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Property Insurance Cases Of Note From The 1st Half Of 2022

By **Eli Flesch**

Law360 (August 5, 2022, 5:09 PM EDT) -- The U.S. Supreme Court's decision not to take up a pandemic coverage suit gave insurers their biggest federal win yet, while two recent policyholder victories in state court have kept hopes alive for businesses seeking coverage for their losses, placing them among the most important cases of the year.

Goodwill Industries of Central Oklahoma Inc. v. Philadelphia Indemnity Insurance Co.

The Supreme Court's **decision not to consider** whether Goodwill's Oklahoma affiliate should be entitled to insurance coverage for its pandemic losses was the culmination of a set of federal case law dramatically favoring insurers. With federal appellate courts uniformly rejecting policyholder arguments, the high court's decision in June emphasized that state courts have been a somewhat better venue for businesses fighting coverage suits.

The Goodwill outcome didn't come as a surprise to carrier-side attorneys, who said Goodwill's petition leaned too heavily on alleged violations of the Erie doctrine, which holds that U.S. federal courts can't create common law on state law issues. The justices weren't likely to find that argument enticing, according to the attorneys, given the overwhelming number of pro-insurer rulings across multiple circuit courts.

Decided last year, the Eighth Circuit's precedential coverage decision in Oral Surgeons PC v. The Cincinnati Insurance Co. helped lead to the Supreme Court's decision.

"Oral Surgeons set the stage for the landslide of precedent in favor of insurers because of the soundness of the reasoning in that case," said Laura Foggan, a Crowell & Moring LLP attorney who represented insurance groups as amici in the case. "Virtually all of the arguments that have been presented in litigating these claims were there at the start."

Michael S. Savett, an insurer attorney with Clark & Fox, said the Oral Surgeons ruling affirmed the policy requirement of physical loss or damage, leading many trial-level state and federal courts to follow the Eighth Circuit's lead this year.

"While there have been secondary disputes over application of various policy exclusions, the majority of coverage denials for business interruption claims have been based on the absence of physical damage caused by the virus," Savett said.

The case is Goodwill Industries of Central Oklahoma Inc. v. Philadelphia Indemnity Insurance Co., case number 21-1358, in the U.S. Supreme Court.

Cajun Conti and Marina Pacific

These two Louisiana and California state court wins for policyholders litigating pandemic coverage suits have kept hope alive for businesses as the majority of courts continue to side with insurance companies on direct physical damage questions.

First, a 3-2 majority for the Louisiana Fourth Circuit Court of Appeal **reversed a trial court's judgment** against restaurant operator Cajun Conti LLC, saying that coverage exists under an all-risks insurance policy for the restaurant's viral loss or damage.

Just under a month after the Cajun Conti ruling, hotel operator Marina Pacific **notched its own victory**. A three-judge panel of California's Second Appellate District ruled that the owners of Hotel Erwin in Venice Beach and its attached restaurant, Larry's, and other businesses should have been given a chance to present evidence to support their contention that Fireman's Fund Insurance Co. should pay for their losses.

Andy Lundberg, a managing director at the legal finance company Burford Capital LLC, said the California court was well-respected and had made many important environmental and asbestos decisions in the insurance coverage arena. Also notable was the forceful tone of the opinion, he said, which included an acknowledgment that it contradicted the majority of federal case law on pandemic suits.

"This is going to be a case that gets submitted to judges around the country, and they're going to sit down and read this," Lundberg told Law360, adding that the opinion would cause those same judges to see a path forward for other pandemic coverage cases.

Scott D. Greenspan, a policyholder attorney with Pillsbury Winthrop Shaw Pittman LLP, pointed to the Cajun Conti decision as particularly important. Following that ruling, he said the dam broke with respect to virus coverage suits. Cajun Conti LLC, the owner of the 500-seat restaurant Oceana Grill, was also the first in the U.S. to file such a suit.

The cases are Marina Pacific Hotel and Suites LLC et al. v. Fireman's Fund Insurance Co., case number B316501, in the Court of Appeal of the State of California, Second Appellate District; and Cajun Conti LLC et al. v. Certain Underwriters at Lloyd's, London et al., case number 2021-CA-0343, in the Louisiana Court of Appeal, Fourth Circuit.

