



2020

Forum Shopping COVID-19 Business Interruption Insurance Claims

Chris French

Follow this and additional works at: https://elibrary.law.psu.edu/fac_works



Part of the **Insurance Law Commons**

FORUM SHOPPING COVID-19 BUSINESS INTERRUPTION INSURANCE CLAIMS

*Christopher C. French**

Insurance disputes are typically governed by state law, and state insurance laws vary considerably, with some states being favorable to policyholders and others being unfavorable. With forum shopping, a plaintiff often has many choices regarding where it can bring a lawsuit, including multiple states in which to bring the case and whether to bring the case in federal or state court. Of the over 1000 COVID-19 business interruption insurance lawsuits filed thus far, more than 700 of them have been filed in, or removed to, federal court, with more than 250 of the cases filed as class actions. Many of them were also filed in states with insurance laws that are not favorable to policyholders.

Conventional wisdom provides that a plaintiff's chances of winning are generally much higher in state court than in federal court and that historically federal class actions against insurers have been successful only approximately twenty-five percent of the time. So, why were so many of the COVID-19 business interruption insurance cases filed in federal court in unfavorable states and as class actions when the historical chances of winning are so low in such forums, particularly as class actions?

This Essay provides some possible answers to that question. In doing so, it explores forum shopping considerations in general, the conventional wisdom regarding litigating in federal versus state court, and the empirical data regarding the odds of winning in state versus federal court.

I. INTRODUCTION AND THE CONVENTIONAL WISDOM REGARDING INSURANCE COVERAGE LITIGATION

In addition to huge losses by large businesses, small businesses were estimated to be losing \$255 to \$431 billion per month due to government-ordered

* Christopher C. French is a Professor of Practice at Penn State Law; J.D., Harvard Law School; B.A., Columbia University. The author gratefully acknowledges the legal research contributions of Jacob LaFreniere and Garvey McKee to this Essay. The author also thanks Tom Baker for sharing the underlying data reflected in the University of Pennsylvania Carey Law School's *Covid Coverage Litigation Tracker*, <https://celt.law.upenn.edu/>, and counsel for policyholders and insurers who shared their thoughts on the subject of the Essay.

COVID-19 shutdowns.¹ The United States Department of Labor estimates that forty percent of businesses never reopen after experiencing a disaster that shuts down their operations.² Of the businesses that reopen, at least twenty-five percent fail within two years.³

In an attempt to avoid becoming a business that cannot recover following a disaster, many of the businesses impacted by the government-ordered COVID-19 shutdowns had purchased “all risk” business interruption insurance.⁴ Business interruption insurance is intended to replace the policyholder’s revenue stream in the event the policyholder’s business operations are shut down due to a non-excluded peril.⁵ When insurers, in mass, began denying coverage for COVID-19 business interruption insurance claims, policyholders began filing hundreds of lawsuits against their insurers seeking to obtain coverage.⁶

As of September 15, 2020, over 1000 business interruption insurance lawsuits had been filed.⁷ Of those 1000-plus lawsuits, more than 700 of them were pending in federal court, with over 250 of them filed as class actions.⁸ And, many of the lawsuits were filed in states, such as Ohio and New York, which are generally understood by experienced insurance coverage counsel to have insurance laws that are not particularly favorable for policyholders.⁹

The stakes for the parties in this litigation could not be higher. In the absence of a government bailout, both the policyholders and insurers face potential

1. Press Release, Am. Prop. Cas. Ins. Ass’n, *APCIA Releases New Business Interruption Analysis* (Apr. 6, 2020), <http://www.pciaa.net/pciwebsite/cms/content/viewpage?sitePageId=60052> [<https://perma.cc/W5B3-WBYR>].

2. John Grossmann, *A Business Ponders Whether its Location is Perfect, or a Disaster*, N.Y. TIMES (Dec. 7, 2011), <https://www.nytimes.com/2011/12/08/business/smallbusiness/a-business-tries-to-decide-whether-its-location-is-perfect-or-a-disaster.html> [<https://perma.cc/979L-BRZW>].

