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COVID-19 Coverage Fights Head To State High Courts

By **Shawn Rice**

Law360 (November 5, 2021, 4:36 PM EDT) -- With federal appellate court rulings so far favoring insurers in COVID-19 coverage fights, policyholders are hoping to strengthen their chances by convincing state high courts to adopt their position that the pandemic has caused covered physical loss or damage to their properties.

The Ohio Supreme Court has agreed to answer the question of whether the presence of the coronavirus causes physical loss or damage to property. (John Deacon/courthouses.co)

Most recently, a South Carolina federal judge last month submitted questions — including one on the "direct physical loss or damage" issue — to the state's Supreme Court in Sullivan Management LLC's dispute with Fireman's Fund Insurance Co. over pandemic-related losses to its nine Carolina Ale House restaurants.

U.S. District Judge Mary Geiger Lewis' move mimicked that of U.S. District Judge Benita Y. Pearson of the Northern District of Ohio, who sent **similar questions** to the Ohio Supreme Court earlier this year in an audiology practice's suit over pandemic losses.

While certification is one way to get before a state high court, some businesses have taken a different route. Huntington Ingalls Industries Inc. appealed its COVID-19 coverage loss to Vermont's high court, looking to overturn the July 30 dismissal of its suit against a Chubb unit and others over reinsurance obligations to the military shipbuilding company's global property insurance policy.

As COVID-19 cases land before state high courts, the question is whether the courts will be consistent with the extensive weight of legal authority or take a more state-specific approach, according to Lee Siegel of Hurwitz & Fine PC, who represents insurers.

"There is a lot of fight left and still tens of thousands of insureds on the sidelines," he said. "There isn't anybody with a business interruption policy that doesn't have a COVID claim. When we think of the hundreds of decisions, that barely scratches the surface of the potential claimants out there."

Attorneys on both sides will be watching the Ohio Supreme Court, which is ahead of other states in briefing on the issue. If any state high court reverses the "great weight of the evidence," Siegel told Law360, "you will have tens of thousands of claims being filed against carriers."

"There will be renewed energy by policyholder attorneys to sign up more claimants," Siegel said.

The questions for the South Carolina high court address the presence of the virus at the property, the physical loss or damage issue, a communicable disease coverage extension, civil authority coverage, loss avoidance or mitigation coverage, and a mortality and disease exclusion.

Too many certified questions won't alleviate the coverage disputes, but a well-framed question can, according to attorneys. For example, in a different dispute, Connecticut's high court **answered straightforward questions** on what counts as a collapse and if a basement wall constitutes the foundation for policy-interpretation purposes.

Kieran Leary of Wilson Elser Moskowitz Edelman & Dicker LLP, who represents insurers, said his clients in the Connecticut collapse case used high court certification to get binding authority to avoid thousands of individual trials. It came down to having a good case for it and timing, he said.

And the time is ripe for certification in pandemic coverage disputes, Leary said, since the coronavirus has been around for a while, insurers have largely prevailed at the federal level and "judicial fatigue" is beginning to set in. However, the South Carolina questions are very wordy and convoluted, he said, and there's a good chance the high court will refuse or reframe the questions.

"The South Carolina high court could refuse to answer some or all," Leary said. "I would expect them to do so, especially on the physical loss issue. They are difficult to answer without a specific factual inquiry into that question. You're looking for something with widespread appeal and not just the case at hand."

A decision on the issues by any state high court would be controlling in that state and would be influential in other states, according to Greg Gotwald of Plews Shadley Racher & Braun LLP, who represents policyholders in COVID-19 suits.

Gotwald said he wasn't surprised Vermont's high court would have an early say on the matter, since the state doesn't have an intermediate court of appeals.

"It will be interesting to see if the fact that the policyholder and its captive insurer are making claims will impact that court," he said, given the state's embrace of captive insurance.

Huntington Ingalls told the Green Mountain State's high court the reinsurers must cover losses above the $1.5 billion policy issued by its captive insurance subsidiary. The company said it shouldn't be faulted for its ability to mitigate losses by continuing business at a reduced capacity.

While South Carolina and Ohio federal judges sent questions to their states' top courts, policyholders pursuing business-interruption cases in other federal courts haven't had as much luck with certification.

The Fourth Circuit **last month refused** a real estate developer's request to send questions to Maryland's highest court on whether the coronavirus causes physical damage. That appellate court previously declined a similar request by a car auction company in its own pandemic coverage appeal.

Other federal appeals courts have yet to render decisions on requests to certify questions. In one case, a group of Atlanta restaurants seeking COVID-19 coverage has **urged the Eleventh Circuit** to let the Georgia Supreme Court take up a question on whether the coronavirus causes physical loss or damage to property.

There may be "a long wait" for state high court rulings on the issues, according to Bob Persons of Lindsey & Lacy PC, counsel for the Atlanta restaurants, even though federal courts have the right to certify state law questions to the state high court.

"The federal judiciary all over the country has avoided this pathway," he said. "In part a reason may now be that it would be embarrassing to have state supreme court opinions deciding that these losses are covered in the face of hundreds of federal trial court orders saying they are not."

Marshall Gilinsky of Anderson Kill PC, who represents policyholders, said that in certifying questions to state high courts, federal courts have to predict how they will rule. The questions should be well-framed based on the record being presented, he said.

"What matters the most is what the court says and the decision that it writes," he said. "If the court frames things broadly and answers broadly, so will the sweep of the precedent be broad."

However, insurer attorneys may argue some of the issues at the core of the COVID-19 cases have already been decided by most states in other types of coverage disputes.

Adam Fleischer of BatesCarey LLP, who represents insurers in COVID-19 coverage suits, told Law360 that the pandemic is "unprecedented in many ways," but it didn't create a new issue for policy interpretation requiring state high courts to step in, as "robust precedent" already exists.

"In the extreme minority are jurisdictions where there is inconsistency or uncertainty as to how to apply existing case law addressing the plain meaning of words like direct, physical and loss," he said, adding that federal courts can handle reading policy provisions and reaching a plain meaning aligned with state precedent.

Representatives for Fireman's Fund, Huntington Ingalls and Chubb declined to comment, and representatives for Sullivan Management didn't respond to requests for comment.

--Additional reporting by Daphne Zhang, Eli Flesch and Ben Zigterman. Editing by Breda Lund.
