

## Insurance Pros Size Up Major Industry Risks At NYC Forum

By Eli Flesch

*Law360 (April 3, 2025, 3:43 PM EDT)* -- The influence of litigation financing, artificial intelligence and climate change on insurance law were among key topics this week as insurance experts discussed the biggest risks in the property and casualty space.

In-person and online attendees of a forum Wednesday at the Practising Law Institute in New York heard from attorneys and industry experts on topics including the expansive potential liabilities associated with AI, climate change and government-brought public nuisance suits.

Other panels discussed regulatory changes in California and Florida, arguments for and against litigation finance, suits over coverage for liabilities of what known as forever chemicals and the effect of social attitudes on large jury awards, or so-called nuclear verdicts.

Here, Law360 breaks down highlights from the different panels at the hybrid in-person and online event.

### State of the Property Insurance Market

Kara S. Baysinger, a carrier-side attorney at Willkie Farr & Gallagher LLP, traced California's insurance crisis back to 1988, when voters approved Proposition 103, creating a rate-approval process that some experts have described as outdated. Rate-change proposals that exceed a certain percentage, she explained, are subject to a lengthy review process.

That gave insurers a big incentive to not propose rates above those percentages, Baysinger said. But she added that a newly approved suite of regulatory changes to expedite rate reviews and allow carriers to price policies using catastrophe models was a "huge plus" for insurers.

Fred Karlinsky, a carrier attorney at Greenberg Traurig LLP, described much of Florida's litigation issues in recent years as having to do with "manmade claims," echoing industry concerns that litigation is being brought frivolously, and described a need for home hardening as a big issue as catastrophes batter the state.

"We see that mitigation makes a huge difference," Karlinsky said.

Other consumer advocates and experts have described Florida's measures to curb insurance litigation in the state as hampering consumers' ability to fight for legitimate claims.

Robert J. Gilbert, a policyholder attorney at Latham & Watkins LLP, said it was a point of agreement among policyholder and insurer attorneys that social inflation — an industry term for claim costs that exceed economic inflation — exists and affects coverage decisions.

A live survey of program attendees showed that by about 2-1, attorneys were considering the possibility of nuclear verdicts when advising on potential settlements.

Meredith Elkins, a policyholder attorney with Cohen Ziffer Frenchman & McKenna LLP, updated attendees on the state of suits over coverage for pandemic losses.

She acknowledged that it's been a "rough road for policyholders" on questions of whether the coronavirus caused the kind of physical damage required for coverage, but she noted a more favorable policyholder decision out of North Carolina's high court last year.

She said she didn't expect a flood of litigation as a result but that other cases implicating policies with communicable disease coverage were still percolating.

### **Opportunities and Risks of AI**

Rob Hoffman, a carrier attorney with DLA Piper, likened the advent of AI and its relevance to the insurance industry to the growth of fire insurance during urbanization. Both created new pricing challenges and industrywide transformations, he said.

AI could be used by insurers to help detect fraudulent activity, customize policies, improve customer service and more proactively address risks, he said. But he also said there are concerns over biases and humans making decisions based on flawed AI responses, a sentiment shared by Jamie O'Neill, an Anderson Kill PC associate who has experience in creating machine learning programs and represents policyholders.

Michael S. Levine, a Hunton Andrews Kurth LLP attorney representing policyholders, said the fact that there's no common definition for AI could also have large coverage implications for an industry that prizes specific policy language. If you ask him what AI is, he said, "I'm going to give you a very rudimentary, high-level answer."

Experts said coverage issues could occur in the context of directors and officers coverage, errors and omissions coverage, suits over biometric information and more.

### **Relevance of Litigation Finance**

Scott D. Greenspan, a Sills Cummis & Gross PC policyholder attorney, described litigation financing as a "burgeoning industry." A co-chair of the PLI event, with carrier-attorney Sandra D. Hauser of Dentons US LLP, Greenspan outlined the different arguments for and against litigation funding.

He addressed, for one example discussed by the panel, the argument that litigation funding could allow funders to exercise undue control over litigation. He said he had never agreed to a settlement control provision in a funding agreement but also offered a question: When they do exist, how is that different from an insurance policy where an insurer defends a policyholder without a reservation of rights and retains control over whether to settle?

