Policyholders Counting on Calif. High Court for COVID Loss Claims

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Courts around the nation have held that SARS-CoV-2 cannot cause direct physical damage or loss to property, but policyholder advocates are hoping the California Supreme Court will turn the tide.

In a case that pits a concert organizer against its insurer, United Policyholders argues that the main argument that insurers make when rejecting COVID-19 business interruption claims — that insurance coverage requires a "distinct, demonstrable physical alteration"— was invented by editors of the third edition of Couch on Insurance.

In a Jan. 27 letter to the California Supreme Court, attorney Yosef Y. Itkin with Hunton Andrews Kurth says Couch misstated prior case law to create a new doctrine that has been accepted wholeheartedly by numerous courts.

"This court's intellectual prowess is sorely needed, at some point, to restore order on this issue," the letter, written on behalf of United Policyholders, says.

On Dec. 28, the US Ninth Circuit Court of Appeals sent a certified question to the California Supreme Court asking it to resolve a split among the state's intermediate courts on the direct physical damage or loss question. While some appellate panels have accepted the majority view that a virus cannot cause physical loss or damage covered by commercial property insurance policies, others have ruled that it can.

The question arose because of a lawsuit filed against Vigilant Insurance Co. by Another Planet Entertainment, a company that owns several California venues for music concerts. While federal courts have generally held that SARS-CoV-2 cannot cause a direct physical loss, the 9th Circuit noted that California appellate courts were split on the issue.

With no clear precedent, the 9th Circuit is turning the Supreme Court for the final word.

Attorneys who represent policyholders have been arguing for two years now that the virus that causes COVID-19 can cause a “loss” of property by making in unusable. Insurers counter that even “all-risk” property insurance policies do not cover intangible losses, there must be some tangible alteration.

That premise was asserted by the Couch treatise, published in 1995. Richard P. Lewis and three other attorneys argued in a 2021 essay that the premise is a fallacy. The paper says Couch based its premise about physical alteration on a single decision by a US District Court judge in Oregon, yet Couch says the opinion had been “widely held.” Even the Oregon decision, Great Northern Insurance Co. v. Benjamin Franklin Federal Savings & Loan Association, did not use the modifiers “distinct” or “demonstrable,” the essay says.

In fact, the policyholder attorneys say, courts up to that time had taken a more liberal view of what can constitute a physical loss, holding for example that coverage was owed to a church contaminated by gasoline fumes and to a food distributor for eggs exposed to smoke.

Itkin’s letter says Couch’s “reformulation” of case law has “snowballed” and is now been transformed into a doctrine by some courts.

“There have been many cases that say just because you can’t see something doesn’t mean it can’t hurt you,” said Amy Bach, executive director of United Policyholders.

Jordan R. Plitt, an editor of Couch on Insurance, declined to comment on the attorneys’ comments.

Ken Stoller, assistant vice president and amicus counsel for the American Property and Casualty Insurance Association, said a mandate requiring insurers to provide business interruption coverage to include COVID-19 would undermine the stability of the insurance industry.

“Business interruption insurance is part of property insurance policies that cover actual physical loss of or damage to covered property,” Stoller said in an emailed statement. “Actual physical loss is the total destruction of covered property by fire or tornado or the loss of covered property due to theft, for example. Damage to covered property is the partial alteration of the structural integrity of covered property by fire or tornado, for example. These policies are not intended to cover diseases or pandemic

related losses. In the vast majority of cases, insurers did not price policies to include such coverage, and policyholders did not pay for it."

It's an uphill battle for policyholders. Every federal circuit court except the District of Columbia circuit and state high courts in Connecticut, Iowa, Maryland, Massachusetts, Ohio, Oklahoma, South Carolina, Washington, and Wisconsin have ruled against policyholders who filed business interruption claims for losses caused by COVID-19 shutdowns, Stoller said. The Vermont Supreme Court, so far, is the lone exception.

But David B. Goodwin, senior counsel for the Covington & Burling law firm in San Francisco, said California appellate courts have been more willing to accept the argument that the COVID virus can cause a loss of property by preventing its use. He said there is a long line of cases in California that have held that coverage is owed for intangible factors that caused the loss of use of a property. A majority of the state's intermediate appellate courts have ruled that COVID-19 can cause a covered loss in at least some instances, although they didn't necessarily rule in favor of the policyholder, he said.

Goodwin and his firm represent Major League Baseball, the National Hockey League and Ross Stores, which filed lawsuits against their insurers that seek compensation for COVID-19 income losses.

He said he is optimistic that the California Supreme Court will take a fresh look at arguments for coverage. Unlike federal court judges, who tend to rule based on what they feel is right, the high court justices in California look carefully at policy language and tend to reject general rules about what types of perils are covered by insurance, Goodwin said.