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The Biggest COVID-19 Business Interruption Rulings Of 2021

By **Shawn Rice**

Law360 (December 17, 2021, 2:54 PM EST) -- A number of federal appellate courts gave insurers a clean sweep on COVID-19 coverage suits with losses attributed to government shutdown orders, policyholders took wins at the state court level and a federal jury trial ended with a victory for an insurer to wrap up the biggest decisions of the year.

Clean Sweep At Federal Appeals Courts

The first wave of COVID-19 coverage suits that were dismissed made their way up to federal appellate courts last year. For these cases, businesses alleged their losses during the pandemic were caused by government shutdown orders and restrictions implemented to help curb the spread of the coronavirus.

Insurance companies found momentum while racking up hundreds of wins in trial courts in this initial wave of cases, a trend that policyholder attorneys argue was used to create a "follow the herd" mentality for courts — that is, judges merely following other judges' pro-insurer decisions without conducting additional analysis. And policyholders' woes in federal courts didn't abate on appeal.

On Dec. 9, businesses received their worst blow to their coverage position when the Seventh Circuit added its voice to these COVID-19 coverage suits. In several rulings, the Seventh Circuit ruled an Illinois dental practice, a hotel operator and other policyholders aren't entitled to pandemic-related coverage.

The rulings joined a trend started by the Eighth Circuit — the first federal appellate court to decide a business interruption case in July — which said an insurer didn't have to cover an Iowa dental clinic's losses. The same carrier notched another win when the Eleventh Circuit ruled a Georgia dental clinic wasn't covered.

The Sixth Circuit also sided with an insurer, saying an Ohio café's property insurance policy didn't cover losses tied to the pandemic and shutdown orders. Policyholders were then dealt another big setback by the Ninth Circuit in a trio of rulings in favor of insurers on business income losses from the shutdown orders.

Courts in 2021 have widely rejected policyholder efforts to treat "loss of use" as if it were direct physical loss of, or damage to property, according to Laura Foggan of Crowell & Moring LLP, who said that policyholders later pivoted to boldly suggest the presence of the virus somehow meets that policy requirement.

But Foggan, who represents carriers, told Law360 the Sixth Circuit illustrated in its ruling concerning a bridal salon's proposed class action that "this lacks a factual basis and hasn't gotten traction either."

Erin Bradham of Dentons, which also represents insurers, said appellate courts "have largely mirrored what we've seen at the trial court level."

These rulings state there isn't coverage for losses blamed on government orders or the presence of the virus, according to attorneys, and, in some cases, that virus exclusions separately bar coverage.

"Although the appellate courts have expressed sympathy for businesses impacted by COVID, they have not been willing to rewrite insurance policies to create coverage where it does not exist," Bradham said.

Policyholder attorneys, however, say early appellate rulings were expected and not remarkable given the relatively scant allegations and lack of any factual record. In many of these cases, these attorneys say the businesses don't allege tangible alteration to both insured surfaces and insured indoor air — a "distinct theory" of liability.

Despite these early decisions, policyholder attorneys argue there is still a question of what the federal appellate courts will do with a well-pleaded complaint alleging the presence of the virus on the property — especially in light of the Eighth Circuit's footnote that its holding was based on the government orders.

The science and understanding of the coronavirus "have evolved significantly," noted Greg Gotwald of Plews Shadley Racher & Braun LLP, which represents policyholders. He told Law360 the "Clorox defense" — the suggestion by insurers that the virus can be wiped off — is weak because cleaners don't fully eliminate the virus.

"If that were the case, the pandemic would have ended long ago. Heavy science-based complaints are more the standard now," he said, noting the Eighth Circuit noted that the virus can trigger coverage.

Policyholder attorneys have attacked Section 148:46 of the influential insurance legal treatise, Couch on Insurance, arguing the "standard" Couch proclaimed as the prevailing law was wrong and only got worse leading up to the COVID-19 litigation. The Couch treatise, which has been cited by many courts that have dismissed policyholders' complaints, espoused what it characterized as a "widely held" standard that physical loss or damage requires a "distinct, demonstrable, physical alteration of property."

In addition, policyholder attorneys also have challenged the insurance industry's bankruptcy concerns.

In briefs written for appellate courts, insurers have voiced a fear that the insurance industry will go bankrupt if it is required to pay out pandemic-related loss claims, said Scott Greenspan of Pillsbury Winthrop Shaw Pittman LLP. The argument has resonated with some federal courts, as evidenced in some recent federal appellate decisions, but Greenspan said judges must look at the insurance contract, not the economic arguments.

"It's a false argument as the overwhelming majority of these property policies have broad virus exclusions and suit limitation provisions," he said.

State Courts Reject 'Herd Behavior'

Federal courts around the country have leaned heavily in favor of insurers with 41% of the 1,296 suits filed in those courts being permanently tossed, according to Law360's COVID-19 Insurance Case Tracker. But policyholders have celebrated "significant" wins at the state court level that they hope will set a new tone.

