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9th Circ. Poised To Weigh COVID-19 Coverage Battles

By **Shawn Rice**

Law360 (August 6, 2021, 6:39 PM EDT) -- The Ninth Circuit will hear arguments Wednesday from policyholders and insurers in three suits over whether business-interruption coverage extends to pandemic-related losses, in what could be a preview of the many cases pending before federal appellate and trial courts.

The Ninth Circuit is set to hear three appeals in business-interruption suits dealing with a wide range of insurance issues related to pandemic-related losses. (AP Photo/David Zalubowski)

More than a year into the pandemic, these suits have reached the federal appellate courts, with the Ninth Circuit leading with 61 appeals, according to the most recent data from the University of Pennsylvania's COVID Coverage Litigation Tracker. The legal community is now waiting to see how the Ninth Circuit will decide these cases.

Here, both insurer- and policyholder-side experts break down the cases ahead of the oral arguments in

Chattanooga Professional Baseball LLC et al. v. National Casualty Co. et al., Selane Products Inc. v. Continental Casualty Co. and Mudpie Inc. v. Travelers Casualty Insurance Co. of America. In all three of these cases, policyholders lost their coverage bids.

What's at Stake

The financial health of thousands of businesses throughout the United States, according to experts, is at stake in these three oral arguments, as the Ninth Circuit is considered to be an influential jurisdiction.

When governments began issuing shutdown orders last year to curb the COVID-19 pandemic, businesses were forced to temporarily close. After insurance companies denied their claims, businesses began filing suit in both federal and state courts.

Meanwhile, insurers have pushed for government programs to cover the losses, rather than focusing on quickly paying policyholders' claims, according to Amy Bach, executive director of the national consumer group United Policyholders. This is similar to their response after other catastrophic events like 9/11 and Hurricane Katrina, she said.

"The ink had barely dried on claim submissions when the industry ran to Congress," Bach said. "It is making a lot of people and businesses lose confidence in the insurance industry."

Over 18 months into the pandemic, hundreds of federal and state courts have weighed in on coronavirus insurance cases, but experts said it is time for guidance from the appellate courts. The turning point will come when appellate courts issue rulings deciding larger groups of cases and common issues, according to experts.

"These Ninth Circuit cases tempt the court to pry open the concept of commercial property coverage to include regulatory restrictions, which would change the entire nature of this form of insurance," said David Buishas of BatesCarey LLP, who represents insurance companies.

How We Got Here

The Ninth Circuit's oral arguments come more than a month after the Eighth Circuit **issued the first appellate-level ruling** in a pandemic business-interruption suit. In July, a three-judge panel ruled that an Iowa dental clinic's losses due to government-imposed restrictions during the pandemic weren't covered by its policy.

The upcoming oral argument hearings — involving a group of minor league baseball teams, a dental appliance maker and a children's clothing retailer. — present a broad spectrum of issues, according to experts, and should give the Ninth Circuit an opportunity to provide clarity on a number of questions.

While insurance is regulated by the states and insurance law is made in state courts, federal courts have played a leading role in COVID-19 insurance litigation, according to policyholder-side experts. Particularly, these experts expressed concern over the federal courts' "aggressive" role in tossing out suits before discovery.

But insurer-side experts said policyholders across California have been unsuccessfully trying to convince trial courts that the virus caused unique property changes within their premises.

"Unable to legitimately allege actual changes to their physical property, the policyholders now wish to change the nature of the coverage itself, which they need a respected intermediate court such as the Ninth Circuit to buy into," Elisabeth Ross of BatesCarey LLP, who represents insurers, told Law360.

The Policyholders' Stance

The Ninth Circuit appeals offer different factual issues and policy language. For example, the appeals in Chattanooga Pro Baseball and Mudpie address policies containing a standard virus exclusion.

The baseball teams argue their insurer is barred from relying on that exclusion based on statements made to regulators in 2006 when it was approved. In essence, the teams' position is that insurers misled regulators when they stated that the exclusion wouldn't significantly narrow coverage.

What the teams have going for them is the fact that the regulatory estoppel argument is a fact-intensive issue, said Micah Skidmore of Haynes and Boone LLP, who represents policyholders, which will be hard for a court to dismiss or decide as a matter of law.

