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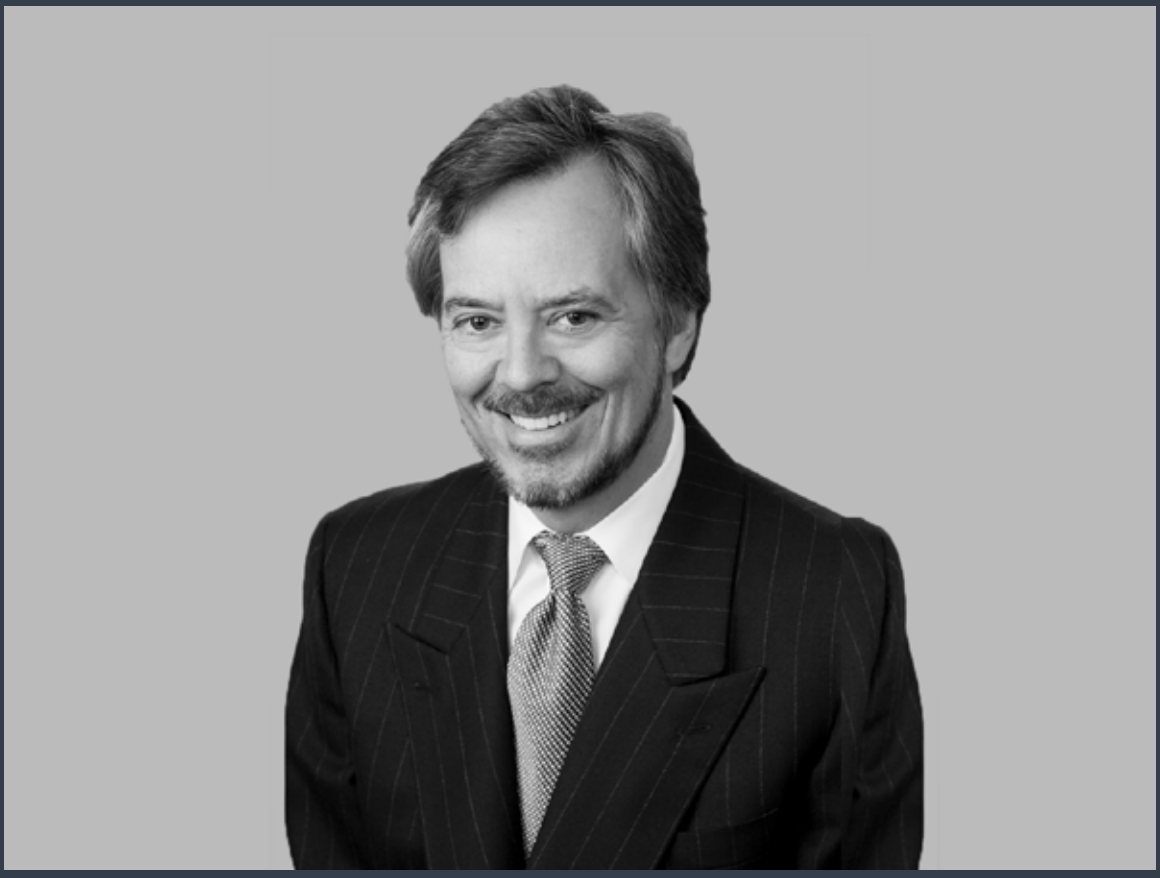

Covid business interruption insurance: What do the numbers tell us?

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As predicted, the fallout of the Covid pandemic in the US has included a large wave of insurance coverage litigation, directed primarily at the issue of whether the business interruption coverage included in commercial insurance policies extends to the trillions of dollars in losses flowing from the virus.

What conclusions should, and shouldn't, clients and lawyers draw from the record to date? As discussed below, the raw numbers are a starting point, and may seem to indicate momentum, but they don't provide a sound basis for predicting the final outcome of what is sure to be a long and costly battle.

The headcount

More than 1,900 Covid insurance cases are pending or have already been resolved in the state (about 650) and federal (about 1,300) courts.[1] Trial courts have issued merits rulings on more than 400 of them—roughly 85% of which have favored the insurers. New cases continue to be filed almost daily.

The forum factor

Interestingly, insurers have fared significantly better in dismissing policyholder claims in the federal courts (to which insurers have removed a number of cases originally filed in state court). Whereas the state court dismissal rate is around 57%, roughly 93% of federal cases have been dismissed at the early motion stage. Federal courts thus seem to be appreciably more aggressive in disposing of these cases at the pleading stage.

This trend is a bit surprising, on at least three grounds. First, insurance policy interpretation is, under the Erie doctrine, governed by the contract law of the different states. Second, the coverage issues presented have thus far not been addressed by most

state courts. Third, many federal judges have lived through the great environmental insurance coverage wars that began in the 1980s and continue to the present, and so are well aware that the insurance industry will litigate defenses to coverage claims to the highest court of virtually every jurisdiction. Notably, federal district judges have thus far not shown much eagerness to certify those dispositive questions of state insurance law to those state supreme courts, as the rules of court in nearly all states permit them to do. (At least three federal Courts of Appeals have now done so.)

Why are at least the lower federal courts seemingly reaching out to decide novel questions of state law to dismiss cases at the pleading stage? Possible explanations include:

- Sophisticated policyholder lawyers are being choosier about their cases and the jurisdictions in which they file them, preferring to file them in state court, while lawyers with less insurance experience are filing weaker cases and opting for, or being removed to, federal court.
- Insurers are being selective in targeting their motions to dismiss, focusing on federal cases with relatively obvious pleading vulnerabilities. The statistics speak only to the judicial treatment of claims that insurers choose to attack by motion—not to those of cases they don't.
- The federal courts are tacitly seeking to conserve judicial resources. A dismissal order will, after all, have one of two fates. If it is affirmed, the trial court got it right, and expended no more effort than necessary in doing so. If it is reversed, the trial court on remand will have the benefit of the appellate court's ruling, and/or of the relevant state high court's intervening determination of the dispositive issue(s)—ensuring that the record's further development will be as efficient as possible.

Trends—or are they?

The raw numbers, especially with their federal-court component, seem to bode ill for efforts to recover benefits under business interruption coverage. But do they? There are several reasons to think not.

RESULTS IN WEAK CASES DON'T PREDICT RESULTS IN STRONG CASES

First, the nearly 2,000 Covid coverage actions filed to date are not cookie-cutter cases. Although the majority involve the same threshold issue concerning the coverage "trigger"—the requirement that the loss for which benefits are claimed result from "direct physical loss or damage" to property, which insurers deny is the case with the Covid virus—policies then start to diverge widely. Some contain virtually bulletproof exclusions for losses caused by virus. Others include "contamination" exclusions that do or don't reference viruses. Some exclude "contamination" and yet at the same time extend coverage to loss caused by "communicable disease." And some have no applicable exclusions at all.

Accordingly, gross dismissal numbers say very little about the quality of any given case or group of cases. Cases that fail to plead the actual physical presence of virus on the relevant property are almost all dismissed; policyholders who can plead and prove that the virus was present on the property stand a much better chance of surviving motion practice and reaching trial. Likewise, cases that seek to avoid a very carefully worded virus exclusion are an entirely different proposition from cases where the insurer, amazingly, opted out of using any of the various virus or contamination exclusions

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