Policyholder attorneys were alarmed at the disparity between state and federal rulings in any particular state on the same issues and, presumably, under the same controlling law. However, the state court victories for policyholders served "as a litmus test," according to one policyholder lawyer.

Michael Levine of Hunton Andrews Kurth LLP told Law360 these decisions confirm policyholders aren't overreaching, claims are valid and losses are within the scope of coverage. The biggest takeaway from the state court policyholder wins is judicial recognition that policyholders' interpretations are reasonable, according to Levine. "All of those judges can't all be unreasonable," Levine added.

"I think many federal judges have found an easy way to clear their dockets and defer the issue to another court for another day, recognizing that the issues will eventually be decided at the state level," he said.

In one case, an Illinois state judge defied the majority in an Oct. 25 ruling, saying he wouldn't join in the "herding behavior" happening with courts in their approach to motions to dismiss COVID fights. That Illinois judge said a contractor and developer's suit could proceed over losses from the shutdown of a Brooklyn condominium tower project, as it sufficiently alleged the virus caused physical loss or damage.

That Illinois state court decision, along with touted wins in Pennsylvania and Nevada state courts, were described as a "sea change" for policyholders. Those August rulings saw a contractor and the owner of a Las Vegas casino survive attempts to throw out their suits. A Pennsylvania state judge also granted summary judgment in March to a dental practice for coverage with an insurer.

And in July, a California state judge allowed a discount department chain to keep alive its $1 billion coverage suit against many insurance companies on the basis a contamination exclusion may not bar virus losses.

However, attorneys for insurance companies highlight the overwhelming quantity of rulings favoring their positions on both the federal and state level. Adam Fleischer of BatesCarey LLP, which litigates on behalf of insurers, estimates over 90% of federal COVID-19 cases and over 70% of state court cases have been tossed on motions to dismiss.

"The assertion that there is an unjust variance between federal and state rulings on COVID-19, is an inaccurate rallying cry that policyholder counsel have been trying to manufacture," he told Law360.

With about 33 state court cases surviving the dismissal stage, Fleischer points out that half of the suits are from California and Ohio, which have had appellate courts issue rulings in favor of insurers with a finding of no coverage for COVID-19 losses to a California hotel operator, an Ohio nail salon and an Ohio sports apparel store.

And even the few outlier wins for policyholders at the pleading stage haven't translated into ultimate success for them, according to attorneys for insurers. Some of those cases would eventually be lost at the summary judgment stage or in the case of Cajun Conti LLC v. Certain Underwriters at Lloyd's of

London, at a bench trial. Counsel for the parties in Cajun Conti, which was the first COVID-19 insurance case to be tried before a judge, didn't respond to requests for comment.

Given insurance "is a creature of state law," Peter Halprin of Pasich LLP, which represents policyholders, told Law360 that "the fact that state courts applying their own laws have found coverage is telling."

Jury, Not Judge Decides COVID Case

The year was capped off by a Missouri federal jury's verdict in K.C. Hopps Ltd. v. Cincinnati Insurance Co. On Oct. 28, the jury found the insurer didn't breach its policy by denying a Kansas City restaurant and bar operator's claim for pandemic-related losses. The restaurant owner has since asked for a new trial. Counsel for the parties in K.C. Hopps didn't respond to requests for comment.

Policyholder attorneys remarked that the verdict was the result of a jury instruction added on the eve of trial that didn't give the jury much choice but to find for the carrier. Jury instruction No. 21 said if government shutdowns affected the loss then they should find for the insurer, according to policyholder attorneys.

The federal judge was wrong to add the instruction concerning the Cincinnati policy's "ordinance or law exclusion," as the exclusion shouldn't apply to orders issued because of a covered cause of loss, according to policyholder attorneys. The attorneys believe future jury trials will find for coverage based on the experts and evidence presented.

But Keith Moskowitz of Dentons, which represents insurers, said the K.C. Hopps verdict reflects how jurors, like judges, recognize that business closures were to stop the spread of the coronavirus, not due to any direct physical loss or damage to the properties that would be covered in a commercial property insurance policy.

"K.C. Hopps is best explained by the jury's recognition of this reality, not by jurors' fatigue on the COVID issue. The defense verdict for the insurers in the K.C. Hopps jury trial shows the uphill battle policyholders face, even if they are able to get past the pleading stage," said Moskowitz.

K.C. Hopps shows the challenges faced in discovery or at trial, according to attorneys for insurers, as businesses must prove that their premises — not those of nearby businesses — were contaminated with the virus to the point the property was unusable and uninhabitable, causing a suspension of operations.

"K.C. Hopps demonstrated the corner into which policyholders are backed in order to prove a COVID-19 commercial property claim," Fleischer of BatesCarey said. "They try to argue that they closed because the virus so contaminated their premises that they decided it was physically unusable. This is simply not the true scenario for most businesses, and not a story that most businesses wish to push to a jury, a judge or local customers."

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