Reinfection: Examining Judicial Traits and Estimating Outcomes as COVID-19 Coverage Cases Gain Appellate Review

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Quick Background and Disclaimer

- Tom Baker is building upon the Covid Coverage Litigation Tracker Database (with Michael Heise and Jeff Stempel): coding nearly 500 federal and state court decisions according to more than 100 variables – almost done
- Full data analysis still pending (this stuff takes longer than you think)(a/k/a the “planning fallacy” noted by cognitive scientists)
- Only a glimpse available at this time. Data is incomplete and any inferences are at best tentative
- Eventually a more comprehensive study and paper will be produced (within the next year)

The Raw Numbers

- 484 Judicial Decisions on Merits through July 7, 2021 (our cutoff date)
- 370 (76.5 percent) federal court decisions
  - 96% from Art. III judges and 4% from Magistrates
- 114 (23.6 percent) state court decisions
- Translates to an insurer win rate of 86.2 percent (417 decisions) with policyholders prevailing in 13.8 percent of decisions (67)

Further Breakdown

- Full Dismissal With Prejudice: 72.9% (353 decisions)
- Full Dismissal Without Prejudice: 7.9% (38 decisions)
- Insurer Motion for SJ Granted: 5.0% (24 decisions)
- PH Motion for SJ Denied: .4% (2 decisions)
- Motion to Dismiss Denied: 10.1% (49 decisions)
- Partial Dismissal With Prejudice: 1.5% (7 decisions)
- Partial Dismissal W/out Prejudice: .2% (1 decision)
- PH Motion for SJ Granted: 1.9% (9 decisions)

The Federal-State Difference

- Federal Courts

- Insurer wins in Federal District Court
  - 91.6 percent (339 decisions)
  - Leaving Policyholders with 8.4 percent success rate (31 wins)

- State Courts
  - No appellate or high court decisions
  - Insurer win rate at trial “drops” to 68.4 percent (78 decisions)
  - Policyholders improve to 31.6 percent win rate (114 decisions)

In a world of comparatively little division

- Does political affiliation make much differences?
- Federal trial courts now 52.3% GOP and 47.7% Dem
- Democratic federal appointees – 87.5 percent win rate for insurers
- Republican federal appointees -- 95 percent win rate for insurers
- Not a huge gap – but preliminary Chi-Square analysis reflects statistical significance (odds of result not being mere chance or variance) at .05 level. Again some caution: more complete/final analysis of data may change both findings and measures of statistical significance

Judicial Demographics (con't)

- Currently a federal bench that is 70% male and 30% female
- Male Judges -- 91 percent win rate for insurers
- Female Judges -- 92 percent win rate for insurers
  - Not only no difference but no statistical significance
- Also no difference in win rate according to the age of the judge (based on a simple regression analysis rather than cross-tabulation)
- Waiting on analysis according to judge's race/ethnicity (but predicting no discernable differences, at least not at .05 statistical significance)

Think a little about framing

- To say that an insurer win rate moves from 95 percent to 90 percent may seem unimpressive
- But if one instead looks at this as a policyholder win rate moving from five percent to 10 percent . . . .
- The policyholder win rate has doubled
- Applied to state court, this can be viewed as policyholders having a four times better likelihood at winning in state court
- Consider this re political affiliation of federal judges in pending appeals.
- All-Republican appellate panel likely to rule against coverage
- All-Democratic panel significantly improves PH odds

And remember, this is Fed Ct Data So Far

- In state courts, policyholders are still losing majority of cases but not as frequently
- To the extent there is a similar political correlation of outcomes among state court judges, the impact on outcomes would presumably be magnified
- Applying the metric to a state supreme court where judge political, ideological, jurisprudential leanings more apparent presents possibility of better handicapping of party chances
- Although federal panel designations come too late for briefs, oral argument might profit from presentation taking party affiliation into account

A “Smart” Judge or “Elite” Judge Difference?

- ABA Ratings: Well Qualified; Qualified; Not Qualified
- 62 percent of federal judges in sample had top rating (with 38 percent in the other categories)
- Before Well Qualified Judges – 93 percent win rate for insurers
- Before Qualified/Not Qualified Judge -- 87 percent win rate for insurers
- Statistically significant at .05 level but just barely
- Does this reflect insurers doing better when judge is more “qualified” – or when the judge comes from more of a Big Law/corporate law background?

What Use/Impact of Secondary Authority?