Greenspan said he expected to see federal legislation dealing with transparency in litigation funding, given the Republican makeup of Congress. Former attempts at such a bill have been made by Rep. Darrell Issa, R-Calif.

### **Coverage Battles Over PFAS Liabilities**

Experts increasingly expect the universe of litigation over a group of "forever chemicals" known as PFAS — including environmental contamination and product liability claims — to lead to high-dollar disputes over insurance coverage for associated costs. They say PFAS, or perfluoroalkyl and polyfluoroalkyl substances, are the next asbestos, referring to coverage battles over long-tail liabilities connected to that material.

"What we're seeing is déjà vu all over again," said Eric Caugh, a Zelle LLP insurer-side attorney, comparing PFAS issues to those involving federal Superfund laws under the Comprehensive Environmental Response, Compensation and Liability Act, which has been used to identify parties liable for cleaning up highly polluted sites.

Panelists discussed the ways PFAS coverage suits could be similar to those involving asbestos, like the relevance of exclusions that bar coverage for pollution-related claims.

But there are also differences, as John Ellison of Reed Smith LLP noted in describing potential triggers for coverage. PFAS disputes emerge in many different contexts, he explained, from environmental discharge to the chemicals' incidence in household products.

There is going to be a lot of "creative thinking" regarding triggers, Ellison said.

Summer Craig, an insurer attorney with Simpson Thacher & Bartlett LLP, said whether pollution exclusions apply could depend on the products.

Also relevant to coverage, certain businesses may have permit exceptions for environmental discharge, said James M. Davis, a policyholder attorney with Perkins Coie LLP.

### **Deepening Climate Change Risks**

In addition to the growing physical damages associated with climate change, a warming planet could also disrupt key supply chains, calling into question certain types of business interruption coverage, said Seth Row, a Stoel Rives LLP policyholder attorney.

To mitigate their exposure to climate risks, insurers have been changing their policies, such as through raising deductibles, adding new sublimits and writing in longer waiting periods before business interruption coverage can kick in after a loss. And competing decisions on the insurability of smoke and debris damages in California have also arisen, Row noted.

Infrastructure could also break down, he said. Speaking of the roads in his home state of Oregon, he said, "They are not designed to sustain 110-degree heat."

Laura A. Foggan, a carrier-side attorney with Crowell & Moring LLP, said questions of whether physical loss or damage occurred — a prerequisite for many coverages — could also be influenced by pandemic coverage litigation. In one of the recent fire debris decisions in California, an appeals judge referenced

the state Supreme Court's ruling in an entertainment venue's defeat on whether it was owed pandemic loss coverage.

Andrew W. Hahn, a policyholder attorney with Covington & Burling LLP, said more climate change litigation is also expected on the liability side. Just because President Donald Trump's administration said it won't defend U.S. Securities and Exchange Commission climate disclosure rules doesn't mean insureds shouldn't be cognizant of misrepresentations, he said. Those kinds of misrepresentations can implicate D&O coverage, Hahn said.

He also noted that states and municipalities could level claims against companies for contributing to climate change and that damages could relate to property, increased preparation or planning costs and impacts to health.

### **Opioid and Other Public Nuisance Suits**

Attorneys on the final panel of the day described a growing trend of courts finding that insurers don't have to cover the massive liabilities their policyholders have faced in connection with their role in public health crises like the opioid epidemic.

That's because courts have been finding that there has been no bodily injury or occurrence to trigger coverage under the insureds' policies, said Patrick Hofer, a Clyde & Co. LLP carrier attorney.

Jeffrey Schulman, a policyholder attorney with Blank Rome LLP, agreed that was the overall trend but said "there is room for some movement." He also said an underdiscussed aspect of public nuisance suits was the incidence of property damage claims. That could include, for example, a government bringing an opioid suit that alleges damage to parks in which drug use occurs. Opioid suits have been brought against many actors in drug supply chains.

Andrew Nadolna, a mediator and arbitrator with JAMS, said such suits are "almost impossible to mediate" given the money at stake and that the trend of insurers' wins was headed in a direction not unlike their success in pandemic coverage litigation.

--Editing by Aaron Pelc and Emma Brauer.