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The Biggest COVID-19 Business Interruption Rulings Of 2022

By **Ben Zigterman**

Law360 (January 2, 2023, 12:02 PM EST) -- After consistently getting turned down by federal appellate courts in 2021, policyholders seeking COVID-19 business interruption coverage had a bit more success in 2022 in state appellate and supreme courts, notching victories at the Vermont Supreme Court and from appellate panels in Louisiana, Pennsylvania and California.

The decisions gave policyholder attorneys hope while attorneys for insurers downplayed them as rare or procedural.

"We saw a division in state appellate authority, which is what I think most of us had all thought would happen at the outset of these cases," policyholder attorney Rani Gupta of Covington & Burling LLP said. "Obviously, not all of them came out the way that I would have ruled, but a lot of courts are being more thoughtful and there's been more of a development of a division in authority."

However, state supreme courts in Washington, Oklahoma, Iowa, Wisconsin, South Carolina, Delaware, Maryland, Ohio and Massachusetts sided with insurers, continuing carriers' dominance in COVID-19 coverage cases.

"Policyholders will continue to fight hard until the bell sounds, and they will land an occasional punch. However, as things stand, policyholders are losing by a lot of points," said Scott Seaman, a partner at Hinshaw & Culbertson LLP, who represents insurers.

State Supreme Court Decisions

Since the Eighth Circuit in July 2021 became the first federal appeals court to rule in a COVID-19 coverage suit, all federal appellate courts that have issued rulings have sided with insurance carriers. Meanwhile, policyholders increasingly looked to state supreme courts, where they argued the cases should be decided.

Policyholder attorneys were thrilled in January when the Washington Supreme Court decided to take up a case, but the first state supreme court to rule — Massachusetts' — sided against Verveine Corp. and in favor of its insurer.

Its decision was followed by similar ones throughout the year from Washington, Oklahoma, Iowa, Wisconsin, South Carolina, Delaware, Ohio and Maryland, with most finding that losses from shutdown orders aren't covered. The Massachusetts, Wisconsin, South Carolina,

Ohio and Maryland justices went further, ruling that businesses didn't have coverage for losses caused by the presence of the virus at their premises.

"Key rulings from what are often viewed as policyholder-friendly states such as Washington underscore the broad acceptance of the position that there is no coverage," said Laura Foggan, a partner at Crowell & Moring LLP, who represents carriers.

Cajun Conti

The mood shifted for policyholders in June when a Louisiana appellate panel reversed a trial court's judgment against Cajun Conti LLC, the owner of a New Orleans restaurant.

It was the first state appellate court to side with a policyholder in a COVID-19 coverage fight, which policyholder attorney Scott Greenspan of Pillsbury Winthrop Shaw Pittman LLP said "broke the dam" and laid the groundwork for other decisions later in the year for policyholders.

"It sort of sent courts a message that you don't have to reflexively rule for insurance carriers just because other courts have," Greenspan said. "It was a reminder to courts to look at the policy language and not just blindly follow case law without regard to the policy language."

The Louisiana Supreme Court agreed in November to review the split 3-2 decision in Cajun Conti.

Vermont Supreme Court

In September, policyholders scored their first win before a state supreme court, when the Vermont Supreme Court revived Huntington Ingalls' lawsuit, finding that the shipbuilder has sufficient allegations to proceed past the motion to dismiss stage.

While carrier attorneys highlighted Vermont's liberal pleading standard and argued that the reasoning was in line with other state supreme court decisions, policyholder attorneys were thrilled with the decision.

"Huntington Ingalls was very significant," Greenspan said. "It indicated that a loss of functional use without physical alteration can cause physical loss, that you don't need physical alteration to constitute physical loss."

Baylor College Of Medicine

Also in September, a Texas jury reached a $48 million verdict in favor of the Baylor College of Medicine in its COVID-19 coverage suit, becoming the first jury to side with a policyholder in a pandemic-era business interruption suit.

To policyholder attorney Michael Levine of Hunton Andrews Kurth LLP, this may have been the most important decision of the year for policyholders.

