

## **Pandemic Business-Interruption Cases To Watch In 2022**

By **Shawn Rice**

*Law360 (January 3, 2022, 12:02 PM EST)* -- Federal appellate courts will grapple this year with the next wave of COVID-19 coverage suits, with the focus on whether the presence of the virus caused a covered loss, while several state high courts are set to potentially shift the entire landscape in deciding key pandemic coverage questions.

The early suits decided by federal appellate courts focused on losses tied to government restrictions during the pandemic, but 2022 will see these courts deciding suits by businesses alleging their losses were also caused by the presence of the coronavirus on their properties.

In addition, both policyholders and insurers will look to several state high courts — including those in Ohio, Massachusetts and Oklahoma — to offer their stance on several issues that will impact these coverage battles.

The pandemic's effects on businesses won't be soon forgotten by Scott Greenspan of Pillsbury Winthrop Shaw Pittman LLP, who represents policyholders. He told Law360 that the coronavirus killed a close friend, who got sick after taking his daughter to the hospital for a blood test following a lifesaving cancer treatment.

"My friend got COVID and died in his early 40s from an essential business that was open, leaving behind four young children," he said. "The insurers will tell you that the business was safe and functional. But being essential doesn't mean it was safe, habitable, or fit — it just means it was open because there were economic, political or other countervailing reasons to be open."

### **State High Courts' Rulings**

Several state high courts of last resort will hear COVID-19 coverage suits that could turn the tide. Policyholder attorneys say most states recognize that conflicting interpretations of the same language is strong evidence of ambiguity, so a favorable state high court ruling would add substantial credibility to this argument, as well as the specific arguments made in the case under the policy language at issue.

Because the next wave of decisions will address more nuanced allegations by businesses, Peter Halprin of Pasich LLP, who represents policyholders, said it's "hard to read the tea leaves."

An Ohio audiology practice and its insurer have both received plenty of backing from interested trade groups in their dispute before the Ohio Supreme Court. The Buckeye State's highest court recently

announced it will hear arguments Feb. 8 on whether the presence of the virus and related government closure orders caused physical loss or damage to the practice's property.

Before then, owners of three Boston-area restaurants will tell Massachusetts' highest court Jan. 7 why their insurer should pick up the tab for pandemic-related losses. The Bay State justices want to hear arguments on whether the pandemic and government closure orders triggered the restaurants' insurance coverage, and whether a virus exclusion precludes coverage for losses caused by the coronavirus.

Experts are anticipating a ruling any day from the Oklahoma Supreme Court, which is mulling several COVID-19 coverage suits that saw favorable results for Native American tribes on carefully developed issues.

Hunton Andrews Kurth LLP's Michael Levine said a state high court ruling in those cases "will be significant, as it will be the definitive pronouncement of that state's law." The rulings could change the landscape, particularly on the "physical loss" issue, but Levine said the effect of any decision will only be as broad as its facts.

"So, decisions from the state high courts will have to be read carefully to ensure that their holdings are not misapplied beyond the facts on which the case was decided," Levine told Law360.

Policyholder attorneys brushed aside insurers' prediction that a state high court victory for the tribes will lead to a "tidal wave" of new litigation. The policies at stake have suit limitation provisions and exclusions, policyholder attorneys said, preventing any "parade of horrors" for new suits.

Keith Moskowitz of Dentons, who represents insurers, said he doesn't anticipate any shift by state high courts given the overwhelming weight of decisions favoring insurance companies in federal and state courts. He told Law360 there would still be "thorny causation questions and other factual obstacles" in the path of businesses seeking coverage.

Referencing a Missouri federal jury verdict in favor of Cincinnati Insurance Co., Moskowitz said laypeople and judges alike understand the pandemic "is tragic because of its impact on people," but also that the pandemic and the virus didn't cause covered direct physical loss or damage to businesses' properties.

The state high court cases "will obviously be watched closely," Robinson & Cole LLP's Wytan Ackerman said, as a policyholder win, "although it seems unlikely based on all the federal and state appellate decisions to date, could have a significant impact." However, Ackerman, who represents insurance companies, said that impact depends on the ruling and what provisions are addressed.

"Insurers have more than one defense to coverage in these cases," he told Law360.

## **Second Wave of Federal Appeals**

The early COVID-19 coverage cases involved standard form policies, often with the Insurance Services Office's standard virus exclusion, and typically didn't allege the presence of the virus on the policyholder's property. This year's federal appeals rulings will include some of these cases but also those alleging physical alteration of insured property due to the virus.

For instance, late last year the First Circuit challenged an East Coast seafood chain to give the exact time that one of its restaurants was considered unfit and dangerous due to the presence of the virus. And a taekwondo studio argued its case to the Second Circuit for why the presence of the virus caused physical damage.

The Eighth and Sixth Circuits, meanwhile, appeared to accept in coronavirus coverage appeals that a "virus on the premises" case could satisfy the "direct physical loss or damage" language in a policy without a virus exclusion, according to Greg Gotwald of Plews Shadley Racher & Braun LLP, who represents policyholders. He told Law360 that courts "are going to have to deal with the strong science-based factual allegations about physical alteration."

"I struggle to see how those cases don't get reserved and sent back for factual development about physical alteration," said Gotwald, who is also following an Indianapolis hotel's Seventh Circuit appeal — which was backed by a group of universities — as well as a Seattle hotel's Ninth Circuit appeal.

Attorneys will also be eyeing the Ninth Circuit for cases led by the owner of steakhouse restaurants and a Las Vegas casino, both of which are being considered for argument in March.

With suits alleging losses due to the presence of the virus, many insurers have compared the coronavirus to the common cold and flu in terms of the actual impact. But Pillsbury's Greenspan said it was "laughable and deeply offensive" to compare the coronavirus to common viruses.

"It's amazing that they can equate the coronavirus to the common cold," he said. "The common cold hasn't been killing millions around the world. The common cold isn't deadly. This was akin to poison gas being released to the environment. The insurers' argument dishonors the memory of the millions who have perished at the hands of COVID-19 and is an insult to their survivors."

Attorneys on the insurer side, however, said they don't see 2022 bringing any significant changes to the current landscape, despite their counterparts predictions.

While it's possible a federal appellate court may rule differently in 2022, Crowell & Moring LLP's Laura Foggan, who represents insurance companies, told Law360 that the direct physical loss or damage requirement "is so fundamental to property coverage that it seems unlikely."

For suits that survive dismissal, she noted that many insurers have ultimately prevailed on summary judgment or at trial. Both the first bench trial and the first jury trial in coronavirus business-interruption suits yielded verdicts for the insurers, Foggan pointed out.

Counsel for the policyholders in those cases didn't respond to requests for comment.

The jury verdict shows that laypeople understand that the coronavirus doesn't impact physical property any differently than the flu virus, according to Ackerman of Robinson.

"No one who has COVID would say there is direct physical loss to their home or to a pharmacy they went to for a COVID test or a restaurant they visited the day before that," he said.

Insurer attorneys say the allegations in the second wave of suits doesn't present anything new for three reasons: Businesses don't allege when or how their property was altered or damaged, the factual motivation for business closures remains government orders, and the virus is easily removed through

cleaning and disinfecting.

And there's no indication that this year's rulings will depart from last year's in favor of insurers on coverage issues, according to Erin Bradham of Dentons, who represents insurers, "despite great sympathy for the existential challenges faced by businesses throughout the pandemic."

--Additional reporting by Shane Dilworth, Christopher Cole, Matthew Santoni, Jasmin Jackson and Ben Zigterman. Editing by Breda Lund.

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