

Part Three: Reviewing Key U.S. Insurance Decisions, Trends, & Developments

COVID-19 Business Interruption Coverage Litigation

Insights for Insurers Alert | 5 min read

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This is the third installment of our series of articles reviewing some of the key trends and developments currently impacting the U.S. insurance industry.

The issuance of various governmental orders requiring businesses to temporarily modify or close their operations led to an almost immediate avalanche of claims and lawsuits involving first-party commercial property policies. According to the University of Pennsylvania Carey School of Law Covid Coverage Litigation Tracker, by mid-December there had been approximately 2,122 COVID-19 coverage cases, with 1,923 involving business interruption, 1,732 extra expense, 1,658 civil authority, 216 other, 208 ingress/egress, 110 contamination, 91 event cancellation, 84 sue and labor, and 15 liability cases. Approximately 469 cases were filed as putative class actions and 745 cases include allegations of bad faith.^[1]

At the trial court level, insurers have prevailed in over 76% of the 176 rulings on motions to dismiss in state courts and in over 95% of the 570 rulings by federal courts, mostly on the grounds that the virus claims do not involve “direct physical loss or damage” to property as required under most U.S. policy wordings, governmental orders do not constitute loss of property, and/or virus exclusions preclude coverage.^[2] Insurers have prevailed in approximately 47 summary judgment rulings (with partial summary judgment granted in another 9 cases) while policyholders have prevailed in just 11. Insurers have also prevailed in the first bench trial and in the first COVID-19 jury trial.^[3] There are approximately 235 appeals pending in federal court and 84 in state court.

At the appellate court level, insurers have prevailed in the first 19 decisions from the U.S. Circuit Courts of Appeal, with the Second, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits ruling for insurers under the laws of multiple states.^[4] These courts have ruled in insurers’ favor based on the lack of “direct physical loss or damage” as well as virus, microorganism, loss of use, and ordinance or law exclusions. Federal courts have dismissed over 40% of policyholders’ coverage actions for pandemic loss coverage, 17% of the pandemic

insurance actions filed in federal courts have been voluntarily dismissed, and approximately 40% of the suits have yet to be fully decided, according to *Law360's* COVID-19 Insurance Case Tracker.^[5]

The first five state appellate court decisions, one in California, one in Indiana, one in Michigan, and two in Ohio, also have been in favor of insurers.^[6]

In the U.S., COVID-19 coverage litigation has proceeded mostly through individual cases. Efforts by some policyholders to consolidate COVID-19 business interruption coverage cases have been largely rejected. On August 14, 2020, the Judicial Panel on Multidistrict Litigation (“JPML”) denied a request to consolidate all COVID-19 federal litigation.^[7] The JPML later rejected a request to create multidistrict litigation (“MDL”) involving four insurers, although it did agree to centralize more than 30 lawsuits against Society Insurance Company.^[8]

The pace of new filings on first-party policies has slowed. Given most such policies have one or two-year contractual limitations periods, most COVID-19 cases under these policies likely have been filed by now. However, a last minute flurry of new filings can be expected.

The activity level on other lines—such as general liability, professional liability, director and officer liability, and workers’ compensation policies—may increase. This coupled with the numerous outstanding motions to dismiss and many appeals yet to be decided means the COVID-19 coverage war will continue to rage on for some time. This is particularly likely given the pandemic is ongoing with the latest variant. So far, insurers have fared reasonably well. Still, COVID-19 has been an expensive proposition for the insurance industry.

[1] See *Covid Coverage Litigation Tracker*, University of Pennsylvania Carey Law School (last visited Dec. 7, 2021).

