



## Alerts

### Where We Stand: The Latest Snapshot of COVID-19 Business Interruption Insurance Coverage Litigation

October 21, 2020

*Insights for Insurers*

Approximately 1,300 COVID-19 business interruption and civil authority insurance coverage cases are working their way through federal and state courts throughout the country. Decisions continue to be rendered and tracking trial court rulings can be challenging with over 300 motions to dismiss pending. There are now more than 30 reported decisions with the early results largely favoring insurers. By our count, insurers have prevailed on motions to dismiss in 26 cases, policyholders have avoided early dismissal in seven cases, and, in three Ohio state court cases, insurer motions to dismiss have been converted to motions for summary judgment to allow for discovery.

We are aware of favorable decisions on insurer motions to dismiss from federal courts in Texas, Florida (four), California (nine), Michigan, Illinois, Iowa, Pennsylvania, Georgia, Kansas, and Minnesota. Policyholders have survived initial motions to dismiss in federal courts in Missouri (three cases all pending before the same judge), and Florida.

Policyholders have avoided early dismissal in New Jersey, Pennsylvania, California, Missouri, and Ohio state court actions, while insurers have prevailed in state court actions in Michigan, California, Illinois, Florida, and the District of Columbia.

Approximately half of the dismissals to date have been with prejudice. Even where policyholders manage to avoid early dismissal, they will face significant hurdles in obtaining business interruption or civil authority coverage under most policies.

Some policyholders are attempting to short circuit the traditional appeal process. In *The Inns by the Sea v. California Mut. Ins. Co.*, the California state court granted the insurer's demurrer. The insured hotels filed a Notice to Appeal to the appellate level court. They filed a Petition to Transfer to the matter to the California Supreme Court on October 16, 2020, arguing that the case presents an urgent matter of public concern for California small businesses and their employees. (See: *The Inns by the Sea v. California Mut. Ins. Co.*, Case No. 20CV001274, Modesto Cnty.; Case No. H048443, California Court of Appeal Sixth Appellate District.) A previous attempt by policyholders to have the Pennsylvania Supreme Court exercise King's Bench jurisdiction was denied by the Pennsylvania high court in *Tambellini v. Erie Ins. Exchange*, No. 52 WM 2020 (May 14, 2020).

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We also are aware of three coverage actions that have been voluntarily dismissed prior to a merits ruling in federal court in Texas (joint motion to dismiss), Pennsylvania state court (voluntary dismissal), and federal court in Kansas (voluntary dismissal). In one of the earliest COVID-19 coverage matters, *Social Life Magazine v. Sentinel Ins. Co., Ltd.*, a federal court in New York denied the insured magazine's motion for a preliminary injunction to require the insurer to pay the policyholder's business interruption claim pending resolution of the lawsuit. The court stated that COVID-19 "damages lungs. It does not damage printing presses."

Various factors are impacting the court rulings in these matters, particularly the terms of the policy at issue—including the presence of virus and other exclusions—and the strategy employed by the policyholder in drafting its complaint. For example, in an apparent tactic to avoid application of virus exclusions, some insureds have specifically alleged that there is no evidence of COVID-19 on the insured property. Other policyholders have asserted the presence of the virus on the property in an attempt to plead direct physical loss.

The vast majority of COVID-19 coverage cases will not be subject to multi-district litigation (MDL). On August 14, 2020, the Judicial Panel on Multidistrict Litigation denied a request by some policyholders to consolidate all COVID-19 federal litigation. The Panel later rejected a request to create mini-MDLs with regard to four insurers, although it did agree to centralize more than 30 lawsuits against Society Insurance Company. (See: *In re Soc'y Ins. Co. COVID-19 Bus. Interruption Protection Ins. Litigation*, 20 U.S. Dist. LEXIS 183678 (J.P.M.L. Oct. 2, 2020). It should also be noted that more than 350 cases have been filed as putative class actions. About the same number of cases include bad faith claims, many of which allege failure to conduct an adequate investigation or rote denial of claims.

New actions continue to be filed, although the number of new weekly filings has declined over the past couple of months. It is too soon to know whether this trend will continue, as many policyholders could be waiting for case law developments prior to determining whether—and where—to institute coverage litigation.