3. *Id.*

4. See, e.g., Jeff Katofsky, *Subsiding Away: Can California Homeowners Recover from Their Insurer for Subsidence Damages to Their Homes?*, 20 PAC. L. J. 783, 785 (1989) (“In an ‘all-risk’ policy, all losses except those specifically excluded are covered. This is the broadest form of coverage and has been so interpreted by the courts.”) (emphasis in original).

5. See, e.g., *Cont’l Ins. Co. v. DNE Corp.*, 834 S.W.2d 930, 934 (Tenn. 1992) (citing *Nw. States Portland Cement Co. v. Hartford Fire Ins. Co.*, 360 F.2d 531 (8th Cir. 1966)) (“The purpose of business interruption insurance is to protect the insured against losses that occur when its operations are unexpectedly interrupted, and to place it in the position it would have occupied if the interruption had not occurred.”). See also Gregory D. Miller & Joseph D. Jean, *Effect of Post-Loss Economic Factors in Measuring Business Interruption Losses: An Insured’s and Insurer’s Perspectives*, in *New Appleman on Insurance: Current Critical Issues in Insurance Law* 25, 25 (2010) (“Business interruption insurance, at its core, is intended to place the insured in the position it would have been in had it not suffered a loss.”).

6. See *APCIA Releases New Business Interruption Analysis*, *supra* note 1 (“Many commercial insurance policies, including those that have business interruption coverage, do not provide coverage for communicable diseases or viruses such as COVID-19. Pandemic outbreaks are uninsured because they are uninsurable.”); Julia Jacobs, *Arts Groups Fight Their Insurers Over Coverage on Virus Losses*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/05/05/arts/insurance-claims-coronavirus-arts.html> [<https://perma.cc/ZG7G-N6LK>].

7. See *CCLT Case List*, UNIV. PENN. CAREY L. SCH., <https://cclt.law.upenn.edu/cclt-case-list/> [<https://perma.cc/9NKF-C8VU>] (last visited Sept. 5, 2020).

8. *Id.*

9. *Id.*

bankruptcy if they lose.¹⁰ So, one would expect that the policyholders' counsel carefully analyzed various states' insurance laws and then selected the forums most favorable to their policyholder clients when bringing the lawsuits.

Yet, many of the policyholders' counsel's choices regarding where to file the lawsuits are at odds with the conventional wisdom regarding the best forums for litigating insurance cases. Conventional wisdom provides that policyholders are better off suing in state court than federal court.¹¹ This is because state judges often are elected and serve in the same communities as the plaintiffs.¹² Likewise, the juries in state court are also from the immediate area in which the court is located, unlike federal court jury pools that encompass a much larger geographic area.¹³ State court judges generally are also less likely to dismiss a case based on a motion to dismiss or a motion for summary judgment.¹⁴ For all these reasons, conventional wisdom dictates that plaintiffs are better off in state court than federal court for most types of cases, including insurance cases. Insurance Defense Strategy 101, on the other hand, dictates that, for the opposite reasons, insurers prefer to litigate in federal court, and they should remove state court cases to federal court whenever possible.

In addition, most insurance disputes, including the COVID-19 business interruption cases, are governed by state insurance law, which varies from state to state, with some states' laws favoring policyholders and others favoring insurers.¹⁵ So, to the extent they have choices, one would expect policyholders' counsel to be selective in deciding which state's laws are the most favorable for their

10. See *APCIA Releases New Business Interruption Analysis*, *supra* note 1.

11. See, e.g., Mark S. Humphreys, *Suing An Insurance Company – Federal Or State Court?*, DALL. FORTH WORTH INS. LAW. BLOG (Mar. 2, 2019), <https://www.dallasfortworthinsurancelawyerblog.com/suing-an-insurance-company-federal-or-state-court/> [<https://perma.cc/GS3S-P4BC>] (“It is well known among insurance lawyers that an insurance company always wants to have its lawsuit contested in Federal Court.”); Max Kennerly, *Why Civil Defendants Want to Be in Federal Court: Judicial Vacancies*, LITIG. & TRIAL (Jan. 7, 2013), <https://www.litigationandtrial.com/2013/01/articles/series/special-comment/judicial-vacancies/> [<https://perma.cc/CPJ8-QMJU>] (“[I]t’s lawyer’s lore that federal courts are better for defendants while state courts are better for plaintiffs.”); Walter J. Andrews et al., *Not So Fast: Federal Court Blocks Insurers’ Bid to Remove to Federal Court*, LAW.COM (Mar. 28, 2019, 10:45 AM), <https://www.law.com/dailybusinessreview/2019/03/28/not-so-fast-federal-court-blocks-insurers-bid-to-remove-to-federal-court/?sreturn=20200813001253> [<https://perma.cc/D22D-Y338>] (“Florida insureds generally prefer to have their insurance coverage disputes decided in Florida state courts, where they are more familiar and where the judges and juries tend to be from the same local area as the insureds. Insurers often prefer federal courts for the same reasons . . .”).