If the Ninth Circuit addresses whether the 2006 form of the virus exclusion narrowed coverage or left its scope intact, David Wood of Barnes & Thornburg LLP said, insurers might think twice before representing to regulators that a new exclusion doesn't affect the scope of coverage. Wood, who represents policyholders, said he's interested in how the Ninth Circuit rules on concurrent causation in the Chattanooga case, given the policies don't contain an anti-concurrent causation provision.

Without mentioning concurrent causation, the district court ruled the excluded cause — the coronavirus — was the root cause, since losses from the canceled 2020 baseball season wouldn't have happened if not for the pandemic. If the Ninth Circuit affirms, Wood said, it would imply an anti-concurrent causation exclusion into the policies.

"This would represent a sharp turn by the court away from protecting the rights of policyholders against insurers bent upon construing their coverage obligations narrowly," he said.

In Mudpie, the loss was allegedly caused by government shutdown orders and not the presence of the virus. The fact that the lower court agreed that physical alteration to property isn't required for coverage bodes well for the policyholder, according to Skidmore. The retailer's argument should prevail because the district court's decision depends on adding language to the policy, as there isn't any express requirement for permanent damage or an intervening physical force in the policy, he said.

The strength of Selane's case, according to Skidmore, is that the microbe exclusion in its policy proves the company's point, as insurers wouldn't need exclusions like it or the virus exclusion if microscopic particles like a virus didn't cause property damage.

"You are trying to exclude damage that the insurer alleges isn't there to begin with," he said.

United Policyholders' Bach said there are 40 years of case law in support of the position that invisible things can cause property damage. And there's a lot of variation in how insurers wrote policies and defined their obligations, she said.

"There's no way insurers should be off the hook for many of these losses," Bach said. "It feels like courts are rendering outcome-oriented decisions instead of following decades of established case law."

The Insurers' Stance

Insurers have maintained that their policies only cover actual physical loss of or damage to property. For example, actual physical loss could be the total destruction of property by fire or tornado, while damage would be the partial alteration of its structural integrity by fire or tornado, according to insurers.

Mudpie asked the Ninth Circuit to answer if an insured's inability to use its storefront due to the shutdown orders is a physical loss of or damage to property. The vast majority of courts, including the Eighth Circuit, have held that the mere loss of use of property isn't a physical loss.

The insurer's strength is the court's reading of the policy, according to Buishas of BatesCarey, to recognize that an insured and insurer work together to identify, document, repair and replace a property to get a business up and running.

"Then it becomes clear that income losses due to COVID-19 stay-at-home orders are simply not intended

to be covered," he said.

In Selane, the Ninth Circuit is presented with whether the presence of the coronavirus caused physical alteration to property. Ross of BatesCarey said she expects the appellate court to recognize that "countless viruses, including the flu, have been known to be ubiquitous within a community, and yet their existence has never been believed to cause a demonstrable, physical alteration to property."

Claire Howard, senior vice president and general counsel at the American Property Casualty Insurance Association, said in an emailed statement that these policies aren't intended to cover diseases or pandemic-related losses, as the majority of insurers didn't price and policyholders didn't pay for such coverage.

If the suits retroactively force coverage of COVID-19 losses not in the policies, Howard said, it would weaken the insurance industry's ability to pay claims on existing policies.

"Only the federal government can be the financial bridge for a crisis of this scale, proportion, and duration," she said.

Overall, policyholders face a challenging hurdle at the Ninth Circuit, as courts have overwhelmingly granted insurers' motions to dismiss in federal business-interruption suits. While federal courts aren't known for drama, according to Skidmore of Haynes and Boone, it will take a "dramatic statement" from the Ninth Circuit to overturn these three district court rulings to favor the insureds.

The cases are Chattanooga Professional Baseball LLC et al. v. National Casualty Co. et al., case number 20-17422; Selane Products Inc. v. Continental Casualty Co., case number 21-55123; and Mudpie Inc. v. Travelers Casualty Insurance Co. of America, case number 20-16858, all in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Breda Lund.
