LAW360 Insurance Authority

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# The Big Picture: COVID Coverage Cases In Fed. Appeals Court

By **Shawn Rice and Ben Zigterman**

Law360 (February 25, 2022, 1:58 PM EST) -- Federal appellate courts have taken divergent paths in grappling with COVID-19 coverage cases, with some waiting to hear from state high courts, others consolidating the suits and still more issuing ruling after ruling in favor of insurers who say policies don't cover the economic stifling of a global pandemic.


While some issues — such as whether insurance policies' so-called civil authority provisions cover pandemic-related forced shutdowns of nonessential businesses — have been ruled on in some circuits, other questions remain. (AP Photo/David Zalubowski)

Since the Eighth Circuit in July **became the first appeals court** to issue a ruling in the **deluge of business interruption suits** that swept into courts in the wake of the virus and its related shutdowns, all federal appellate courts that have issued rulings have sided with insurance carriers.

But the appeals process has become complicated now that several state supreme courts have taken up cases and policyholder attorneys have honed their arguments in search of a path past the dismissal stage of litigation, experts told Law360.

While some issues — such as whether insurance policies' so-called civil authority provisions cover pandemic-related forced shutdowns of nonessential businesses — have been ruled on in some circuits, other questions remain.

For example, some appellate courts are now considering whether businesses that argued that virus particles damaged their properties or caused losses should have a chance to prove their insurance coverage to a jury.

Scott Greenspan of Pillsbury Winthrop Shaw Pittman LLP, who represents policyholders across the

country, said he doesn't see how the insurers will now be able, in so-called virus on the premises cases, to argue that governments caused the losses, which may box them out of the arguments that have led to victories in earlier cases.

"Policyholders will argue that the doctrines of judicial estoppel and issue preclusion prevent insurers from making such a 180 degree change in position if they won cases by arguing the virus caused the losses," he said.

But the insurance industry **remains confident that the federal appellate courts** will continue to side with them.

Adam Fleischer of BatesCarey LLP told Law360 there has been "careful inventorying" by each federal appellate court on whether there are any potential legal or factual differences from prior rulings. He sees the "various legal roads" headed to the same conclusion — businesses aren't covered for losses without any physical change to their properties.

"As this process is unfolding, I think the picture is becoming very clear," Fleischer said.

And that picture is of courts that have mostly reached identical pro-insurer outcomes on the key nuanced issues — that a loss of use equals a direct physical loss, that likely virus in the community causes a direct physical loss, and that a person with virus on the premises, or the existence of virus on surfaces, causes direct physical loss or damage that triggers insurance coverage.

As state high courts begin to look at the issue, policyholder attorneys see a possible light at the end of the tunnel.

"So, the story is only beginning in the state supreme courts which have the last word given that insurance law is a pure creature of state law," Greenspan said.

He told Law360 that matters could have been resolved faster if federal courts had certified physical loss or damage questions to their state supreme courts. All such requests have so far been denied, court records show.

"To my great surprise not a single federal court has granted a policyholder's motion to certify," he said, noting only two certifications came from an insurer's motion and a federal judge who wasn't asked.

Policyholder attorneys say that each state high court **should be the venue** to examine how each state's laws should apply to the coverage, which will result in better outcomes for their clients.

For federal appellate courts that have already issued a decision under a given state's law, Rob Hoffman of DLA Piper, who represents insurance carriers, said these courts "are increasingly favoring per curiam decisions decided on the briefs" so as "to conserve judicial resources where the answer is clear."

In some of the more recent cases, appeals courts don't find a need to hold oral arguments anymore, said Mound Cotton Wollan & Greengrass LLP partners Jared Markowitz and Wayne Glaubinger in a joint statement.

"Also, many trial court decisions are becoming shorter and shorter — they often need not say much more than 'see XYZ appellate authority,'" they said.

As more of these pandemic-era insurance cases make their way into the federal appellate system, Law360 takes stock of where cases stand in each circuit.

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# Federal COVID-19 Coverage Appeals

A look at where oral arguments are scheduled and decisions have been made by federal appellate courts in COVID-19 coverage suits.

