

Calif. Panel Agrees To Publish Pro-Policyholder Virus Decision

By **Dorothy Atkins**

Law360 (January 6, 2023, 4:49 PM EST) -- A California state appellate panel has agreed to publish a December pro-policyholder COVID-19 pandemic coverage decision, making it citable as authority for parties litigating similar cases in the Golden State, after an amicus party argued that keeping it unpublished would allow insurers to incorrectly interpret California's insurance law in their favor.

In a two-page **order** Thursday, a unanimous three-judge panel granted a request by an amicus curiae party, the consumer protection nonprofit United Policyholders and Endeavor Operating Co. LLC, to publish the panel's previously unpublished Dec. 14 opinion, which revived a Los Angeles Italian restaurant's COVID-19 coverage case against Century-National Insurance Co.

The December decision was a **rare ruling in favor of policyholders** seeking insurance coverage for their COVID-19-related losses. They have faced an uphill battle in courts since the global pandemic forced businesses to close in March 2020.

If an opinion of a California appellate court has been officially published, other cases can cite the decision as an authority, according to Golden State rules of the court.

United Policyholders argued in its Dec. 28 **request** that the panel's "well-reasoned" ruling in favor of the restaurant, Shusha Inc., should be published so that it can assist lower courts in resolving important disputed issues in California insurance law regarding the scope of the appellate court's **July holding** in **Marina Pacific Hotel and Suites LLC v. Fireman's Fund Insurance Co.**

In that case, the appellate court held that the hotel owners' allegations that the virus physically altered their property were enough to allow their business interruption suit to move forward.

United Policyholders argued that insurance companies, including the defendant in the instant suit Century-National, have incorrectly argued that the appellate court's Marina decision should be narrowly interpreted to apply only to the facts of that case, when it instead should be adopted more broadly to allow policyholders to move forward with their COVID-19-related insurance claims in court.

"These are key recurring disputed issues in COVID-19-related insurance coverage actions. ... If Shusha remains unpublished, insurance policyholders will not be in a position to definitively rebut insurer mischaracterizations of the holding in Marina Pacific," United Policyholders argued.

United Policyholders said publishing Shusha's holding would clarify that courts should interpret the phrase "direct physical loss or damage" in the context of COVID-19 coverage claims to mean that the Marina Pacific decision applies equally to insurance policies that do not have "communicable disease" coverage provisions.

The company added that the Shusha holding is also more detailed in addressing causation than the Marina decision, and Shusha instructs that even when a policyholder alleges it was forced to close its business due to both the presence of the virus and government shutdown orders, the policyholder has alleged a sufficient causal link between the peril and the physical loss or damage.

"Shusha explains that whether an insured's losses were caused by direct physical loss or damage from the COVID-19 virus or by government orders is a 'question of fact for a summary judgment motion or trial,'" the brief says. "Because Shusha addresses causation in more depth than Marina

Pacific, publication of Shusha would provide clear direction on the causation issue."

On Thursday, the appellate court effectively agreed with the amicus curiae party and certified its Shusha decision for publication.

United Policyholders' counsel, David B. Goodwin of Covington & Burling LLP, told Law360 on Friday that the panel's decision to publish its opinion is an important step toward getting the law right in California on pleading a claim for loss or damage resulting from the virus.

Goodwin also noted that the Ninth Circuit **recently certified** whether COVID-19 can trigger property insurance coverage to the California Supreme Court.

"We are confident that when the California Supreme Court addresses the issue it will agree with the reasoning of this appellate court," Goodwin said.

Counsel and representatives for the other parties didn't immediately respond to requests for comment Friday.

The order is the latest chapter in a lawsuit that the owner of the Sherman Oaks La Cava Italian restaurant filed against its insurer, which is owned by Allstate Insurance Holdings LLC subsidiary National General Holdings Corp., in July 2020, alleging breach of an insurance contract and related claims. Century-National had denied it coverage for La Cava's lost income as a result of its suspension of restaurant operations in March 2020 due to the pandemic and government shutdowns.

In April 2021, Century-National asked the court to throw out the lawsuit. After a hearing, in July 2021 the trial judge sustained the insurance company's demurrer without leave to amend, citing five California federal district court decisions denying coverage.

In the ruling, the trial judge observed that "substantially all of the federal district courts" were in agreement and had routinely held that the existence of the COVID-19 virus in the air or on surfaces did not constitute "direct physical loss of or damage to property" within the meaning of the insurance policy.

But last month, the appellate court disagreed, finding that the restaurant sufficiently alleged direct physical loss or damage to its property caused by the COVID-19 virus and that the restaurant didn't need to "provide authority" to support its allegations at the pleading stage.

The panel also held that La Cava sufficiently argued claims for bad faith and Unfair Competition Law violations by alleging that Century-National denied the restaurant's claim for business interruption coverage without any meaningful investigation in whether the virus caused physical loss or damage to the restaurant.

As of Friday, Century-National had not notified the court it would appeal the decision, according to the docket, but it has roughly until the end of the month to do so.

Federal district courts around the country have permanently tossed about 51% of the 1,431 suits from policyholders against their insurance companies seeking pandemic loss-related coverage, according to **Law360's COVID-19 Insurance Case Tracker**. An additional 20% of the pandemic insurance suits filed in federal courts have been voluntarily dismissed, the tracker shows, though about 26% have yet to be fully decided.

Appellate Judges Gail Ruderman Feuer, Dennis M. Perluss and John L. Segal sat on the panel for the Second Appellate District.

United Policyholders and Endeavor Operating Co. LLC is represented by David B. Goodwin of Covington & Burling LLP.

Shusha is represented by Kathryn Lee Boyd and Kristen L. Nelson of Hecht Partners LLP and Jonathan A. Sorkowitz of the Law Offices of Jonathan A. Sorkowitz.

Century-National is represented by Spencer A. Schneider and Karen E. Adelman of Berman Berman

Berman Schneider & Lowary LLP.

The case is Shusha Inc. v. Century-National Insurance Co., case number B313907, in the Court of Appeal of the State of California, Second Appellate District.

--Additional reporting by Eli Flesch, Ben Zigterman and Riley Murdock. Editing by Linda Voorhis.

Update: This article has been updated with the new name for law firm Berman Berman Berman Schneider & Lowary LLP.