



Alerts

COVID-19 Coverage Litigation: Insurers Maintain Unbeaten Record in All Appellate Court Decisions to Date

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Insights for Insurers

As we approach the end of the first quarter of 2022, things are still looking good for insurers in the COVID-19 coverage litigation battle.

The issuance of various governmental orders requiring businesses to temporarily modify or close their operations led to an almost immediate avalanche of claims and lawsuits involving first-party commercial property policies. Suits relating to the pandemic have also involved other policies as well.

A Growing Case Count

There has been a slight uptick in new case filings recently, as the two-year contractual limitations period for filing suit under many first-party policies is approaching. According to the University of Pennsylvania Carey School of Law Covid Coverage Litigation Tracker, as of the end of February 2022, there were approximately 2,227 COVID-19 coverage cases filed, with 1,974 involving business interruption, 1,779 involving extra expense, 1,699 involving civil authority, 220 involving ingress/egress, 115 involving contamination, 92 involving event cancellation, 87 involving sue and labor, 16 involving liability, and 219 relating to other matters. Approximately 469 cases were filed as putative class actions and 768 cases include allegations of bad faith.^[1]

Insurers Rack Up Victories in the Majority of Decisions on Motions to Dismiss and Motions for Summary Judgment

At the trial court level, insurers have prevailed in more than 78 percent of the 194 rulings on motions to dismiss in state courts and in more than 95 percent of the 598 rulings by federal courts. These victories have been obtained predominately on the basis that the virus claims do not involve "direct physical loss or damage" to property as required by most U.S. policy language, governmental orders do not constitute loss of property, and/or virus exclusions preclude coverage.^[2] Insurers have prevailed in approximately 52 summary judgment rulings (with partial summary judgment granted in another 10 cases) while policyholders have prevailed in just 11. Insurers have also prevailed in the first bench trial and in the first COVID-19 jury trial.^[3] Policyholders have voluntarily dismissed many suits and many more cases remain pending.

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Insurers Remain Undefeated at the Appellate Court Level, But Many Appeals Are Pending

Insurers have won, on the merits, in every appellate court decision rendered to date in both federal and state court.

At the appellate court level, insurers have prevailed in the first 28 decisions from the U.S. Circuit Courts of Appeal, with the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits ruling for insurers under the laws of multiple states.^[4] These courts have ruled in insurers' favor based on the lack of "direct physical loss or damage" as well as virus, microorganism, loss of use, and ordinance or law exclusions.

The first seven state appellate court decisions, one in California, one in Indiana, one in Michigan, two in Ohio, and two in Illinois also have been in favor of insurers in the COVID-19 coverage battle.^[5]

There is a long way to go, and many appeals remain pending. There are approximately 240 appeals pending in federal court (including 81 in the Ninth Circuit alone), a further 91 in state court, and future appeals are also expected.

[1] See [Covid Coverage Litigation Tracker](#), University of Pennsylvania Carey Law School (last visited Mar. 23, 2022).

