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Policyholders Hopeful Despite 9th Circ. COVID-19 Losses

By **Shane Dilworth**

Law360 (October 4, 2021, 7:58 PM EDT) -- The Ninth Circuit's three recent rulings upholding dismissals of COVID-19 coverage suits may initially seem like another big win for insurers at the federal appellate level, but some experts say there's no reason for the insurance industry to be donning party hats just yet.

For policyholders, Friday's rulings echoed similar decisions from the Sixth, Eighth and Eleventh circuits that held government shutdown orders did not cause physical loss or damage to properties, a key issue in early pandemic coverage disputes. The Ninth Circuit also concurred with its sister courts that virus exclusions found in many "all-risk" property policies bar coverage for losses caused by COVID-19.

Scott Greenspan of Pillsbury Winthrop Shaw Pittman LLP, who represents policyholders, told Law360 that the rulings are the latest "to apply the 'first wave'" of COVID-19 coverage disputes, which typically involve broad virus exclusions, allegations of loss solely from government orders and no allegations of virus of the premises."

Greenspan said these disputes, which he dubbed "David versus Goliath" cases, are "proving tougher to win."

Conversely, newer complaints are more like "science reports on COVID-19" and typically allege the presence of coronavirus on the premises and that property was damaged as a result of the virus' presence, he elaborated.

According to Greenspan, the Ninth Circuit panel's ruling in Selane Products Inc. et al. v. Continental Casualty Co., is important for policyholders because it presents "a roadmap on how to draft a complaint to survive a motion to dismiss in California." Far from a victory for them, Greenspan said Selane is a significant defeat for the carriers.

The unpublished opinion in Selane, Greenspan said, sets that stage for how to define physical loss or damage. He pointed out that the appeals court made clear in that decision that physical loss or damage sufficient to trigger all-risk coverage could successfully be alleged if the policyholder claimed the virus was present on the premises.

Christopher Cunio of Hunton Andrews Kurth LLP told Law360 the Ninth Circuit's opinions may have limited or no application to cases where policyholders specifically allege that the presence of COVID-19 on their properties caused damage.

"Not all COVID-19 coverage disputes are the same," said Cunio, who represents policyholders, explaining that policies, factual allegations, claimed losses and state laws can vary from case to case.

"While insurance companies will surely try to blur lines and argue for the application of a virus exclusion or a finding of no physical loss or damage, those analyses are fundamentally flawed," said Cunio, who represents policyholders.

But attorneys representing insurance companies are still celebrating the Ninth Circuit's rulings.

Laura A. Foggan of Crowell & Moring LLP represented the American Property Casualty Insurance Association and National Association of Mutual Insurance Companies in filing amicus curiae briefs supporting the insurers in two of the cases decided by the Ninth Circuit. She told Law360 that "a number of important holdings" came out of the rulings.

Specifically, Foggan pointed out that the significance of the panel's findings in Mudpie Inc. v. Travelers Casualty Insurance that loss of use of a property is not synonymous with physical loss or damage and that direct physical loss or damage requires actual damage to a property.

In a joint emailed statement on the Mudpie ruling, John Ewell and Joanna Roberto of Gerber Ciano Kelly Brady LLP emphasized that "the Ninth Circuit rejected the policyholders' arguments that 'physical damage' can be satisfied where there is 'loss of use' or property is 'no longer suitable for its intended purpose.'"

"The Ninth Circuit, as with the majority of jurisdictions, ruled there must be physical alteration to the property to trigger coverage in the first instance," they said.

Christina Roberto of TittmannWeix told Law360 that the panel's focus on the period of restoration in the Mudpie ruling does not bode well for policyholders. The period of restoration is a policy provision that limits how long a policyholder can claim to have sustained business interruption losses and ends when the property is cleaned or disinfected.

"Even if contamination were to be found to potentially constitute 'direct physical loss of or damage to property,' policyholders still have to contend with the fact that the 'period of restoration' ends when the insured premises can be 'repaired, rebuilt or replaced with reasonable speed,'" said Christina, who represents insurers.

The rulings in Selane and Chattanooga Professional Baseball LLC v. National Casualty Co. were also important in addressing the applicability of virus exclusions, Foggan told Law360.

She explained that the Chattanooga decision held that a virus exclusion was applicable under the laws of 10 states where minor league baseball teams were located and "found the virus exclusion applicable under all possible standards of causation."

Moreover, Foggan pointed out that the Chattanooga ruling "rejected policyholders' arguments regarding regulatory estoppel under federal and state law, and equitable estoppel, finding no misrepresentations." In their estoppel arguments, the policyholders essentially contended that the insurers went back on prior representations about the scope of coverage afforded by their policies when denying businesses' claims for pandemic-related losses. The policyholders asserted that these alleged misrepresentations

should bar the insurers from relying upon their virus exclusions.

In the Chattanooga opinion, however, the Ninth Circuit found that of the 10 states where the teams were located, only West Virginia explicitly recognized the doctrine of regulatory estoppel. The panel also held that the teams were unable to show that the other nine states would adopt the doctrine if presented with the opportunity.

Ewell and Roberto opined that the ruling in Chattanooga is "the most significant." The duo, who predominantly represent insurers, explained that "this case sets a challenging precedent for policyholders in those states while also signaling a cautionary presage for other litigants considering a similar argument."

These latest rulings by a federal appeals court will present "a significant setback for policyholders," Ewell and Roberto said.

"The Ninth Circuit had been one of the policyholders' most receptive forums in terms of onward arguments and decisions," they said. "If any circuit would have been willing to consider creative arguments or break from the national trend, it is the Ninth Circuit."

--Additional reporting by Mike Curley and Shawn Rice. Editing by Nick Petruncio.
