

Policyholder Attys Eye Ohio Justice's Role In COVID-19 Fight

By **Shawn Rice**

Law360 (February 4, 2022, 4:14 PM EST) -- An Ohio justice's past authored opinion is on the minds of attorneys for policyholders as the Buckeye State's highest court on Tuesday addresses, in a closely watched business-interruption suit, whether Cincinnati Insurance Co. must cover an audiology practice's pandemic-related losses.

Businesses and trade groups filed many pages of arguments since the Ohio Supreme Court accepted a certified question in Cincinnati and Neuro-Communication Services Inc.'s case about whether the presence of the coronavirus on property caused "direct physical loss or damage" that is covered.

Unlike the COVID-19 coverage cases heard by the Massachusetts and Vermont high courts, which were issues of first impression in those regions, the Ohio justices have several pro-insurer rulings by the Sixth Circuit and the state's own appellate courts. Despite those outcomes, attorneys want to hear probing questions from Justice Melody J. Stewart in this case.

Policyholder attorneys are especially curious how Justice Stewart will apply her opinion as an Ohio appeals court judge in *Mastellone v. Lightning Rod Mutual Insurance Co.* — which was cited by Cincinnati and other insurers — to the COVID-19 business interruption insurance coverage context.

In *Mastellone*, the Ohio panel ruled mold on the siding of a home wasn't "physical damage" as the mold didn't change the siding's structural integrity. Experts agreed the mold could be removed without causing harm to the wood so the panel said there wasn't any direct physical injury under a homeowners' policy.

Both sides have talked about *Mastellone* and reach "widely different conclusions on what was decided," so Justice Stewart is the best candidate to say what that decision means in the context of these COVID-19 coverage suits, said John Ellison of Reed Smith LLP, who is co-counsel for United Policyholders.

"Who better to tell us than the person who wrote the opinion? It's an interesting twist," he said.

What's At Stake

U.S. District Judge Benita Y. Pearson of the Northern District of Ohio sent the question to the state's high court — accepted in April 2021 — asking if the presence of the virus "in the community, or on surfaces at a premises," or by a person infected with the virus causes direct physical loss or damage to property.

On Tuesday, the Ohio justices will hear their first COVID-19 coverage oral arguments. After getting the case, the Sixth Circuit sided against an Ohio café before following with more rulings in favor of insurers and two Ohio appellate panels found no coverage for an Ohio nail salon and a sports apparel store.

Massachusetts' justices already hinted on Jan. 7 that past insurer wins might sway a ruling on whether restaurants were covered by their insurer for pandemic-related losses. Vermont's highest court on Jan. 26 asked reinsurers why the country's largest military shipbuilder shouldn't be covered for its own losses.

The oral arguments present unique circumstances as Neuro-Communication's case originated in federal court and the request for certification was made by Cincinnati. Legal observers are curious what influence the existing federal and state appellate rulings will have on the Ohio Supreme Court's decision-making.

If the Ohio justices were to come out in favor of the insurers, it "would make it very difficult or impossible for policyholders to pursue claims for coverage for COVID-related losses in Ohio under most policies," according to Erin Bradham of Dentons, who represents insurance carriers.

"But answering in favor of the policyholders will only begin, and not end, the inquiry," she said.

Policyholders would still need to show their losses were caused by physical loss or damage, not by the government orders, to recover under most commercial property insurance policies, according to Bradham. And even then, she said, many policies have a virus exclusion, which isn't before the Ohio high court.

Policyholder Stance

The survival and viability of many Ohio businesses is on the line in this case, said Joseph Cole of Brouse McDowell LPA's Toledo, Ohio, office. A ruling in favor of the insurers "could leave Ohio policyholders with hundreds of millions, if not billions, in losses," according to Cole, who counsels policyholders.

Neuro-Communication briefed the Ohio justices that the coronavirus and related shutdown orders caused losses by impacting the office's physical space and functionality. There is no requirement of "tangible, physical alteration" or "structural alteration" in "loss" and "damage," the audiology practice said.

Policyholders challenge the insurers' citation to Mastellone, which was used by the Sixth Circuit in its first ruling to predict how the Ohio high court would rule. They say Mastellone — "an old mold case" — is easily distinguishable as that case dealt with a homeowners' policy, not commercial property policies.

Mastellone was only decided after a trial on the merits after testimony from experts was given on both sides, according to Cole, in what could be significantly important for Neuro-Communication's case. Unlike that case, there haven't been any established factual findings by either side, Cole explains.