[2] *Id.*

[3] *Id.*

[4] See *10012 Holdings Inc. v. Sentinel Ins. Co. Ltd.*, No. 21-80-cv (2d Cir. Dec. 27, 2021); *Kim-Chee LLC v. Philadelphia Indemnity Ins. Co.*, (2d Cir. January 28, 2022); *Terry Black’s Barbecue, L.L.C v. State Auto Mut. Ins. Co.*, No 21-50078 (5th Cir. Jan. 5, 2022); *Aggie Investments, LLC v. Continental Cas. Co.*, (5th Cir. Jan. 7, 2022); *Bridal Expressions LLC v. Owners Ins. Co.*, No. 21-3381, 2021 U.S. App. LEXIS 35676 (6th Cir. Nov. 30, 2021); *Estes v. Cincinnati Ins. Co.*, (6th Cir. Jan. 12, 2022); *Dakota Girls, LLC v. Philadelphia Indemnity Ins. Co.*, (6th Cir. Nov. 5, 2021); *Henderson Road Restaurant Systems, Inc. et al v. Zurich American Ins. Co.*, (6th Cir. Sept. 29, 2021); *Santo’s Italian Cafe LLC v. Acuity Ins. Co.*, (6th Cir. Sep. 22, 2021); *Sandy Point Dental, P.C. v. Cin. Insurance Co.*, No. 21-1186, No. 21-1559, No. 21-1203, 2021 U.S. App. LEXIS 36399 (7th Cir. Dec. 9, 2021); *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.*, No. 21-1173, 2021 U.S. App. LEXIS 36398 (7th Cir. Dec. 9, 2021); *Mashallah, Inc. v. W. Bend Mut. Ins. Co.*, No. 21-1507, 2021 U.S. App. LEXIS 36400 (7th Cir. Dec. 9, 2021); *Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co.*, No. 21-1316, 2021 U.S. App. LEXIS 36396 (7th Cir. Dec. 9, 2021); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, No. 20-3211, 2021 U.S. App. LEXIS 19775 (8th Cir. July 2, 2021); *Mudpie, Inc. v. Travelers Cas. Ins. Co.*, No. 20-16858, 2021 U.S. App. LEXIS 29624 (9th Cir. Oct. 1, 2021); *Selane Prods. v. Cont’l Cas. Co.*, No. 21-55123, 2021 U.S. App. LEXIS 29633 (9th Cir. Oct. 1,

2021); *Chattanooga Prof'l Baseball LLC v. Nat'l Cas. Co.*, No. 20-17422, 2021 U.S. App. LEXIS 29632 (9th Cir. Oct. 1, 2021); *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.*, No. 21-6045, 2021 U.S. App. LEXIS 37802 (10th Cir. Dec. 21, 2021); *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Insurance Co.*, No. 21-11046, 2021 U.S. App. LEXIS 26196 (11th Cir. Aug. 31, 2021); *Ascent Hospitality Management Co. LLC v. Employers Ins. Co. of Wausau*, No. 21-11924, 2022 U.S. App. LEXIS 1161 (11th Cir. Jan. 14, 2022).

[5] Eli Flesch, [7th Circ. Deals Policyholders 'Body Blow' In Virus Ruling](#), Law360 (Dec. 7, 2021).

[6] See *Inns-by-the-Sea v. Cal. Mut. Ins. Co.*, 71 Cal. App. 5th 688 (2021); *Sanzo Enters., LLC v. Erie Ins. Exch.*, 2021-Ohio-4268 (Ct. App.); *Nail Nook, Inc. v. Hiscox Ins. Co.*, 2021-Ohio-4211 (Ct. App.); *Ind. Repertory Theatre v. Cincinnati Cas. Co.*, No. 21A-PL-628, 2022 Ind. App. LEXIS 2 (Ct. App. Jan. 4, 2022); *Gavrilides Mgmt. Co., LLC v. Mich. Ins. Co.*, No. 354418, 2022 Mich. App. LEXIS 632 (Ct. App. Feb. 1, 2022).

[7] *In re Soc'y Ins. Co. COVID-19 Bus. Interruption Protection Ins. Litigation*, 482 F. Supp. 3d 1360, 1361 (J.P.M.L. 2020).

[8] *In re Soc'y Ins. Co. COVID-19 Bus. Interruption Protection Ins. Litigation*, 492 F. Supp. 3d 1359, 1361 (J.P.M.L. 2020).

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