12. See, e.g., Andrews et al., *supra* note 11.

13. See, e.g., Kennerly, *supra* note 11.

14. See, e.g., Kennerly, *supra* note 11.

15. See, e.g., PETER J. KALIS ET AL., POLICYHOLDER’S GUIDE TO THE LAW OF INSURANCE COVERAGE § 26.03[B] (1st ed. 1997 & Supp. 2020) (“Insurance contracts are interpreted according to state law. Not surprisingly, the manner in which the courts of the various states address similar interpretive issues can vary widely from one state to the next.”); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 553–54 (1996) (“Conflicts scholars don’t fight bitterly about the differences among approaches [to determining choice law] because we disagree about their aesthetic qualities. We fight because the differences matter in terms of outcomes.”).

lawsuits in order to maximize both their chances of winning and the size of the awards if they do win.¹⁶

Consequently, it is surprising that more than 700 of the COVID-19 business interruption insurance lawsuits have been filed in, or removed to, federal court, with many of them in states that generally are understood by insurance coverage attorneys to favor insurers. Several questions thus come to mind when considering the choices made by the policyholders' counsel regarding the selection of the forums for the litigation. Are the policyholders' counsel who are bringing the COVID-19 business interruption loss lawsuits uninformed regarding insurance law and the conventional wisdom regarding state versus federal court? Is the conventional wisdom regarding which forums are the most favorable to policyholders wrong? Are there other reasons for bringing the lawsuits in the forums that the policyholders' counsel selected which outweigh the generally unfavorable aspects of litigating in federal court and in states with unfavorable insurance laws?

This Essay attempts to answer those questions. It does so in four parts. Part One provides the factual background regarding the COVID-19 business interruption insurance litigation and the conventional wisdom regarding litigating in state court versus federal court, as well as the value in picking the right state. Part Two discusses forum shopping in general and the various factors to consider when choosing a forum. Part Three reviews the empirical data to determine whether the conventional wisdom set forth in Part One is correct. Part Four provides some possible explanations regarding why policyholders' counsel brought the lawsuits where they did. Ultimately, the Essay concludes that, regardless of the merits of policyholders' COVID-19 business interruption insurance claims, many of the policyholders' chances of winning are likely much lower because the cases will be decided in federal court instead of state court, and in states with unfavorable insurance laws.

II. FORUM SHOPPING CONSIDERATIONS

Because the outcomes of many cases may be different depending upon where the lawsuit is filed, forum selection is commonly referred to "forum shopping."¹⁷ By calling it forum shopping, it is implied that an attorney who selectively picks the forum in which to litigate a case is subverting the legal justice

16. See, e.g., Shari Seidman Diamond & Jessica M. Salerno, *Empirical Analysis of Juries in Tort Cases*, in RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 427 (Jennifer Arlen ed., 2013) ("When the judge and jury agreed on liability . . . juries on average awarded 20% more than the judges reported that they would have awarded."); Kennerly, *supra* note 11 ("For what it's worth, though, state courts are typically the home of large personal injury verdicts . . .").