"In fact, the insurers are asking the Ohio Supreme Court justices to be epidemiology experts and ignore the science which finds that the property can be transformed into disease vectors," he said. "The facts might not be sufficiently developed yet for the Ohio Supreme Court to make a definitive ruling."

The procedural element for these federal and state cases in Ohio has been odd, according to

policyholder attorneys, suggesting some courts have raced to get decisions out. Policyholder attorneys point to how the First Circuit stayed several COVID-19 coverage appeals pending the Massachusetts high court's ruling.

"I don't know how that will impact the thinking of the justices," Ellison of Reed Smith said. "Speaking if I was one, I'd find that a bit annoying. That the federal court is trying to tell me what state law is with how our system is structured. It doesn't seem like the relationship is being respected by the federal courts."

Insurer Stance

Laura Foggan of Crowell & Moring LLP, who is co-counsel for American Property Casualty Insurance Association and National Association of Mutual Insurance Cos., calls the policyholders' arguments an attempt "to distract" the Ohio justices from the clear policy terms and the overwhelming precedent.

In its brief, Cincinnati argued the presence of the virus didn't physically alter Neuro-Communication's office in a way to cause direct physical loss or damage. The policy covers tangible harm to property like a fire, storm, theft or vandalism that requires repairing, rebuilding or replacing property, the insurer said.

Pre-pandemic decisions don't back policyholders' position that limitations on the use of property due to a government order cause direct physical loss of property, according to Foggan. She also dismissed the suggestion that the absence of a virus exclusion in Cincinnati's policy somehow confirms coverage.

The issue under Ohio law turns on Mastellone — which held that the presence of mold that can be cleaned from surfaces didn't alter or otherwise damage property — as supporting dismissal of COVID-related claims by the Sixth Circuit and the Ohio appellate courts, according to Keith Moskowitz of Dentons.

"While the Ohio Supreme Court has the power to chart its own course, that kind of wholesale rejection of the opinions of other respected courts would be very surprising," said Moskowitz, who counsels insurers.

Scott Seaman, co-chair of the global insurance services practice group at Hinshaw & Culbertson LLP, said insurers will want to continue that record of victories across the country and at the federal appellate level by scoring wins in the first state high court rulings. But he is "optimistic" about an insurer win.

"I am not sure whether we are early in the third quarter or fourth quarter of the COVID coverage war, but even with a big lead you do not want to give the policyholders any momentum especially with respect to a claim that is not properly covered by a policy," said Seaman, who represents insurers.

What To Expect

If the Ohio justices rule in favor of policyholders, K. James Sullivan of Calfee Halter & Griswold LLP says it will be interesting to see how federal trial court outcomes based on the multiple pro-insurer holdings out of the Sixth Circuit will be dealt with since it would be at odds with their decision.

The issues before the Ohio justices "are broad enough" that unless there is a narrow ruling, its outcome will likely impact many pending and potential COVID-19 business interruption suits in Ohio court, said Sullivan, who is among a team of attorneys representing the interests of Ohio businesses in this appeal.

Attorneys for policyholders and insurers expect changes to the existing landscape or confirmation of the current outcomes now that these COVID-19 coverage cases have navigated through the state and federal courts up to appellate courts and now are awaiting outcomes with several state high courts.

What's happening in Ohio, Massachusetts and other state high courts are "watershed moments in these battles," according to Ellison of Reed Smith. While not ignoring federal court outcomes, he said his experience says, "state appellate courts rightfully feel it's their province on what the law is in their state."

Seaman of Hinshaw & Culbertson said the Ohio justices would be telling "several learned jurists" they were wrong if the high court rules in favor of coverage — given the "well-reasoned, well-supported" rulings of no coverage reached by the Ohio appellate panels and the Sixth Circuit considering Ohio law.

"But like when my wife makes a pronouncement at home, the Ohio Supreme Court has the final word on Ohio insurance contract law, so the law is whatever it pronounces it to be whether I agree or disagree," he said.

Counsel for Neuro-Communication and Cincinnati didn't respond to requests for comments.

Neuro-Communication is represented by Nicholas A. DiCello of Spangenberg Shibley & Liber LLP and Yechiel Michael Twersky of Berger Montague PC.

Cincinnati is represented by Michael K. Farrell, Daniel M. Kavouras and Rodger L. Eckelberry of BakerHostetler and Daniel G. Litchfield of Litchfield Cavo LLP.

The case is Neuro-Communication Services Inc. v. The Cincinnati Insurance Co. et al., case number 2021-0130, in the Supreme Court of Ohio.

--Additional reporting by Angela Childers, Ben Zigterman and Chris Villani. Editing by Nick Petruncio.