders seeking COVID-19 coverage.

The California case is Another Planet Entertainment LLC v. Vigilant Insurance Co., case number S277893,

in the Supreme Court of California.

The New York case is Consolidated Restaurant Operations Inc. v. Westport Insurance Corp., case number APL-2022-00160, in the Court of Appeals of the State of New York.

The Nevada case is Starr Surplus Lines Insurance Co. v. The Eighth Judicial District Court of the State of Nevada, case number 84986, in the Supreme Court of the State of Nevada.

The New Jersey case is AC Ocean Walk LLC v. American Guarantee and Liability Insurance Co. et al., case number 087304, in the Supreme Court of New Jersey.

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