17. See, e.g., *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1683 (1990) ("A court will call a practice 'forum shopping' when it wishes to paint it as an unsavory machination designed to thwart public policy and achieve an unmerited goal. By contrast, it will avoid the label when it considers the reasons behind the forum selection reasonable or justified."); Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1508 (1995) ("The name of the game is forum-shopping."); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2259 (2002) (describing forum shopping as "gam[ing] the process"); Margo E.K. Reder, *Punitive Damages as a Necessary Remedy in Broker-*

system by manipulating legal rules in a way that results in an unjust outcome in the case.¹⁸ The idea that forum shopping results in an outcome that is a subversion of justice is premised, however, on the idea that there is only one just outcome in each case. Yet, if the laws are different in the various states with an interest in the case, then the outcomes could be different in each state. By suggesting only one outcome in a case is just means the laws in any state that would lead to a different outcome are unjust. Legislators and judges obviously do not agree, or the laws would be uniform in all fifty states.

Forum shopping also should not be viewed as a subversion of justice because there are numerous limitations on what is permissible forum shopping to ensure the chosen forum is “fair.” For example, the chosen forum must satisfy the personal jurisdiction requirement that the defendants have at least minimum contacts with the forum state.¹⁹ *Erie* also requires that federal courts apply state law when the court’s subject matter jurisdiction is based upon diversity of citizenship to ensure fairness.²⁰ There also are transfer of venue and *forum non-conveniens* rules that ensure the chosen forum satisfies a certain level of fairness and convenience for the parties and witnesses.²¹

Although one Supreme Court Justice denounced forum shopping as an “evil” practice decades ago, the Court has long since recognized the practice as legitimate lawyering.²² The law arguably even encourages forum shopping by offering numerous potential forums for cases to be brought with only limited judicial scrutiny of the plaintiffs’ choices.²³ Consequently, competent counsel

Customer Securities Arbitration Cases, 29 IND. L. REV. 105, 127 n.189 (1995) (commenting that choice of law clauses are used as part of the “game of forum-shopping”).

18. Some of the past criticisms of forum shopping occurred because plaintiffs’ counsel found friendly jurisdictions in which to file mass tort claims and the courts in such jurisdictions did not seem to strictly apply the rules that required the court to have personal jurisdiction over the parties, as well as the courts’ questionable practices regarding the handling of summary judgment motions and the admission of defense evidence at trial. Consequently, some jurisdictions were considered “judicial hellholes” by defense counsel. *See, e.g.*, Victor E. Schwartz et. al., *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 WASH. U. J.L. & POL’Y 235, 236, 244, 248–250 (2004); 151 CONG. REC. 1626, 1651 (2005) (statement of Sen. Orrin Hatch (“[T]he minute the lawyers start talking about a class action and they send a demand letter, the companies know they are dead if the case is brought in Madison County, IL. No matter how right they may be, they are dead because the judges in that particular jurisdiction are in the pockets of the local lawyers with whom the out-of-State lawyers who have these class actions align themselves in order to go in there and get these outrageous verdicts that would not be obtained in any fair court of law.”)).

19. *See, e.g.*, *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“[D]ue process requires . . . that in order to subject a defendant to a judgment in personam, if he be not within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”) (citations omitted).

20. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 83 (1938).

21. *See, e.g.*, *Forum Shopping Reconsidered*, *supra* note 17, at 1691; Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. Rev. 333, 344 (2006).

22. *Compare* *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 521 (1953) (Jackson, J., dissenting) (referring to forum shopping as “the type of evil aimed at in *Erie R. Co. v. Tompkins* [304 U.S. 64 (1938)]”), *with* *Perens v. John Deere Co.*, 494 U.S. 516, 531 (1990) (recognizing the Court’s holding effectively rewards forum shopping), *and* *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 779 (1984) (recognizing state-by-state forum shopping is a common litigation strategy).

23. *See, e.g.*, George D. Brown, *The Ideologies of Forum Shopping-Why Doesn’t a Conservative Court Protect Defendants?*, 71 N.C. L. Rev. 649, 673 (1993) (“A number of factors converge to make things easy for

who are zealously representing their clients, as counsel are required to do under the Rules of Professional conduct, should be forum shopping if there are multiple potential forums in which to bring a case.²⁴ Indeed, in some cases, with insurance coverage litigation being a prime example, the plaintiff's ability to pick the forum is one of the plaintiff's biggest advantages in the litigation. That advantage should not be overlooked.²⁵

In the context of COVID-19 business interruption insurance cases, there are numerous states where the plaintiffs and defendants both have enough legal ties to the dispute to allow the lawsuit to be brought in the state. There also are multiple venues within the various states in which the lawsuit can be brought. Further, many of the cases can be brought in either federal or state court due to diversity jurisdiction. Diversity jurisdiction itself also can be created or destroyed by the plaintiff(s) depending upon the residencies of the plaintiff(s) who bring the lawsuit and which defendant(s) the plaintiff(s) decide to sue.

