

# COVID-19

# The Progress of the Litigation Pandemic

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# Origins

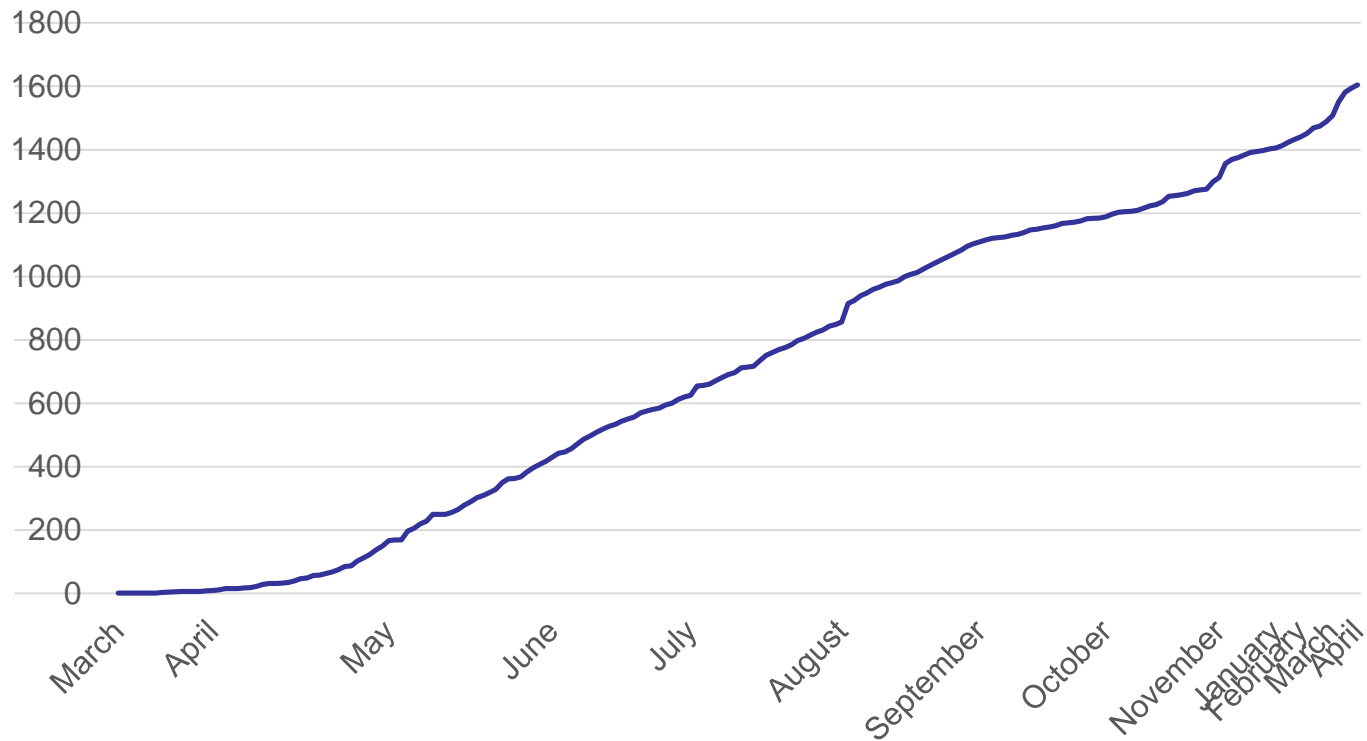
- The first COVID-19 DJ was filed by a New Orleans restaurant on March 16, 2020



# Litigation Status

- Today, there are nearly 2000 pandemic-related DJs pending in the United States.
- About a quarter are putative class actions.
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- Nearly all involve business interruption claims.

