

Big Businesses Step Into Pandemic Insurance Coverage Fight

By **Shawn Rice**

Law360 (April 5, 2021, 7:33 PM EDT) -- Science and specificity are likely to take center stage in pandemic-related insurance litigation, as professional sports teams, casinos and a fashion giant add their heft to an area of law being tested in state, federal and appellate courts across the country, according to insurance recovery experts.

In the past year, mom and pop businesses have gone up against their insurers for coverage of losses related to government shutdowns, new cleaning policies and other business interruptions as COVID-19 ground the economy to a halt.

And those smaller businesses have repeatedly lost their cases, as judges have found that government shutdowns and the virus itself don't add up to a "physical loss or damage" to the insured businesses as outlined in their policies.

Federal courts in 231 cases have tossed the majority of the suits, while policyholders have fared better in state court where results are mostly split, according to a database maintained by the University of Pennsylvania Carey Law School. At the state level, courts in 65 cases refused to kick the suit about half of the time, according to UPenn's most recent data.

Now, the likes of Caesars Entertainment, the Los Angeles Lakers and Philadelphia Eagles have stepped into the fray looking to change the outcome, and it could mean a new future for what business interruption allegations look like in court, experts told Law360.

Michael Miguel, an insurance litigator at McKool Smith PC, noted the novelty of the issue and said its future is still uncertain.

"It's the crystal ball that is kind of murky," he said. "I can't tell if this is the next asbestos or the next Y2K."

Miguel said he expects there will be more sophisticated arguments from firms with a greater level of experience who are filing suits. These cases of first impression will be best served by sophisticated counsel, he said.

But, Miguel added, "the guy with the corner shop expects the same treatment as Caesars from their insurer."

John G. Koch, a member of Flaster Greenberg's insurance recovery, litigation and environmental practice groups, told Law360 that smaller businesses went first into the business interruption fray because law firms were willing to take the cases on contingency.

"They had to do something, and ASAP," Koch said.

But larger companies are more likely to have deeper relationships with their insurers and complex insurance programs, and may not have gotten their coverage denied as quickly, Koch said. As a result, they "may be in less of a rush to the courthouse," he said.

The lack of uniformity in policy language and exclusions among insurance companies, according to insurance recovery experts, turns the current litigation landscape back into a case-by-case or state-by-state inquiry. Missouri and Ohio are among states where policyholders have survived the motion to dismiss stage, according to UPenn's COVID-19 tracker site.

Haynes and Boone LLP partner Adrian Azer echoed other experts telling Law360 that big law firms will try to keep these coverage fights in state court but also look for other favorable arenas.

"People are going to try to find jurisdictions with more success rates, such as Missouri, while other jurisdictions may be harder," Azer said, noting a heavily cited case, *Studio 417 Inc. v. Cincinnati Insurance Co.*, in which a Missouri federal judge found that businesses had sufficiently alleged a physical loss under their policies.

There was no consensus among insurance recovery experts on how an insurer's relationship with a larger company will affect outcomes. For some, success at the pleadings stage could factor into an insurer's openness to a possible settlement that smaller businesses wouldn't have the clout to reach.

Big law firms with a specialized insurance practice will be able to offer a stronger litigation strategy, according to experts. And super large policyholders also have unique insurance policies that insurance recovery attorneys will address more clearly, the experts said.

Many of the early suits made only "cursory allegations" of property loss, according to David F. Klein, a partner at Pillsbury Winthrop Shaw Pittman LLP. But for newer suits, he believes policyholders will "go deeper and spell out" with scientific evidence the kind of damage to insured properties results from the coronavirus.

"There is a narrative that the insurance industry has cultivated that these cases are losers," Klein told Law360. "If you really parse the decisions, it is a pretty close call in the eyes of the courts."

The past year of COVID-19 litigation saw insurers cherry-pick the policyholder suits that weren't well-pleaded, he added.

But as larger companies enter the field, insurance recovery experts are expecting to see those suits dive more into the fundamentals of policies and meaning behind the language and exclusions. Policyholders may look to inform judges on what an "all-risk" policy means and to define "physical loss" by looking at the drafting history of the policies, for example.

Mark Wilner, a partner at Gordon Tilden Thomas & Cordell LLP, told Law360 that attorneys for

policyholders will be more "nuanced" with addressing the impact of shutdown orders in the newer suits.

"You have to look at the language of these shutdown orders. Were they full shutdown or partially shutdown orders? What date were they entered? You will have more robust complaints because plaintiff lawyers are seeing decisions come down to this nuanced language," Wilner said.

For example, Caesars alleged it gave COVID-19 sick pay to more than 15,000 employees and had more than two million cancellations. Major casinos in New York and Michigan likewise alleged they have covered losses from government orders closing their businesses and forcing new cleaning measures before reopenings.

The fashion giant behind luxury brands Versace, Jimmy Choo and Michael Kors, for example, alleged routine cleaning doesn't kill the virus, and its losses were therefore caused by physical damage from the virus particles themselves. The Lakers and Eagles both said insurers were wrongfully denying coverage under "all-risk" policies while collecting hefty premiums.

Some courts, in their decisions on motions to dismiss, have said the coronavirus can easily be wiped away as if it were dirt. But insurance recovery experts said these newer complaints from casinos and professional sports teams can be expected to provide more detail about the virus based on updated information and scientific research from the Centers for Disease Control and Prevention and World Health Organization.

Those details could potentially overcome judicial reticence to find that the virus particles cause physical damage to properties, experts told Law360.

And as those challenges mount, the insurance recovery experts said they're expecting more of an effort to certify questions to state high courts to decide if a loss of use of property from the COVID-19 pandemic and government shutdown orders is a "physical loss or damage."

As the country continues to reopen and vaccinations become more common, success for policyholders in court remains to be seen. But court watchers can expect bigger businesses to emphasize scientific facts and policy specifics in their attempts to have insurers cover the losses.

--Additional reporting by Jeff Sistrunk, Daphne Zhang, Hailey Konnath and Melissa Angell. Editing by Nicole Bleier.