Consequently, there are numerous questions for counsel to consider when selecting the forum in which to sue: 1) which judges are likely to be sympathetic or hostile to the plaintiff's claims, 2) what would be the likely composition of the jury in each potential forum, 3) which of the various potentially applicable states' laws are the most favorable and least favorable, and 4) what are the choice of law rules in each potential forum and which state's laws likely would be chosen under each potential forum's choice of law rule?²⁶

It is not difficult today to learn about a judge's legal proclivities by reviewing the judge's past opinions and the judge's profile. In some forums, there may be a fairly limited pool of potential judges. If counsel has choices regarding where to file a lawsuit and knows which judge likely will hear the case, then counsel should consider which judges would be the most favorable for the case.

One should also consider what type of jury would be best for the case. The compositions of the prospective jury pools are different in state and federal courts. The composition of the jury is very important to determining the outcomes of cases because jurors view the evidence presented through the prisms of their own life experiences. With that in mind, would an urban jury or a rural jury be better for the plaintiff's case? For example, a lawsuit brought in state court in Pittsburgh would have a jury pool largely comprised of people who live in or around the city of Pittsburgh, which has a heavily democratic population that is racially diverse. If the same lawsuit were filed in federal court in Pittsburgh, however, then

plaintiffs. These include relaxed standards of personal jurisdiction, the general obligation of states to provide a forum, choice of law theories that encourage the use of forum law, and minimal scrutiny by the Supreme Court of state choice of law decisions.”).

24. See MODEL RULE OF PRO. CONDUCT, r. 1.3 (AM. BAR ASS'N 2020) (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).

25. See, e.g., Brown, *supra* note 23, at 669 (“[A] recurrent theme in common-law opinions that is directly supportive of the practice [of forum shopping]: the maxim that the plaintiff is master of his forum.”) (citing *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913)).

26. See, e.g., Brown, *supra* note 23, at 653–54 (“A party may seek to derive advantage not only from the substantive law, but also from the attitudes of different judges and juries, the length of court dockets, and the geographical convenience to itself and its adversary.”).

the jury pool would be comprised of people who live in the western half of the Commonwealth of Pennsylvania, which is a primarily white and republican population. So, there would be two very different jury pools for a lawsuit filed in Pittsburgh depending upon whether the case is in federal court or state court.

COVID-19 business interruption insurance claims are governed by state law.²⁷ Insurance laws can vary considerably from state to state, sometimes dramatically so.²⁸ Thus, counsel should carefully consider which state's laws are the most favorable to policyholders before deciding where to sue.

Once counsel has determined which state's laws are the most favorable, counsel should then consider how to get that state's law to apply in the case. That means counsel should consider the choice of law rules in each of the potential forums where the lawsuit could be brought. In doing so, counsel can then determine which forum's choice of law rules would most likely result in the most favorable laws being applied.

III. EMPIRICAL DATA REGARDING THE CONVENTIONAL WISDOM

As discussed in Part I, the conventional wisdom provides policyholders should be bringing COVID-19 business interruption insurance cases in state court. Yet, more than 700 of the 1000-plus cases have been filed in, or removed to, federal court. This suggests either the conventional wisdom is wrong or many of the policyholders made a mistake by suing in the forums they chose. To figure out whether the conventional wisdom is correct, one can consider the empirical data regarding the chances of winning when litigating in federal versus state court.

Does empirical data support the conventional wisdom regarding the advantages of forum shopping and the chances of winning in state versus federal court? Yes, and dramatically so.

