



Tips for Insurance Policyholders From Recent Covid-19 Decisions

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Recent decisions from state appellate courts addressing insurance coverage for losses from the pandemic provide guidance on what to include in a Covid-19 insurance coverage complaint, say Rani Gupta and Tyler Weinblatt of Covington & Burling. They detail practical tips for policyholders filing complaints.

Before the Covid-19 pandemic, complaints filed in insurance coverage actions typically were concise. Insurance coverage lawsuits turn on the disputed meaning of insurance policy language, as applied to contested facts. They almost always required discovery before any ruling could be reached. Policyholders' complaints simply sketched an outline of the case rather than pleading every conceivable fact.

But insurance policyholders who have attempted to apply normal rules to Covid-19 insurance coverage actions have found their crisp complaints are now a liability, as courts in Covid-19 coverage disputes have demanded much more.

Recent decisions from state appellate courts addressing insurance coverage for losses resulting from the pandemic provide useful guidance on what to include in a Covid-19 insurance coverage complaint.

Guidance from State Appellate Courts

First, the Vermont Supreme Court, reversing the [dismissal](#) of a Covid-19 insurance coverage action, recently relied upon the policyholder's allegations that the virus was "continuously present" at the policyholder's property, confirmed by more than 6,000 positive Covid-19 tests reported at the insured property. The policyholder also alleged that the virus "adhere[d]" to surfaces.

Such allegations help demonstrate that the Covid-19 virus causes "physical loss or damage" to property that may trigger coverage under a property and business interruption policy. In particular, where the Covid-19 virus is present in a business's property, such presence physically alters the air and surfaces of that property turning it from safe to unsafe—physical damage—and prevents the normal use of that property—physical loss.

Considering these allegations, the Vermont Supreme Court emphasized the importance of allowing “experts and evidence to come in to evaluate the validity of insured’s novel legal argument” rather than simply “dismissing this case based on a layperson’s understanding of the physical and scientific properties of a novel virus.”

Another recent appellate [decision](#) in California supports the importance of well-pleaded factual allegations. In that case, the policyholder alleged that the Covid-19 virus “transform[s] the physical condition of the property” through its physical effects on surfaces, and that the virus was “present” throughout the insured properties where it was “continually reintroduced to surfaces at those locations.”

Here, too, considering these allegations, the court correctly recognized that resolution of the case required facts and evidence: “it might be more efficient if trial courts could dismiss lawsuits at the pleading stage based on the judges’ common sense and understanding of common experience rather than waiting to actually receive evidence to determine whether the plaintiff’s factual allegations can be proved. But that is not how the civil justice system works in this state,” the decision said.

Practical Tips for Policyholders

Fortunately, these complaints need not be the size of a textbook. Rather, what is important is identifying and pleading the right key facts.

Although not exhaustive, these cases provide a policyholder with some practical tips to fight early dismissal. The tips are as follows.

Identify multiple instances of the presence of Covid-19 on insured property; provide details regarding the presence of Covid-19, including dates of infection, persons infected, symptoms following infection, and specific property infected; explain how the virus affected the air and surfaces of property, including references to scientific research; detail steps that the policyholder took to remediate the virus’s effects on property; and finally, connect—temporally and geographically—the presence of Covid-19 on insured property to those losses and expenses incurred by the policyholder.

Including these facts in a complaint requires clear communication with clients to receive up-to-date and sufficient information—for instance, concerning employees or other individuals who have had Covid-19.

Of course, including these allegations isn’t a guarantee of success—any more than omitting them doesn’t necessarily lead to dismissal. And sometimes such detailed allegations obscure the actual harm of the virus. For example, focusing on individual cases of Covid-19 elides the collective and cumulative effects of the virus.

That said, because many of the Covid-19 insurance coverage decisions have been unusual, the detailed allegations may help judges understand the merits of the cases better. And, if they do, these cases can move on to be decided with evidence—as they should.

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