Overstreet v. Allstate

While not fully decided, the Texas Supreme Court's **decision in May** to again take up questions over the state's concurrent causation doctrine, concerning damages caused by covered and uncovered perils, could help reshape insurance recovery in Texas.

The suit in question concerns whether damage to homeowner Harold Franklin Overstreet's roof is attributable to hail — a covered cause under the homeowner's policy with Allstate Vehicle and Property Insurance Co. — or uncovered wear and tear.

The certified questions ask not only whether the doctrine applies to wear and tear, but also whether plaintiffs who say only one peril caused their property to be damaged must then bear the burden of attributing their loss between that peril and uncovered perils.

The third certified question asks if plaintiffs could meet that burden with evidence showing one peril caused all of a loss.

Jay W. Brown, a partner at Shackelford Bowen McKinley & Norton LLP, said the last two questions were already shaping litigation.

"Before you can consider wear and tear part of concurrent causation, I think we have to have some evidence that actually shows how the wear and tear aspect contributed to cause the damage," Brown said.

Experts have said that in a state like Texas — one of the largest property insurance markets in the U.S., and no stranger to inclement weather — extending the doctrine to wear and tear could be a windfall for insurers. Steven Schulwolf, of the Austin- and Chicago-based Schulwolf Mediation, said insurers relied on the doctrine last year to their benefit, including in one case involving a gold coin dealer that **accepted fraudulent checks** in exchange for a set of coins.

"The Supreme Court's review potentially could go beyond just 'wear and tear' cases," Schulwolf said. "The court could also potentially clarify what evidence is enough to satisfy an insured's burden, particularly if it otherwise seeks to argue that 100% of the damages were due to a covered claim."

The case is Overstreet v. Allstate, case number 22-0414, in the Texas Supreme Court.

Cynthia Franklin v. Lexington Insurance Co.

Property insurance policyholders in Missouri scored a win in June when a **state appeals panel ruled** that an AIG unit breached its policy by improperly depreciating labor costs when calculating the actual cash value of a storm-damaged roof.

While courts around the country have split over whether insurers can depreciate labor costs, the Missouri panel found that Lexington Insurance Co. should have paid homeowner Cynthia Franklin for the actual cash value of her damaged property, which the policy calculated by subtracting the depreciation costs from the roof's replacement cost.

"Now that Missouri has weighed in, the [number of] jurisdictions ruling labor cannot be depreciated continues to swell, and arguably comes closer to being the majority rule," said John Ewell and Joanna M. Roberto, partners at Gerber Ciano Kelly Brady LLP, in a joint analysis provided to Law360.

Costs to insurers can vary significantly depending on whether they are allowed to depreciate labor costs, Ewell and Roberto said. In some cases, insurers might assume unexpected risks while underwriting, they said.

The case is Cynthia Franklin v. Lexington Insurance Co., case number WD84816, in the Missouri Court of Appeals, Western District.

Consolidated Restaurant Operations v. Westport Insurance Corp.

The first New York **appellate decision** in a pandemic coverage suit marked a major insurer victory by handing carriers a favorable piece of case law in an important venue for insurance litigation. The case, between Texas-based Consolidated Restaurant Operations and Swiss Re unit Westport Insurance Corp., was litigated in New York under a choice of law provision included in the restaurant operator's policy.

Like many other pandemic suits, CRO's bid for $50 million in coverage eventually failed when a panel of First Judicial Department judges found that the operator didn't allege the kind of physical loss or damage required for coverage under its policy.

The judges were highly skeptical of CRO's claims during oral arguments and ultimately ruled that there was no meaningful difference between CRO's allegations that the presence of COVID-19 caused physical damage and the often-failed type of allegations that coverage was available for losses caused by government shutdown orders.

The case is Consolidated Restaurant Operations Inc. v. Westport Insurance Corp., case number 2021-02971, in the Supreme Court of the State of New York, Appellate Division, First Judicial Department.

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