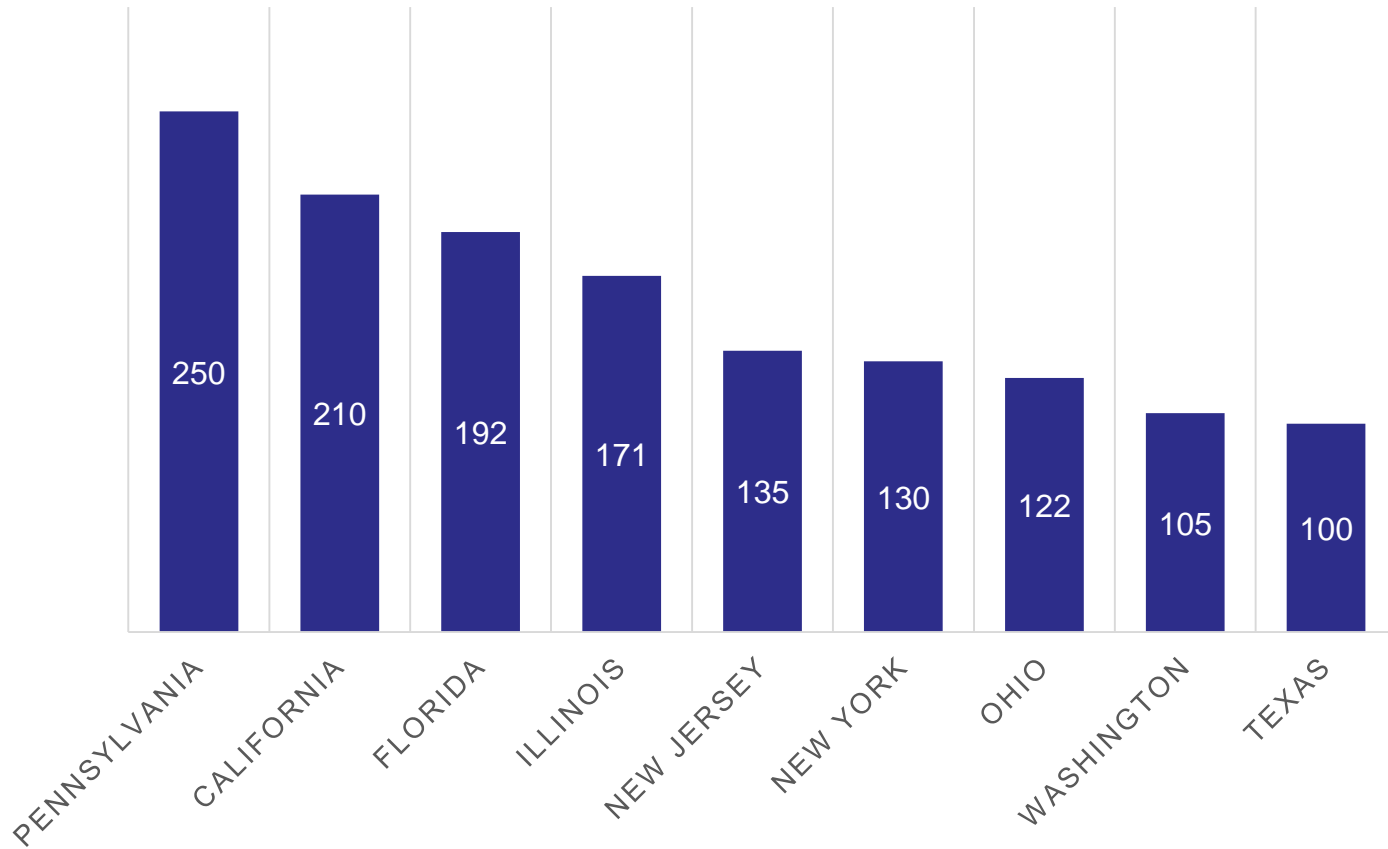
# A Wave of Coverage Litigation



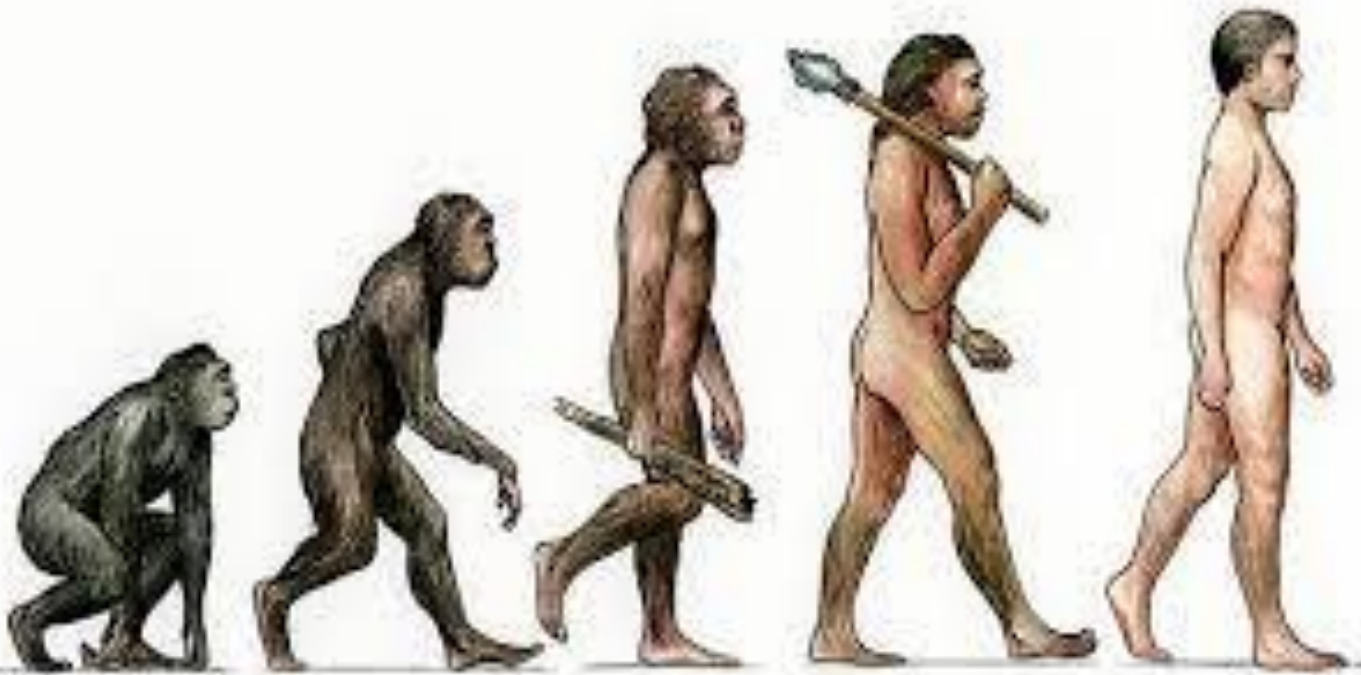
# Litigation Status

- There is litigation in every state except Alaska, North Dakota and Wyoming.
- For the most part, COVID litigation is concentrated in California, Florida, Illinois, New Jersey, Ohio and Pennsylvania.

# Current Hot Spots



# The Evolution of the COVID-19 Insurance Coverage Litigation



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# Phase I: The Little Fish Swim In

- During the Spring of 2020, the earliest suits were mainly brought by small businesses, especially restaurants and beauty parlors.
- Most suits were filed by small, local law firms.
- Small businesses didn't have links to large law firm or couldn't afford their fees.



# Phase II: Enter the Sharks

- In mid-April, national law firms entered the fray. These firms were specialized in class action cases but had limited insurance experience.
  - Geragos & Geragos (Los Angeles, CA)
  - Golomb & Honik PC (Philadelphia, PA)
  - Lanier Law Firm Pc (Houston, TX)
  - Levin, Sedran & Berman LLP (Philadelphia)
  - Podhurst Orseck, PA (Miami, FL)



