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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Policyholders Unfazed By 1st Appellate COVID Coverage Loss

By **Shawn Rice**

Law360 (July 9, 2021, 10:00 AM EDT) -- The Eighth Circuit recently came out with the first appellate COVID-19 business interruption suit ruling in favor of insurance companies, but attorneys for policyholders said they don't expect the decision to be influential in the many other appeals over coverage for pandemic-related losses.

On July 2, the Eighth Circuit ruled that Cincinnati Insurance Co. doesn't have to cover an Iowa dental clinic's losses due to government-imposed COVID-19 restrictions, finding the suspension of nonemergency procedures didn't cause any "direct physical loss or damage" to property without any physical alteration.

For attorneys on the insurer side, the Eighth Circuit's ruling was a welcome well-reasoned outcome.

This "is a key precedential ruling," Laura Foggan, chair of Crowell & Moring's insurance/reinsurance group, told Law360, as the Eighth Circuit's ruling makes clear there is no ambiguity in the policy terms.

Foggan is representing two insurance trade groups, the American Property Casualty Insurance Association and National Association of Mutual Insurance Cos., in support of insurers in appeals before the Seventh, Ninth and Eleventh circuits involving suits by a steakhouse and brewery operator, Los Angeles restaurants and a Florida furniture retailer. The carriers in those cases are also defending wins before trial courts.

"The Eighth Circuit expressly found no coverage under a policy that did not contain the virus exclusion," Foggan said. "That should end policyholder efforts to suggest that the lack of a virus exclusion somehow suggests coverage exists for COVID-related business loss."

Attorneys who represent policyholders, however, told Law360 the decision is far narrower than insurance companies will try to argue and should not have an outsized impact in other COVID-19 business interruption appeals.

If the Eighth Circuit's decision is any indicator, Michael S. Levine of Hunton Andrews Kurth LLP told Law360, "we can probably expect future circuit rulings to do as the Eight Circuit did and narrowly address the issues presented" but won't see an appellate ruling broadly attempt to resolve issues not presented by the case under review.

Levine, who represents **a** seafood chain and a Las Vegas hotel and casino in appeals before the First and Ninth circuits, said Oral Surgeons is unique because the closure stemmed in large part from the Iowa Dental Board's order. But perhaps the biggest difference is that many other suits actually allege physical loss and damage from the presence of the virus, an allegation that was conspicuously absent in Oral Surgeons.

"This case [Oral Surgeons] is not those cases. Period. Hard stop," Levine said.

The state law applicable to particular appeals is likely to influence the outcomes, but attorneys for insurance companies told Law360 there is ample precedent across many states supporting their position. Although the Eighth Circuit in Oral Surgeons relied on Minnesota law as indistinguishable from Iowa law, according to insurer attorneys, there is long-standing precedent — in Iowa and elsewhere — that has recognized the plain meaning of the physical loss or damage requirement.

The decision is likely to be followed by other appellate courts and trial courts, said Wystan M. Ackerman of Robinson & Cole LLP, who represents the same insurance trade groups as Foggan, APCIA and NAMIC, as well as insurers before the Ninth and Tenth circuits in cases involving a San Francisco retailer and an Oklahoma Goodwill's affiliated nonprofit.

Michael Savett of Clark & Fox, who represents insurers, agreed the Eighth Circuit was correct to focus on the need for physical loss or damage as that prerequisite to coverage "has been the overriding reason" most courts have ruled in favor of insurers. He told Law360 the number of decisions in favor of insurers would only increase as a result of the Eighth Circuit's decision.

According to Raymond J. Tittmann of TittmannWeix, the Eighth Circuit's ruling "portends a rapid narrowing of the ongoing debate to policies lacking a virus exclusion." And the decision puts policyholders with a virus exclusion in their policy "into a catch-22," said Tittmann, who represents insurers.

While judicial interpretation of the virus exclusion remains less uniform, Clark & Fox's Savett said even if the virus is allegedly physically present at a premise, without testing done at the time to support the claim, the suit "probably will be doomed."

But for policyholder attorneys, Oral Surgeons doesn't answer all issues that have arisen in business interruption suits. They said the ruling shouldn't have a negative impact on policyholders in other appellate courts considering suits over pandemic-related losses, despite efforts by insurance companies to argue otherwise.

"I'm not naïve to the fact that insurers in other cases will try to read the Eighth Circuit decision far more broadly," said Bradley L. Booke of the Law Offices of Bradley L. Booke, who is representing a Nevada advertising agency in its business interruption suit appeal before the Ninth Circuit.

Mark John Geragos of Geragos and Geragos APC, who is representing Los Angeles restaurants in two Ninth Circuit appeals, told Law360 that some have anticipated that state supreme courts will ultimately have the final word on many COVID-19 business interruption cases.

Oral Surgeons "is unfortunate" but not binding, and ultimately irrelevant to his cases, he said.

Policyholder attorneys emphasized the Eighth Circuit's express limitation of its analysis to the question

of whether government-ordered closures caused a "direct physical loss." Oral Surgeons noted the lack of allegation of the coronavirus's presence, which is a key allegation being raised in newer suits, attorneys said.

The Eighth Circuit's reliance on Iowa and Minnesota law, according to policyholder attorneys, won't impact suits where state case law is more insured-friendly or silent on the "direct physical loss" issue.

There are differences in every case and policy, according to Glenn L. Udell of Brown Udell Pomerantz & Delrahim Ltd., as in his Seventh Circuit appeal where a mattress company argues its insurer is barred from relying on a virus exclusion based on alleged misrepresentations to Illinois regulators regarding the exclusion's purpose and scope.

In addition, the detail and specificity of the factual allegations made by policyholders has improved as they have gained a better understanding about the virus and how courts have treated less-detailed allegations, according to Matthew B. Weaver of Reed Smith LLP, who has represented nonprofit advocacy group United Policyholders in support of businesses in their COVID-19 coverage appeals.

It will likely be years before state and federal appellate courts have unraveled all the COVID-19 business interruption cases brought before them. Prior to the Eighth Circuit's ruling, there were 167 cases being heard across federal appellate courts with oral arguments heard or scheduled, according to data from the University of Pennsylvania's COVID Coverage Litigation Tracker, and 42 cases being heard across various state appellate courts.

Gregory M. Gotwald of Plews Shadley Racher & Braun LLP, who is also representing United Policyholders in support of businesses, was looking toward other appeals with oral argument already scheduled.

The Third and Ninth circuits, in particular, have consolidated some of the initial appeals in these business interruption suits before one panel, Gotwald told Law360, saying these consolidated cases will most likely be heard last as they "will draw more attention and take longer to process."

--Additional reporting by Daphne Zhang, Eli Flesch, Hailey Konnath and Lauren Berg. Editing by Vincent Sherry.