27. See *supra* note 15 and accompanying text.

28. *Id.* One of many examples of insurance law being completely inconsistent in some states is the courts' interpretation in the 1990s of the "sudden and accidental" pollution exclusion, an exclusion contained in standard form CGL policies that was interpreted completely differently by courts throughout the country even though the language being interpreted was identical and the facts of the case were often very similar. Compare *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1092 (Colo. 1991) ("Although 'sudden' can reasonably be defined to mean abrupt or immediate, it can also reasonably be defined to mean unexpected and unintended. Since the term 'sudden' is susceptible to more than one reasonable definition, the term is ambiguous, and we therefore construe the phrase 'sudden and accidental' against the insurer to mean unexpected and unintended."), and *Claussen v. Aetna Cas. & Sur. Co.*, 380 S.E.2d 686, 690 (Ga. 1989) ("In sum, we conclude that the pollution exclusion clause is capable of more than one reasonable interpretation. The clause must therefore be construed in favor of the insured to mean 'unexpected and unintended.'"), with *Am. Motorists Ins. Co. v. ARTRA Grp., Inc.*, 659 A.2d 1295, 1308 (Md. 1995) ("We agree with the interpretation of the pollution exclusion clause adopted in numerous other cases Under those interpretations, the language of such an exclusion provides coverage only for pollution which is both sudden and accidental. It does not apply to gradual pollution carried out on an ongoing basis during the course of business.") (emphasis in original), and *Upjohn Co. v. N.H. Ins. Co.*, 476 N.W.2d 392, 397 (Mich. 1991) ("We find persuasive the recent opinions of the United States Court of Appeals for the Sixth Circuit which find the terms of the pollution exclusion to be unambiguous. We conclude that when considered in its plain and easily understood sense, 'sudden' is defined with a 'temporal element that joins together conceptually the immediate and the unexpected.'") (footnote omitted) (citations omitted).

Empirical research published in 2019 reveals that the plaintiffs' success rate in federal court fell from seventy percent in 1985 to thirty percent by 2017.²⁹ There are numerous theories why this is the case – the appointment of pro-business judges, changes in the Rules of Civil Procedure, changes in pleading requirements and the rules related to the granting of motions for summary judgment, the types of cases ultimately being adjudicated in federal court, etc. – but the fact remains that plaintiffs currently are losing in federal court by a wide margin.³⁰

Conversely, a study of the outcomes of almost 27,000 civil trials conducted in state courts across the country revealed that the plaintiffs won sixty percent of the cases overall.³¹ Another study analyzed a database of three million federal cases and concluded that the plaintiff's chances of winning a case dropped from fifty-eight percent to twenty-nine percent if the case was removed from state court to federal court.³²

Further, empirical data reveals that: 1) member classes are only certified in twenty-four percent of federal class actions, and 2) insurers win seventy-five percent of the breach of contract class actions brought against them in federal court.³³ Consequently, by bringing many of the COVID-19 business interruption lawsuits in federal court, especially as class actions, the empirical data predicts that the policyholders' chances of success are very low.

In addition to suing in state court in order to increase the chances of success in a case, is there a way for plaintiffs' counsel to get the most favorable laws available to apply in the case? Yes, by filing the lawsuit in a state with laws favorable to the plaintiffs' claims. An empirical study regarding choice of law decisions for torts cases reveals that, in the forty-two states that do not use the *lex loci* choice of law rule,³⁴ the court chose to apply the laws most favorable to the plaintiff eighty-six percent of the time, and those laws usually were also the

29. See Alexandra D. Lahav & Peter Siegelman, *The Curious Incident of the Falling Win Rate: Individual vs System-Level Justification and the Rule of Law*, 52 U.C. DAVIS L. REV. 1371, 1373 (2019).

30. *Id.* at 1380–1412.

31. See LYNN LANGTON & THOMAS H. COHEN, U.S. DEP'T OF JUST., CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005 (2008), <https://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf> [<https://perma.cc/HC49-43VR>].

32. See Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1511–12 (1995).

33. See Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 645 (2006) (“Judges certified 24% of the cases as class actions”); Willy E. Rice, *Allegedly “Biased,” “Intimidating,” and “Incompetent” State Court Judges and the Questionable Removal of State Law Class Actions to Purportedly “Impartial” and “Competent” Federal Courts – A Historical Perspective and an Empirical Analysis of Class Action Dispositions in Federal and State Courts, 1925-2011*, 3 WM. & MARY BUS. L. REV. 419, 536 (2012) (“[T]he dispositions of class actions involving breach-of-contract claims and the general finding is clear: insurers and corporations are overwhelmingly more likely to prevail in breach-of-contract class actions. More specifically, corporate defendants “win” repeatedly and consistently, regardless of (1) whether the breach-of-contract complaints named corporations or insurers as class action defendants [T]he meager “win” ratios for class members . . . are just .250 . . .”).