| CIRCUIT | CASES DECIDED | ORAL ARGUMENTS SCHEDULED | PENDING APPEALS |
|---|---|---|---|
| First | None | None | 6 |
| Second | • 10012 Holdings Inc. v. Hartford Fire Insurance Co. et al.<br>• Rye Ridge Corp. et al. v. Cincinnati Insurance Co.<br>• Kim-Chee LLC v. Philadelphia Indemnity Insurance Co. | Feb. 28: SA Hospitality Group LLC 1000 et al. v. Hartford Fire Insurance Co. | 13 |
| Third | None | None | 48 |
| Fourth | None | None | 10 |
| Fifth | • Terry Black's Barbecue LLC v. State Automobile Mutual Insurance Co. et al.<br>• Aggie Investments LLC v. Continental Casualty Co. | None | 9 |
| Sixth | • Santo's Italian Cafe LLC v. Acuity Insurance Co.<br>• Henderson Road Restaurant Systems Inc. et al. v. Zurich American Insurance Co.<br>• Bridal Expressions v. Owners Insurance Co.<br>• Estes v. Cincinnati Insurance Co.<br>• Dakota Girls LLC et al. v. Philadelphia Indemnity Insurance Co. | March 10: System Optics Inc. v. Twin City Fire Insurance Co. et al. | 19 |
| Seventh | • Bradley Hotel Corp. v. Aspen Specialty Insurance Co.<br>• Mashallah Inc. et al. v. West Bend Mutual Insurance Co.<br>• Sandy Point Dental PC v. Cincinnati Insurance Co. et al.<br>• Crescent Plaza Hotel Owner LP v. Zurich American Insurance Co. | None | 16 |
| Eighth | • Oral Surgeons PC v. Cincinnati Insurance Co. | None | 18 |
| Ninth | • Chattanooga Professional Baseball v. National Casualty Co.<br>• Mudpie Inc. v. Travelers Casualty Insurance Co. of America<br>• Selane Products Inc. v. Continental Casualty Co. | March 9: Circus Circus LV LP v. AIG Specialty Insurance Co.<br>March 9: Levy Ad Group Inc. v. Federal Insurance Co.<br>April 13: Palmdale Estates Inc. v. Blackboard Insurance Co. | 83 |
| Tenth | • Goodwill Industries of Central Oklahoma v. PIIC | None | 1 |
| Eleventh | • Gilreath Family & Cosmetic Dentistry Inc. v. Cincinnati Insurance Co.<br>• Ascent Hospitality Management | None | 19 |

Co. LLC v. Employers Insurance Co. of Wausau

Sources: Law360 research, University of Pennsylvania COVID Coverage Litigation Tracker

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# First Circuit

While the Northeastern appeals court hasn't yet scheduled oral arguments in pending business interruption cases, it has issued stays in cases that had hearings or were nearing scheduling them.

The Massachusetts Supreme Judicial Court **last month heard a case** brought by a group of Boston restaurants, and that court's interpretation of how Bay State law should apply to the COVID insurance disputes could prove pivotal for other cases in the First Circuit.

Justice David A. Lowy said at the outset of the hearing that the SJC does not make rulings based on how many other courts have ruled one way or the other around the country, but the court still took note of the poor win-loss record of insured businesses.

In particular, Justice Lowy noted that the Sixth, Seventh and Eighth Circuits all have issued rulings in favor of insurers, and that no appellate court has yet ruled for policyholders.

The First Circuit's stays in the pandemic insurance suits may stem from a desire to see how the state high court will rule on the issue, an argument often brought by policyholders seeking a pause on federal rulings.

Scott Seaman, co-chair of the global insurance services practice group at Hinshaw & Culbertson LLP, said most federal appellate courts are not pausing the suits despite those requests.

"It is not surprising that policyholders are seeking to have federal appellate courts hold cases in suspended animation hoping for something better in state court appeals," he said. "It also is not surprising that federal appellate courts, in large and prudent measure, are not taking the bait and allowing their dockets to be cluttered."

However, Michael Levine of Hunton Andrews Kurth LLP, who **argued for a policyholder** in a case before the First Circuit that was stayed, said appellate courts, "as they should," are still considering each case on its own merits.

Despite some early decisions on cases premised solely on orders as the cause of loss, Levine said he has seen a consistency emerge with federal appellate courts noting that if the case had not been premised on "orders-only," and instead alleged a presence of the virus, the outcome might have turned differently.

"That recognition is consistent with the 60 years of pre-COVID precedent that consistently found the intrusion of hazardous or noxious substances that impaired or prevented use or habitability of insured property to constitute physical loss or damage sufficient to trigger coverage," he told Law360.

# Second Circuit

The Second Circuit swapped oral arguments for submission on the briefs in one COVID-19 coverage case despite setting oral arguments for another case at the end of February.

The difference in the cases comes down to which state's laws are invoked. The suit taken under submission involves New York law — which the Second Circuit considered in its **first ruling on the matter** back in January — while the second case involves not-yet-considered Connecticut law.

There are any number of reasons why the Second Circuit chose to take the one case off the argument calendar and submitted on the briefs, said Jeffrey Schulman, managing partner in Pasich LLP's New York office, so it shouldn't be inferred that the decision was made because the issue was fully resolved.

"There are a significant number of cases winding their way through the state appellate courts right now in New York, Connecticut and elsewhere around the country so these issues are anything but resolved," said Schulman, whose firm has represented policyholders in COVID-19 coverage suits.