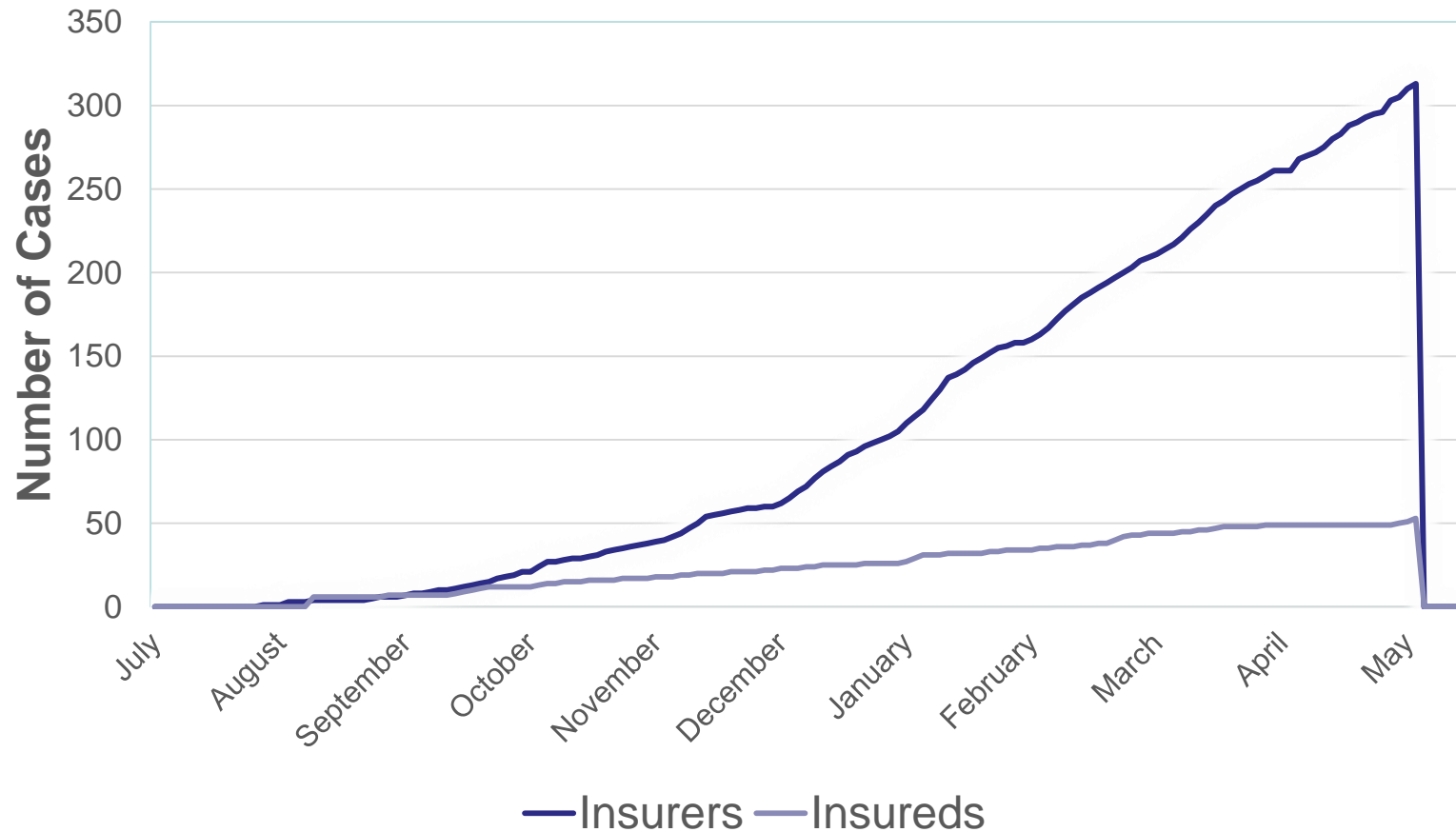
# MDL Consolidation?

- National firms immediately filed competing proposals to consolidate all federal COVID-19 insurance DJs in Miami or Chicago.
- Opposed by insurers and numerous insureds.
- On August 12, the Joint Panel on Multi-District Litigation denied their application:
  - MDL would not be efficient.
  - Too many parties and diverse policy wordings.
  - Very few common fact questions.
- JPMDL subsequently allowed mini-MDLs against regional insurers Society and Erie

# Phase III: Motion Practice

- The extraordinary surge of new filings in the Spring of 2020 persuaded insurers that an aggressive dismissal strategy was vital.
- Motion practice stalled while MDL issues were up in the air. Once it was clear that they would retain jurisdiction, however, federal judges began releasing opinions dismissing these suits.
- By September 2020, what had been a trickle of rulings became a flood.