- Dictionary Use: not as much as one might think in a linguistics battle
- Dictionaries cited in 21.5% of the decisions
- Policyholder win rate improved by five (5) percent if a dictionary was cited – but not a statistically significant finding
- Non-Textual Source Bearing on Meaning cited in only 18 percent of decisions
- Defined as background context (e.g., derivation of current Property/BI forms), drafting history (e.g., advent of virus exclusion), secondary source discussion (e.g., news accounts of virus exclusion; industry programs re BI coverage)

More on (or off) Secondary Authority

- Major Treatises and Restatements not popular, either
- Cited in only eight (8) percent of cases – and this includes the ALI RLL and the Couch treatise
- A surprising finding? Perhaps not in an era of Textualism as the dominant interpretative methodology
- Where these cited, a modest (3-4%) uptick for insurer wins (a Couch effect?) but no statistical significance
- But are some cases more equal than others (e.g., Couch citations prompted critical article by PH counsel: Lewis, Masters, Greenspan & Kozak, *A Glitch in the Matrix* 56 TORT TRIAL & INS. L.J. __ (2021)(forthcoming)(taking issue with case-counting and conclusion in Couch §148:46)

More on Secondary Authority

- Treatises fare better than Restatements, Law Review Articles, Dictionaries, Drafting History, Purpose, Public Policy – but not as much as one might think
- All indicators of meaning other than judge impressions and case law seem to get short shrift (Couch cited in 65 cases)(Appleman cited in 16 cases).
- Surprising for example, that Scott Johnson, *What Constitutes Physical Loss or Damage in a Property Insurance Policy?,* 54 TORT & INS. L.J. 95 (2019) receiving little citation – cited only in two decisions.
- An era of judicial derogation of not only extra-textual information but also of academia, journalism, practitioner commentary?
- But notwithstanding this, do we have "super-spreader" decisions with inordinate influence due to timing, thoroughness, judge status, deployment of decision by counsel? And do these cases use more or less extra-textual or secondary authority than the typical decision?

How much Crunch or Boom Required?

- In 60 percent of cases courts have held that there is no “damage to” property unless there has been a permanent structural alteration of the property (or words to that effect)
- Where a court expressly takes this position, the insurer win rate is essentially 100 percent and this is statistically significant
- But the win rate is not significantly different than the overall win rate
- Does this suggest that even where courts are not expressly requiring structural alteration of property, this is an implicit requirement in nearly all cases (and in all cases with insurer wins)?
- Correct or not, this portion of Couch appears influential
- But courts reaching this view in scores of cases with no citation to Couch or other secondary authority taking this position on “physical damage”

Physical “Loss” and “Damage”

- Or more precisely: “loss of” property and “damage to” property
- Distinction is expressly addressed in only a third (35.2% percent) of decisions – a surprise
- Lower figure than one might expect in light of importance
- And one would think a surprise in cases where prevailing analysis is textual rather than contextual
- But no apparent association between distinguishing the words or concepts and case outcome
- Surprising in that “loss” seems a better term for policyholders than “damage”

Government Shutdown as Loss Or Way Around the Virus Exclusion

- Expressly alleged in 59.4% percent of the decisions (where one could tell from the opinion)
- Successful in almost no cases
- An exception of sorts in *Seifert v. IMT Ins. Co*., 2021 U.S. Dist. LEXIS 103420 (D. Minn. June 2, 2021)
- Similarly, arguing that loss is caused by government order and not arising out of virus has low success rate (less than five percent of the decisions where ascertainable)(preliminary view)
- Argument advanced by PH in only 21.5% of cases (where detectable)(and need to recalibrate according to whether policy at issue contained virus exclusion)

Allegations of COVID-19 Presence

- Where policyholders are express in pleading the presence of COVID-19 on the surface of PH property or in the air inside the property, this appears to reduce the insurer win rate, but only a bit and is not statistically significant
- Initial data run after coding suggests this is pled in only a small number of cases, which seems wrong based on casual (but rather constant) rolling reading of the decisions – will re-examine when all that data is complete and subject to full statistical analysis

General Overview of COVID-19 Insurance Coverage Appeals

- Appeals are pending in most federal circuit courts
- A few state court appeals also pending
- But very few appellate court decisions on the merits yet
- Federal court appeals will be decided faster than state court appeals

8th Circuit Court of Appeals

- *Oral Surgeons, P.C. v. Cincinnati Insurance Company,* No. 20-3211 (applying Iowa law)
  - Insured did not allege presence of COVID-19
  - Insured claim based on interruptions due to government lockdown orders
  - No virus exclusion in policy
  - Court affirmed district court's grant of insurer's motion to dismiss because Insured did not allege physical loss or damage (but court appeared to accept that contamination would suffice)

11th Circuit

- *Gilbreath Family & Cosmetic Dentistry v. Cincinnati Ins. Co.*, No. 1:20-cv-02248-JPB (unpublished)
- Applying Georgia law
- Insured apparently did not allege COVID-19 presence at insured property
- Relied on government lockdown orders
- No discussion of virus exclusion
- Court affirmed motion to dismiss in favor of insurer based on lack of physical loss/damage