"It shows what happens when the evidence actually is considered by ordinary people," Levine said. "No longer can a court credibly say, 'It's not plausible under the federal pleading standard' when a jury has considered the evidence and said, 'It happened.'"

"It shattered the insurers' argument that a virus on the premises case doesn't pass the plausibility test," Greenspan said.

Greenspan said the Baylor verdict shows why insurers have been fighting to keep COVID-19 coverage decisions from reaching a jury.

"The Baylor jury verdict is why the insurers are trying so hard to keep these cases not even in the same planet as a jury," Greenspan said. "If these cases go to a jury, they're going to lose a lot of them because people went through COVID. They know how serious it was. They know that buildings ... were not safe, they were not functional, they were not habitable."

California Appellate Split

Policyholder attorneys also praised a California appellate decision in July that reversed the dismissal of a COVID-19 coverage suit from Marina Pacific Hotel and Suites LLC, creating a circuit split in the Golden State.

The panel dinged the trial judge for ruling based on his "common sense" rather than hearing evidence on whether the virus physically altered property.

"The Marina Pacific decision came on the heels of some other, less favorable decisions in California appellate courts," Gupta said. "[The appeals court] took a look at those decisions and really went back to basic principles of insurance law and California pleading law and explained persuasively why those other decisions were wrongly decided."

"As the Marina Pacific decision recognizes, policyholders should be allowed to present facts and evidence regarding their allegations of COVID-19-related losses and should not be required to prove these facts at the pleading stage," policyholder attorney Esther Kim of Reed Smith LLP said.

Greenspan also highlighted that decision, noting its significance for other policyholders with "the highest-end policies with communicable disease coverage."

"You really have an acknowledgment by an appellate court that this communicable disease coverage can be an explicit recognition by the carrier that communicable diseases can in fact cause physical loss or damage, without physical alteration," Greenspan said. "For policies with communicable coverage, Marina Pacific was clearly the most significant coverage decision of the year."

U.S. Supreme Court

Despite some high-profile decisions in favor of policyholders, carrier attorneys noted their rarity, as well as the U.S. Supreme Court's refusal so far to delve into the issue.

The high court "has made clear it is not inclined to review these issues," Foggan said.

In June, the high court declined to hear a COVID-19 coverage appeal from a Goodwill affiliate in Oklahoma, and in November and December, it declined to hear appeals from a Maryland car auction company and a Baltimore developer.

Seaman also downplayed the policyholders' victories.

"Policyholders have landed less than a handful of punches in the form of state appellate court victories, and the decisions are not determinations that coverage exists," he said. "These tend to be only jabs, as they merely allow the claims of policyholders to live past the motion stage to fight another day."

Peter Klee, a partner with Sheppard Mullin Richter & Hampton LLP who represents insurers, also said policyholders haven't fared much better at the state level than at the federal level.

"The big question that everybody had was, 'Will these federal decisions be followed by the state courts?'" Klee said. "The bottom line is that it looks like COVID-19 insurance coverage litigation is going the way that it started out, which is consistently in the industry's favor."

The Year Ahead

As the new year arrives and the third anniversary of the pandemic approaches, carrier attorneys remain confident, and policyholder attorneys remain hopeful.

In addition to Cajun Conti's case before the Louisiana Supreme Court, policyholders are hoping for favorable decisions in 2023 from the high courts in New Hampshire, New York and Nevada.

"We are two-and-a-half years into the COVID-19 [business interruption] insurance coverage fight, and insurers have a commanding lead," Seaman said. "Insurers have been winning round after round in venue after venue."

Even if the decisions don't always turn out the way policyholders would like, Greenspan said the clarity from state supreme court decisions is welcome.

"General guideposts and rules from state supreme courts will be immensely helpful to both sides and to judges in forging a path forward in these cases," he said.

--Additional reporting by Elizabeth Daley, Riley Murdock, David Holtzman, Chris Villani, Eli Flesch and Hope Patti. Editing by Bruce Goldman and Emma Brauer.