The pandemic impacted all people and businesses, but attorneys for insurance carriers argue there are more similarities than differences in the legal theories arising out of the pandemic.

Fleischer of BatesCarey said federal courts "are beginning to take a step back, gather a high-level view on all that has been pleaded and decided in the federal courts over the last two years, and take stock as to whether there remain novel or nuanced legal arguments."

He pointed to the Second Circuit's Jan. 28 ruling, "somewhat answering questions" potentially left open from its first ruling. The Second Circuit held that a **New York taekwondo studio** couldn't show how government restrictions as well as the presence of the virus at its properties caused physical damage.

Meanwhile, the Vermont high court heard oral arguments Jan. 26, asking if a trial judge was right to predict the justices would side with the **country's largest military shipbuilder** to say the presence of the virus causes physical loss or damage.

# Third Circuit

The Third Circuit is home to Pennsylvania, which had been a popular venue for the COVID insurance disputes. That court's docket now holds the second-highest number of pending appeals on the issue, according to court filings.

But none of those cases have yet come up for oral arguments, in part because many suits are **tied up in multidistrict litigation**, where a hearing will be held in late April on motions to dismiss.

And **another 14** of the suits that already had made it to appeal were consolidated and are still completing briefing as several amici chime in. The policyholders include a law firm, restaurants, optical filter shops, a gallery and a beer garden, all of which have been denied COVID-19-related loss coverage by their insurers. Most said it was the closure order, not contamination by the virus, that led them to lose business, but all were denied coverage under their "all risks" insurance policies from various providers.

Oral argument is expected to be scheduled in the consolidated appeal soon, according to the docket.

# Fourth Circuit

The Fourth Circuit **heard arguments** in December in an appeal from a West Virginia wine and art venue, but has yet to issue a decision. The venue argued that the loss of use of its property during the pandemic was a covered loss under its commercial property insurance policy with The Cincinnati Insurance Co.

Meanwhile, other pending cases before the Eastern Appalachian appeals court include one by the Golden Corral restaurant chain, which is fighting a district court loss in its dispute **against a Chubb insurance unit**. In that case, the Illinois Union Insurance Co. pressed the argument that no other federal appellate court has ruled in favor of a policyholder, and that the Fourth Circuit should rule no differently.

# Fifth Circuit

The appellate circuit overseeing Texas and much of the Gulf Coast **issued a decision in January** that a Lone Star State barbecue joint couldn't show it suffered loss or damage from government-forced shutdowns related to the pandemic.

In the ruling, the three-judge panel found that Terry Black's Barbecue hadn't shown that the shutdown orders hadn't deprived the business of access to its premises. Because the business itself hadn't been altered by the virus and the owners hadn't lost the use of the property altogether, the insurance coverage for business income and extra expenses wasn't triggered.

A day later, the appeals court also shut down a similar case by a spice and tea shop owner called Aggie Investments.

Robert Santoro of DLA Piper said the Fifth Circuit has canceled oral arguments and instead taken some pandemic insurance cases under submission.

One such case, an appeal from a Louisiana bone and joint clinic, had been scheduled to be heard Jan. 31, but the panel said oral arguments were not required. The clinic is arguing that the physical presence of the virus amounts to physical damage.

"We can only speculate as to the reasoning behind these decisions," Santoro said. "But the decisions so far have made a great deal of sense given the rulings to date."

# Sixth Circuit

Meanwhile, that circuit's neighbor up the river has hardly shied away from hearing cases and issuing decisions, even as litigants await a ruling from the Ohio Supreme Court on the issue.

During **oral arguments in early February**, a Buckeye state justice mused that, under the policyholder's argument that the presence of the virus causes damage, a fogged-up mirror would trigger insurance coverage.

The Sixth Circuit has issued at least six rulings in COVID insurance cases, including Wednesday's **decision against** three Michigan restaurants. The panel found that the restaurants' temporary loss of use was not covered.

The circuit's first decision was **issued in September**, when a panel held that an Ohio cafe's property insurance policy did not cover losses attributed to the pandemic and shutdown orders.

Later **that month**, a panel reversed a district court judge's decision in favor of more than a dozen steak and seafood restaurants. The panel found that government orders don't qualify as "direct physical loss of or damage to" property under Ohio law.

In November, a Sixth Circuit panel **again found** in favor of insurers, rejecting an Ohio bridal salon's bid for coverage because of pandemic-related restrictions and another appeal from **16 private preschools**.

And **last month**, a Kentucky dental practice lost its appeal when a panel found that pandemic orders didn't cause direct physical losses.

# Seventh Circuit

While the Seventh Circuit doesn't have any upcoming oral arguments in pandemic business interruptions suits, it has issued four rulings in such disputes, potentially triggering some plaintiffs in the Midwestern circuit to drop out of their litigation voluntarily.

