

'Friends Of Court' Take Key Role In COVID Coverage Appeals

By **Shawn Rice**

Law360 (September 23, 2021, 11:38 AM EDT) -- The battleground has partially shifted to the federal and state appellate courts in many of the COVID-19 business-interruption suits across the country, and several insurer trade groups and policyholder associations have taken on a more prominent role providing voices on the key issues.

The Massachusetts Supreme Judicial Court recently accepted a COVID-19 coverage dispute between the owners of three Boston-area restaurants and their insurer from the state's intermediate appellate court and requested additional briefs from amicus parties, also known as "friends of the court," on core issues of what constitutes a covered physical loss and whether a virus exclusion applies.

Traditionally, the amicus party's role is much more important at appellate courts like the Massachusetts high court, said John Ellison of Reed Smith LLP, who has filed these types of briefs on behalf of nonprofit policyholder advocacy group United Policyholders. He told Law360 that courts there are looking "at a broader picture before them."

Ellison explained both sides in their amicus briefs will approach the whole subject of coverage for pandemic-related losses "from a wider lens than the lawyers handling the actual case."

"There is an increased importance of the amicus in an industry that sells uniformed products across the country. That is a message we have tried to explain to courts," Ellison said. "It's important that a business in Massachusetts gets the same coverage as a business in California under the same policy."

Laura Gregory of Sloane and Walsh LLP told Law360 that the large number of pending state and federal cases is likely the reason for the Massachusetts high court asking for amicus briefs on the application of business-interruption coverage to losses from the pandemic and shutdown orders.

"I don't see the speed of the request, a day after the high court docketed the case, as telling other than to reflect that the case is fully briefed and amicus briefs must be filed 21 days before oral argument," said Gregory, who represents insurance companies. "The request needed to be done quickly."

The owners of Boston restaurants and their insurer **had fully briefed** the Massachusetts appeals court in *Verveine Corp. et al. v. Strathmore Insurance Co. et al.* before the case was transferred to the Massachusetts high court on Sept. 16. The high court wants to hear outside perspectives on the coverage issues.

Specifically, the Massachusetts justices asked for arguments on key issues: whether the COVID-19 pandemic and government closure orders triggered all-risk policies' "business income" and "civil authority" coverages and whether a virus exclusion precludes coverage for losses caused by the COVID-19 pandemic.

According to the most recent data from University of Pennsylvania's COVID Coverage Litigation Tracker, Massachusetts courts have overwhelmingly issued pro-insurance industry rulings with a majority of the business interruption suits being tossed at the dismissal stage.

With so much on the line, other state high courts have also been asked to take up these cases. The Ohio Supreme Court in *Neuro-Communication Services Inc. v. the Cincinnati Insurance Co. et al.* has

received briefs from **several restaurant and business groups** voicing their support for the policyholder.

Peter Halprin of Pasich LLP, who represents policyholders in COVID-19 business interruption suits, told Law360 getting a voice like United Policyholders "levels the playing field" for some of the cases as it provides appellate courts with a better view of insurance law and can direct courts to pre-pandemic state law precedent relevant to the issues.

Many federal appellate courts have also already accepted amicus briefs in COVID-19 coverage appeals.

Michael Levine of Hunton Andrews Kurth LLP told Law360 that his clients benefited from United Policyholders' efforts, such as in **a pending appeal** with the First Circuit in Legal Sea Foods LLC v. Strathmore Insurance Co. to highlight the "serious foundational flaw" with an influential insurance law treatise called Couch on Insurance, which has been cited by many courts that have dismissed policyholders' pandemic coverage suits.

The **origins and consequences of the treatise** for COVID-19 coverage suits are discussed in an upcoming article with the ABA by a group of policyholder attorneys including one from Levine's firm.

Levine said United Policyholders has helped illustrate how Couch is wrong based on a misstatement of law on the definition of "physical loss," which the treatise construed as requiring "physical alteration." Rather, Levin explained courts have found a loss of use or function was enough to trigger coverage as a direct physical loss.

Two insurer trade groups, National Association of Mutual Insurance Companies and American Property Casualty Insurance Association, have made their positions known in these appeals that all-risk policies aren't intended to cover diseases or pandemic-related losses and, in some cases, insurers didn't price for such coverage.

Amicus briefs offer alternative focus to areas — in this case a national perspective — that the parties might not address due to briefing limitations and can bring awareness on important issues pending throughout the courts, said Andrew Pauley, public policy counsel for NAMIC, in an emailed statement to Law360.

Claire Howard, APCIA's senior vice president and general counsel, echoed those thoughts, telling Law360 in an emailed statement that these friends of the court briefs "are an important vehicle for nonparties to provide legal, technical, or scientific information to aid courts in their decisions."

Solicitation of amicus briefs is common practice by courts, but there have been instances where courts have rejected a particular position by the insurer trade group, according to Halprin of Pasich. Those groups aren't always deemed friends of the court if an insurer involved in the appeal is a member of the organization, he said.

"It is a shadow way of getting another brief in," Halprin said.

--Additional reporting by Chris Villani. Editing by Vincent Sherry.

Correction: A previous version of this story had an incorrect name for the APCIA. The error has been corrected.