34. The *lex loci* choice of law rule, which most states no longer use, dictated that the laws of the state where the injury occurred governed for torts claims and the state where the contract was entered governed for breach of contract claims. See, e.g., RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 332, 378 (1934).

laws of the state in which the case was filed.³⁵ Indeed, the ability to litigate in a forum that will apply the laws most favorable to the plaintiffs is one of the primary reasons why plaintiffs should forum shop.³⁶

By abandoning the *lex loci* choice of law rule, the modern choice of law rules used in most states, which focus on the various interests and contacts of each state that has an interest in the case, incentivize plaintiffs to shop for a favorable forum because the standards are malleable enough to arguably support whichever state has the most favorable laws for the plaintiffs.³⁷ For example, under the Second Restatement, there are seven principles generally “relevant to the choice of applicable rule of law,” which include considerations such as the “policies of ... interested states,” “the protection of justified expectations,” and “certainty, predictability and uniformity of result.”³⁸

With respect to contracts in particular, if the contract does not specify which state’s laws govern (and most business interruption insurance policies do not), the Second Restatement provides five factors to consider when analyzing the seven general overriding principles: “[1] the place of contracting, [2] the place of negotiation of the contract, [3] the place of performance, [4] the location of the subject matter of the contract, and [5] the domicile, residence, nationality, place of incorporation and place of business of the parties.”³⁹ Thus, when deciding which law to apply, courts typically analyze the contacts of the relative states and parties in connection with the dispute in light of these factors.

In addition to the twelve factors discussed above, the Second Restatement also has a section that specifically applies to disputes that involve property insurance policies, such as business interruption policies.⁴⁰ That section provides:

[T]he local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in §6 to the transaction, in which event the local law of the other state will be applied.⁴¹

Thus, under this rule, the principal location of the insured risk is presumed to have the most “significant relationship” and, consequently, that state’s law often applies. A showing that another state has a more significant relationship to the dispute, however, can defeat that presumption and lead to another state’s laws being applied.

35. See Symeon C. Symeonides, *Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should*, 61 HASTINGS L.J. 337, 380, 383 (2009) (analyzing choice of law decisions in tort cases in the forty-two states where courts do not use the *lex loci* choice of law rule); Brown, *supra* note 23, at 667 (“Every forum is likely to be biased in favor of its own law . . .”).

36. See, e.g., Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 88 (1999) (“A review of reported cases in which forum shopping has been discussed reveals that the most common motive for forum shopping is selection of the law to be applied to the case.”) (citation omitted).

37. See RESTATEMENT (SECOND) OF CONFLICTS OF LAW §§ 6, 188, 193 (1971).

38. See RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 6 (1971).

39. *Id.* at § 188.

40. See RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 193 (1971).

41. *Id.*

In short, because the current choice of law rules are multi-factor standards that are very malleable, creative counsel can present arguments that the laws of some state different from the state of the principal location of the insured property should apply. For example, sometimes the policyholder has insured property located in multiple states, so no single state is the principal location of the insured property and thus, no specific state's law is presumed to apply. In addition, the states in which the policyholder's principal place of business is located or in which the policyholder is incorporated also have important interests in insurance disputes because those states have significant interests in ensuring their citizens' insurance contracts are enforced. The state where the policyholder's injury occurred also has an interest in vindicating the rights of the policyholder, as a party who was injured in the state. The policyholder's customers' states also have interests in the policyholder's insurance claims being paid, particularly if the business cannot survive without the insurance proceeds. And, of course, the states in which the insurer is incorporated or has its principal place of business also have significant interests in insurance cases because the contract rights and obligations of their citizens are at stake.

