

Business insurance battle for Covid losses shifts to state high courts

Reuters

Every federal appellate court to consider the question so far has ruled that commercial all-risk property insurance policies do not cover income lost due to the Covid-19 pandemic, but policyholders' lawyers say the fight is just getting started on the battlegrounds that matter the most: the state supreme courts.

"It's definitely not over. That's the takeaway for 2023," said Michael Levine of Hunton Andrews Kurth, who is representing policyholders in multiple Covid-19 business interruption disputes nationwide.

"Most state high courts still have not spoken on the issue, but the number will increase in 2023," Levine said, with new cases pending in the top courts of New York, Louisiana, Nevada, and Alaska - and, as of Wednesday, California.

Specifically, the 9th U.S. Circuit Court of Appeals asked the California Supreme Court to resolve a split among California appellate courts as to whether the presence of the Covid-19 virus "can constitute 'direct physical loss or damage to property' for purposes of coverage under a commercial property insurance policy."

The 9th Circuit seemed to rule out that possibility in a 2021 decision, but not all state courts agreed with it. Some appellate divisions ruled in 2022 that plaintiffs must have a chance to show that the virus does, in fact, cause a "physical alteration" by adhering to surfaces.

The 9th Circuit sent the question to the California Supreme Court on Dec. 28, two weeks after the panel heard argument in event-company Another Planet Entertainment's appeal of a ruling for its insurer, Vigilant Insurance. (Neither the event company's attorneys at Pasich nor Vigilant's legal team at O'Melveny & Myers and Clyde & Co responded to requests for comment on Friday.) "If the California Supreme Court does take up this question, that's going to be the case that everybody's watching - along

with the New York case,” said David Weiss, a partner in Reed Smith’s Litigation Insurance Recovery Group. The firm has represented businesses in Covid-coverage disputes as well as United Policyholders, an advocacy group that frequently files amicus briefs on the topic and plans to do so in the New York case, Consolidated Restaurant Organization (CRO) v. Westport Insurance.

CRO, represented by attorneys at Cohen Ziffer Frenchman & McKenna, says the New York trial and appellate courts improperly grafted a requirement of “tangible alteration” onto the definition of property damage, which would eliminate coverage for pollutants and harmful fumes.

Westport disagreed. Its lawyers at O’Melveny & Myers and Clyde & Co argued that the case presents “no novel issues, nor issues of great public importance.” But New York’s top court, the Court of Appeals, agreed to hear CRO’s appeal on Nov. 30. (Attorneys for both sides did not respond to requests for comment.)

While the New York and California decisions “could be very influential,” Weiss said, “at the end of the day the courts in other states are going to use their own laws to determine these issues.”

Both he and Levine foresee litigation continuing into 2024 or beyond.

Laura Foggan, chair of Crowell & Moring’s Insurance/Reinsurance Group, isn’t so sure.

While “there may be a state or two that just stands as an aberration against the rest of the country,” she said, “it doesn’t take (a ruling) by every single state supreme court, when the prevailing view across the country is consistent.” Foggan has represented insurers and industry trade associations in several Covid-coverage cases.

According to the University of Pennsylvania’s Covid Coverage Litigation Tracker, nine of the 10 high court decisions as of Dec. 30 were in favor of the insurance companies. (The exception is Vermont.)

Three other state supreme courts have heard argument but have not yet ruled, according to the litigation tracker.