9th Circuit Court of Appeals

- *Chattanooga Pro Baseball v. National Casualty Co.*, No. 20-17422
  - Insured alleged COVID-19 present at insured properties
  - Insured claim based on interruptions due to government lockdown orders and failure to prevent the spread of COVID-19
  - Virus exclusion in policy
  - Trial court granted insurers' motion to dismiss based on virus precipitating the closure orders to which the virus exclusion applied

9th Circuit Court of Appeals

- *Selane Products, Inc. v. Continental Casualty Co., No.* 21-55123
  - Insured alleged COVID-19 present at insured properties
  - Insured claim based on interruptions due to government lockdown orders
  - No virus exclusion in policy
  - Trial court granted insurer's motion to dismiss based on lack of physical loss/damage, finding "loss of use" insufficient to trigger coverage

9th Circuit Court of Appeals

- *Mudpie, Inc. v. Travelers Casualty Ins.*, No. 20-16858
  - Insured alleged losses due to government orders, but not presence of COVID-19 at insured properties
  - Virus exclusion in policy
  - Trial court granted insurer's motion to dismiss finding that direct physical loss or damage to property does not require physical alteration or change, but holding that property deprivation was not permanent or the result of an intervening physical force

7th Circuit Court of Appeals

- *TJBC, Inv. v. Cincinnati Ins. Co.*, No. 21-1203
  - Insured alleged COVID-19 present at insured properties
  - Insured claim based on interruptions due to government lockdown orders
  - No virus exclusion in policy
  - Trial court granted insurer's motion to dismiss based on lack of physical loss/damage, holding that "loss of use" insufficient to trigger coverage

7th Circuit Court of Appeals

- *Crescent Plaza Hotel v. Zurich American,* No. 21-1316
  - Insured alleged COVID-19 present at insured properties
  - No virus exclusion in policy
  - Trial court granted insurers' motion to dismiss based on lack of physical loss/damage

7th Circuit Court of Appeals

- *Sandy Point Dental v. Cincinnati Ins. Co.*, No. 21-1186
  - Insured alleged COVID-19 present at insured properties
  - Claim based on interruption due to government lockdown orders
  - No virus exclusion in policy
  - Trial court granted motion to dismiss based on lack of physical loss/damage

Ohio Supreme Court

- *Neuro-Communications Servs., Inc. v. Cincinnati Ins. Co.*, No. 2021-0130 (certified question from N.D. Ohio, No. 4:20-CV-1275)
- Despite PH tendency to find state courts more favorable, PH opposed certifying to OH Sup Ct)
- Issues certified are broad and generic – does COVID and/or presence of persons infected with COVID cause physical loss/damage to property

Michigan Court of Appeals

- *Gavrilides Mgmt. Co. v Michigan Ins. Co.*, No. 354418
  - Early suit brought by small restaurant group
  - Alleged *absence* of COVID-19 at insured locations; *did not* allege presence of physical loss/damage at other locations
  - Insured sought coverage solely on basis of state lockdown order impacting business
  - Insurer granted motion for summary disposition based on lack of physical loss/damage

Some Tentative Conclusions

- Insurers have prevailed in significant portion of cases that have gone to dispositive ruling in trial court – but many cases have not been decided by motion practice
- Policyholder wins in state court continue to wind through the system(s). If affirmed on appeal . . . .
- Policyholders have been willing to pursue federal appeals
- Early returns suggest that federal judges have made up their minds ahead of hearing merits/arguments
- But state judges have not – prospect remains for state appellate and high courts to rule for policyholders – at least in the Rule 12 arena
- A possible opening for *Erie* Doctrine analysis as well as discovery

And there's this other thing on the merits

- Insurer arguments on language --how strong are they?
- Strong enough to merit this significant insurer win rate?
- If Policyholders get past Rule 12 and to discovery then items like drafting history, background and purpose of the virus exclusion, and context emerge as factors for decision
- And here – for the insurers with a virus exclusion – there's pretty good material supporting an argument that coverage was not intended (flip side is that insurers without virus exclusion look worse)
- A potential problem for policyholders amid the jurisprudential role reversal of courts and insurers re COVID
- Could be countered by a sufficiently strong version of Reasonable Expectations analysis – but perhaps a long shot.

Can one glean any practical tips for counsel?

- More difficult than anticipated – pleading appears to make little difference – but specific allegations of virus on surfaces or air seems advisable
- Policyholders should try to state in state court
- In states that have peremptory challenges to the initially assigned judge, PH should consider bouncing GOP judges and Insurers should consider bouncing Democrats (if one can tell with state court bench)
- Both sides – and PHs at the threshold -- could perhaps make better/more frequent use of secondary authority, in particular dictionaries, treatises, and articles
- But insurers have (thus far at least) soft-pedaled drafting history and background of virus exclusion in favor of a front-line textualist defense on physical loss/damage

Questions?

- We are happy to (at least try!) to answer any questions, now or following the program
- Our contact information is attached at the end of these slides, so you also should feel free to contact us later with any questions

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