[2] *Id.*

[3] *Id.*

[4] See *10012 Holdings Inc. v. Sentinel Ins. Co. Ltd.*, No. 21-80-cv, 2021 U.S. App. LEXIS 38270 (2d Cir. Dec. 27, 2021); *Kim-Chee LLC v. Philadelphia Indemnity Ins. Co.*, No. 21-1082-cv, 2022 U.S. App. LEXIS 2655 (2d Cir. Jan. 28, 2022); *SA Hospitality Group, LLC v. Hartford Fire Insurance Co.*, No. 21-1523-cv, 2022 U.S. App. LEXIS 7139 (2d Cir. Mar. 18, 2022); *Uncork and Create v. Cincinnati Insurance Co.*, No. 21-1311, 2022 U.S. App. LEXIS 5935 (4th Cir. Mar. 7, 2022); *Q Clothier New Orleans LLC et. al v. Twin City Fire Insurance Co. No. 21-30278, 2022 U.S. App. LEXIS 7565 (5th Cir. Mar. 22, 2022)*; *Terry Black's Barbecue, LLC v. State Auto Mut. Ins. Co.*, No. 21-50078, 2022 U.S. App. LEXIS 287 (5th Cir. Jan. 5, 2022); *Aggie Investments, LLC v. Continental Cas. Co.*, No. 21-40382, 2022 U.S. App. LEXIS 393 (5th Cir. Jan. 6, 2022); *System Optics, Inc. v. Twin City Fire Insurance Co.*, No. 21-3556, 2022 U.S. App. LEXIS 5731 (6th Cir. Mar. 2, 2022); *Bridal Expressions LLC v. Owners Ins. Co.*, No. 21-3381, 2021 U.S. App. LEXIS 35676 (6th Cir. Nov. 30, 2021); *The Brown Jug, Inc. v. Cincinnati Insurance Co.*, No. 21-2644/21-2715/21-2718, 2022 U.S. App. LEXIS 4836 (6th Cir. Feb. 23, 2022); *Estes v. Cincinnati Ins. Co.*, No. 21-5587, 2022 U.S. App. LEXIS 926 (6th Cir. Jan. 12, 2022); *Dakota Girls, LLC v. Philadelphia Indemnity Ins. Co.*, No. 21-3245, 2021 U.S. App. LEXIS 33002 (6th Cir. Nov. 5, 2021); *In Re Zurich Am. Ins. Co.*, No. 21-0302, 2021 U.S. App. LEXIS 29440 (6th Cir. Sept. 29, 2021); *Santo's Italian Cafe LLC v. Acuity Ins. Co.*, No. 21-3068, 2021 U.S. App. LEXIS 28720 (6th Cir. Sep. 22, 2021); *Sandy Point Dental, P.C. v. Cin. Insurance Co.*, No. 21-1186, No. 21-1559, No. 21-1203, 2021 U.S. App. LEXIS 36399 (7th Cir. Dec. 9, 2021); *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.*, No. 21-1173, 2021 U.S. App. LEXIS 36398 (7th Cir. Dec. 9, 2021); *Mashallah, Inc. v. W. Bend Mut. Ins. Co.*, No. 21-1507, 2021 U.S. App. LEXIS 36400 (7th Cir. Dec. 9, 2021); *Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co.*, No. 21-1316, 2021 U.S. App. LEXIS 36396 (7th Cir. Dec. 9, 2021); *Bauer v. AGA Service Co.*, No. 20-3711, 2022 U.S. App. LEXIS 3518 (8th Cir. Feb. 9, 2022); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, No. 20-3211, 2021 U.S. App. LEXIS 19775 (8th Cir. July 2, 2021); *Baker v. Oregon Mutual Insurance Co.*, No. 21-15716, 2022 U.S. App. LEXIS 6769 (9th Cir. Mar. 16, 2022); *Levy Ad Grp., Inc. v. Fed. Ins. Co.*, No. 21-15413, 2022 U.S. App. LEXIS 6954 (9th Cir. Mar. 17, 2022); *Mudpie, Inc. v. Travelers Cas. Ins. Co.*, No. 20-16858, 2021 U.S. App. LEXIS 29624 (9th Cir. Oct. 1, 2021); *Selane Prods. v. Cont'l Cas. Co.*, No. 21-55123, 2021 U.S. App. LEXIS 29633 (9th Cir. Oct. 1, 2021); *Chattanooga Prof'l Baseball LLC v. Nat'l Cas. Co.*, No. 20-17422, 2021 U.S. App. LEXIS 29632 (9th Cir. Oct. 1, 2021); *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.*, No. 21-6045, 2021 U.S. App. LEXIS 37802 (10th Cir. Dec. 21, 2021); *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Insurance Co.*, No. 21-11046, 2021 U.S. App. LEXIS 26196 (11th Cir. Aug. 31, 2021); *Ascent Hospitality Management Co. LLC v. Employers Ins. Co. of Wausau*, No. 21-11924, 2022 U.S. App. LEXIS 1161 (11th Cir. Jan. 14, 2022).

[5] See *Inns-by-the-Sea v. Cal. Mut. Ins. Co.*, 286 Cal. Rptr. 3d 576 (Ct. App. 2021); *Sanzo Enters., LLC v. Erie Ins. Exch.*, 2021-Ohio-4268 (Ct. App.); *Nail Nook, Inc. v. Hiscox Ins. Co.*, 2021-Ohio-4211 (Ct. App.); *Ind. Repertory Theatre v. Cincinnati Cas. Co.*, 180 N.E.3d 403, 404 (Ind. Ct. App. 2022); *Gavrilides Mgmt. Co., LLC v. Mich. Ins. Co.*, No. 354418, 2022 Mich. App. LEXIS 632 (Ct. App. Feb. 1, 2022); *Sweet Berry Café, Inc. v. Soc'y Ins., Inc.*, 2022 IL App (2d) 210088; *Lee v. State Farm Fire & Cas. Co.*, 2022 IL App (1st) 210105.