# Rulings on Dispositive Motions July 2020 – May 2021

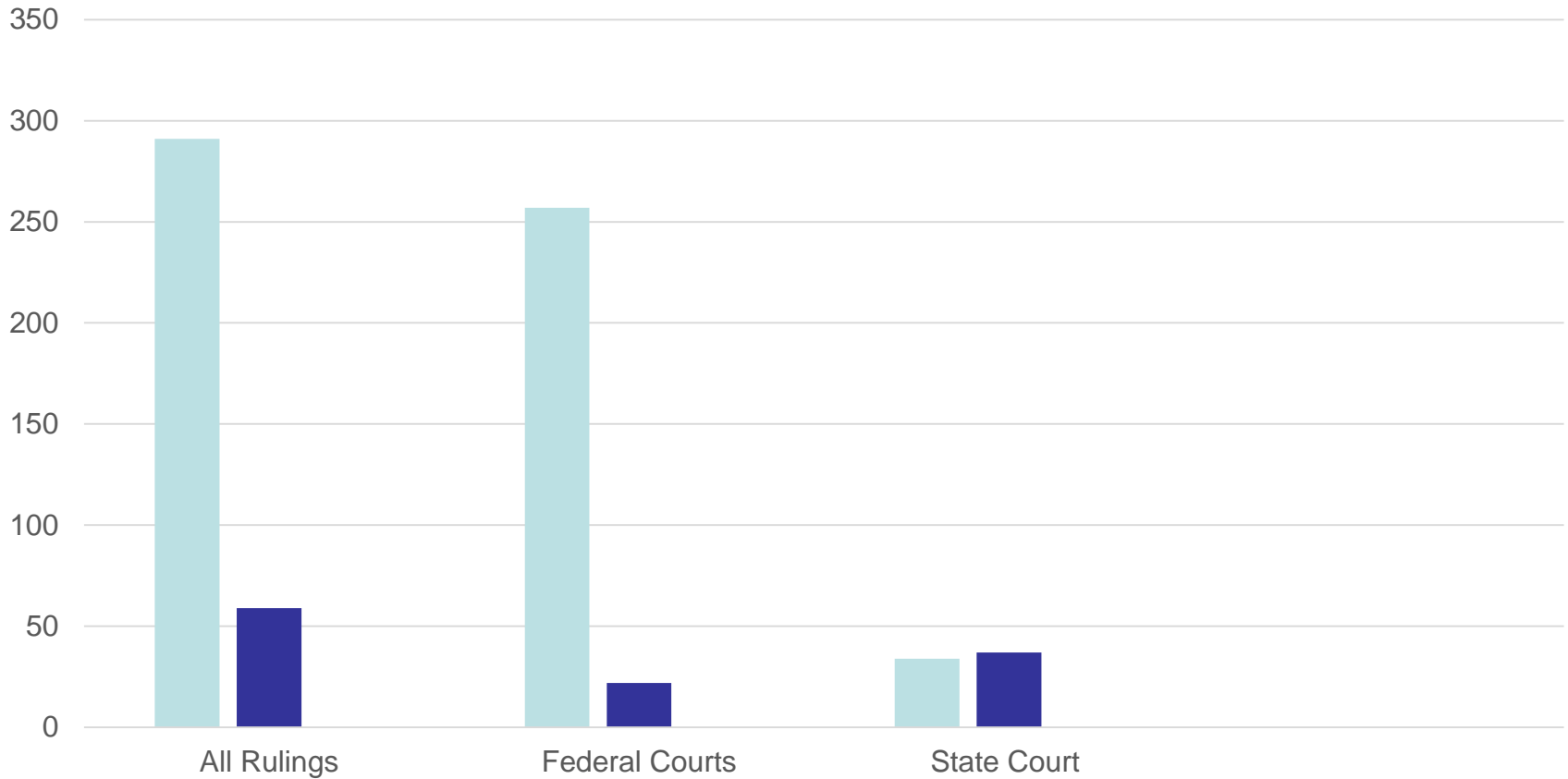


# Dispositive Motions

- As of early May 2021, over 350 dispositive motions have been handed down.
- Insurers prevailed in 85% of these rulings.
- To date, policyholders have only obtained a judgment in 2% of these cases.

# Insurers Are Doing Well So Far

Court Rulings on Dispositive Motions



# Principal Issue Areas

- “Direct Physical Damage or Loss”
- Virus or “Microorganism” Exclusions

# “Direct Physical Loss”

- Most courts, especially federal, are finding that there must be structural damage—mere limitation on use is not direct physical damage or loss to property.
- A small but growing number of rulings are holding that presence of virus is “physical” or that these are claims for “loss” even if not the product of “physical damage”



# Exclusions

- Virus exclusions are faring very well
  - Loss caused by virus
  - Lack of reference to “pandemic” not ambiguity
  - Regulatory estoppel theory inapplicable
- Courts are less receptive to “microorganism” and similar exclusions.

# Insurers Are Winning More Cases With Virus Exclusions

- Insurers have won 90% of cases when policy has a virus exclusion (97% in federal courts) but only 72% in cases with no exclusion.
- State court judges seem to be more influenced where policies contain virus exclusions than federal judges.
- In cases without virus exclusions, insurers won 87% of the time in federal court but only prevailed in 32% of state cases.