The **rulings came down** in December against an Illinois dental practice, hotel operators and others. In one, a three-judge panel said Sandy Point Dental and the Bend Hotel Development Co. weren't able to show that the presence of the coronavirus caused any physical alteration to their properties, a requirement for coverage under "all-risk" policies insuring for direct physical loss.

A month later, a Chicago pastry bakery and a salon **dropped their appeal** before the Seventh Circuit, citing its recent decisions

Meanwhile, the Wisconsin Supreme Court **has taken up** an appeal from a group of policyholders including a coffee roaster, restaurants and breweries. The state Supreme Court will decide whether a reduction in operations qualifies the businesses for coverage.

# Eighth Circuit

The Eighth Circuit had the honor of being the first appeals court to issue a ruling in a COVID business interruption suit and it also has taken more oral arguments to consider if there is new ground or clarification needed from its **landmark first appellate ruling** to resolve matters involving different state laws.

Fleischer of BatesCarey **argued a case** Feb. 15 before an Eighth Circuit panel that focused on Missouri law and whether there was physical loss to nearby property triggering civil authority coverage since the orders talked about protecting life and property.

And the Iowa Supreme Court **heard arguments Monday** on a golf and country club's COVID-19 coverage appeal. The justices discussed whether losses tied to government restrictions must be covered and whether the restrictions or the virus were the cause of the closures.

# Ninth Circuit

The Ninth Circuit issued **three rulings in October** against a children's store operator, minor league baseball teams and a dental appliance manufacturer.

In the longest of the three rulings, the three-judge panel wrote in a published opinion that a California federal judge was right to dismiss a proposed class action brought by children's store operator Mudpie Inc., finding that the retailer failed to sufficiently show it sustained physical damage from the virus or government orders. The panel also found that a virus exclusion applied to Mudpie's claim.

In its second ruling, which was nonprecedential, the appeals court panel found that virus exclusions barred claims brought by a group of minor league baseball teams in an Arizona federal court lawsuit.

And in the third, the panel upheld a California federal judge's dismissal, finding that the dental

appliance manufacturer failed to allege that its premises were physically damaged by the virus or related shutdown orders, much like in Mudpie.

Oral arguments are scheduled in three COVID-19 coverage cases, with two from Nevada set for March 9.

In Circus Circus LV LP v. AIG Specialty Insurance Co. , the Las Vegas **casino owner** is arguing that the presence of the coronavirus caused physical loss and damage by rendering its property unfit for its intended use. In Levy Ad Group Inc. v. Federal Insurance Co., the **advertising agency** is arguing that the loss of use of its premises should be covered as a physical loss.

The Ninth Circuit was scheduled to hear four COVID-19 coverage appeals from California policyholders, including from a **restaurant group** and **strip clubs**, but it removed those cases from its calendar Wednesday pending a decision from the California Supreme Court about whether to take on a COVID-19 coverage suit from a **hotel operator**.

And on April 13, arguments are scheduled in a COVID-19 coverage suit from the owner of the Casa Bella event venue in Sunol, California.

No oral arguments are scheduled for appeals from Washington state, where the Supreme Court **decided in January** to take on its first COVID-19 coverage suit to address whether a pediatric dental practice is covered for losses allegedly caused by government-imposed restrictions.

# Tenth Circuit

No oral arguments are scheduled for COVID-19 coverage appeals in the Tenth Circuit, which ruled against Goodwill Industries of Central Oklahoma in December. The panel found that government orders did not cause the policyholder to suffer a direct physical loss that would qualify it for coverage.

Goodwill **asked in January** for a hearing before the full circuit, arguing it should wait for a decision from the Oklahoma Supreme Court in two related suits from Native American tribes. The Tenth Circuit has since denied that request.

# Eleventh Circuit

The southeastern circuit's decision a few months into the pandemic has been heavily cited, even though Mama Jo's Inc. v. Sparta Insurance Co. had nothing to do with COVID-19. A panel **found in August 2020** that the insurer did not have to cover a Miami restaurant's lost income and extra cleaning costs due to nearby roadwork, agreeing with a Florida federal judge that the eatery's claimed losses did not result from covered "direct physical loss of or damage to" its property.

Since then, the Eleventh Circuit ruled in August 2021 that a Georgia dental clinic did not suffer any property damage from either the coronavirus or government closure orders that would trigger coverage.

And **last month**, a panel ruled against a Georgia-based hotel operator, finding that government restrictions meant to curb the spread of the coronavirus didn't cause Ascent Hospitality Management's properties to suffer covered direct physical damage.

No oral arguments are currently scheduled for other COVID-19 coverage suits in the Eleventh Circuit.

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