# Phase IV: Enter the Big Fish



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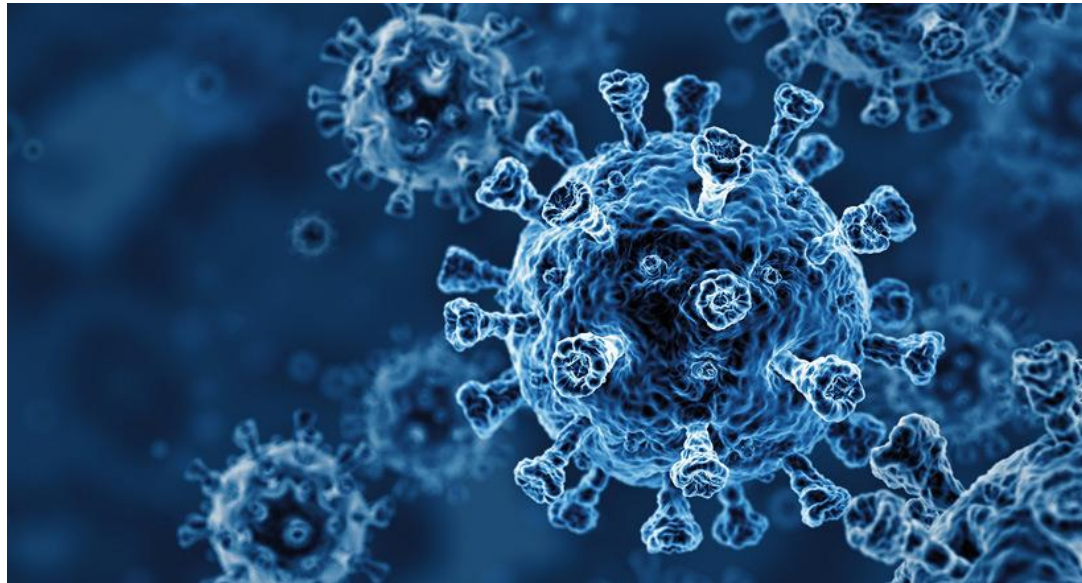
# The Big Fish

- More and more new DJs are being filed by Fortune 500 companies with enormous losses.
  - Entertainment conglomerates
  - Hotel chains
  - National retail chains
  - Sports teams
- These insureds are represented by major law firms with broad insurance experience.
- Many “little fish” have voluntarily dismissed their suits rather than respond to 12(b)(6) motions.

# Phase V: Appellate Practice

- Over hundred cases are now on appeal in the federal circuit courts of appeal as well as state appellate courts in California, North Carolina and Ohio.
- Will other federal courts follow the lead of the Third Circuit and Eleventh Circuits in consolidating these cases for oral argument?
- Will federal courts certify these issues?
- Will motion practice slow down as trial judges await the outcome of these appeals?

# Prognosis for a Litigation Pandemic?



# The Size of the Litigation

- Insurer concerns in 2020 that they might face an endless onslaught of coverage litigation seem, at least for now, to be unfounded.
- Since Labor Day, new filings have dropped
  - Filings in mid-2020 were inflated by MDL efforts
  - Class action lawyers no longer see a “cash cow”
  - “Smaller fish” have been discouraged by pro-insurer rulings and dismissed their cases.
- Recent uptick in filings in March, however.

# The Future of the COVID Insurance Litigation

- The overwhelming rate of success that insurers have enjoyed in getting these cases dismissed will be meaningless if these victories cannot be sustained on appeal.
- As with the environmental coverage wars of the 1980s and 1990s, the ultimate fate of this litigation will depend on how state Supreme Courts rule on key coverage issues.
- Insurers have won the opening battles but the outcome of the war is still uncertain.



# The Shape of the Litigation May Be Changing

- The early cases may have been a mismatch.
- The wave of early pro-insurer rulings created a snowball effect.
- Recent policyholder victories might create a counter-narrative that courts may follow if they want to defer ruling or even find coverage.
- Newer cases are bigger, better staffed and present new sets of legal issues.

# Are We Moving Forward On Two Different Tracks?

- Disputes involving “direct physical loss” and virus exclusions are moving from the trial courts to appellate venues for final resolution.
- Courts are just beginning to grapple with disputes with large corporations with more nuanced policy wordings and exotic insurance coverage issues.