In sum, because the current choice of law rules are flexible, the conventional wisdom and empirical data dictate that policyholders should sue in state court in the state with the most favorable laws if possible, particularly in light of the fact that courts typically apply the law of the forum state. What does a policyholder have to lose by doing so? Primarily, just the costs associated with fighting a forum battle. Fighting and winning that battle, however, may be the difference between winning and losing the entire case. Consequently, it is often money well spent. So, the question remains – why are more than 700 of the 1000-plus COVID-19 business interruption insurance cases in federal court, with many of them in states generally considered unfavorable to policyholders with respect to insurance law? The next part provides some potential answers to that question.

IV. EXPLANATIONS FOR POLICYHOLDERS' COUNSEL'S DECISIONS TO SUE IN FEDERAL COURT

Federal courts do not have exclusive jurisdiction over COVID-19 business interruption insurance claims because the claims will be governed by state law, so suing in state court is an option in every one of the cases. If plaintiffs win sixty percent of the time in state court and lose seventy to seventy-five percent of the time in federal court, then counsel would sue in federal court only if they were unaware of that statistic, were unable to sue in state court for some reason, or had a reason to believe the historical statistics do not apply to the case at issue for some reason (e.g., familiarity with the judge or the judge's past rulings regarding insurance matters).

A. *Uninformed*

The first possible explanation is that the policyholders' attorneys were unaware of the conventional wisdom regarding the advantages of suing in state

court and avoiding federal court. This is an ungenerous explanation, but it is plausible for some of the cases.

Another possibility is that counsel filed in federal court because there was diversity of citizenship between the policyholder and the insurer and counsel expected the insurer to remove the case to federal court. So, by filing in federal court, counsel was able to avoid the delay associated with the removal process.

That, however, is a poor reason to sue in federal court in the first instance because a policyholder often can defeat diversity of citizenship jurisdiction by including non-diverse parties in the litigation – either as defendants or plaintiffs.⁴² Literally hundreds of policyholders across the country have filed nearly identical business interruption insurance cases based upon COVID-19 government-ordered shutdowns under identical or similar policy language, so finding at least one non-diverse plaintiff to include in the lawsuit should not have been difficult. On the defendant side of the case, the policyholders also could, for example, add their local insurance broker as a defendant if the broker failed to procure business interruption insurance that provides the coverage the policyholder expected. Doing so would destroy diversity jurisdiction and prevent the removal of the case to federal court. Further, even if the policyholder did not, or could not, properly add a non-diverse party to the case in order to destroy diversity of citizenship, an insurer cannot successfully remove a state court case to federal court if the case is filed in the insurer's home state.⁴³

In addition, a policyholder often can avoid removal to federal court by bringing only a declaratory judgment action against the insurer in state court instead of suing for breach of contract. Federal courts have discretion to decide whether to adjudicate declaratory judgment actions when they are removed from state court.⁴⁴ The trend, however, has been for federal courts to decline to exercise that discretion when the case is an insurance coverage action involving novel issues of state law, such as the COVID-19 business interruption cases, because state courts are in a better position than federal courts to address novel issues of state law.⁴⁵

42. There is not a consensus among the courts regarding whether removal is appropriate if the out-of-state plaintiffs in a case have separate claims against the non-diverse defendant. *See, e.g.*, Tarifa B. Laddon & Lexi C. Fuson, *Fraudulent Misjoinder in Drug and Device Litigation*, FOR DEFENSE (Sept. 2017), https://www.faegredrinker.com/files/133525_FTD-1709-Laddon-Fuson.pdf [<https://perma.cc/MB89-PK7L>]; *see generally* Matthew C. Monahan, *De-Frauding the System: Sham Plaintiffs and the Fraudulent Joinder Doctrine*, 110 MICH. L. REV. 1341 (2012). Even in jurisdictions that disapprove of the practice of multiple plaintiffs with separate claims against the defendant filing their claims together in a single lawsuit, the plaintiff can still prevent removal by suing the defendant in state court in the defendant's home state. *See* 28 U.S.C. § 1441(b)(2) ("A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title [diversity of citizenship] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.").

43. *See* 28 U.S.C. § 1441(b)(2).

44. *See* Monahan, *supra* note 42, at 1343, 1348.

45. *See, e.g.*, *Reifer v. Westport Ins. Corp.*, 751 F.3d 129, 149 (3d Cir. 2014) ("[W]hen applicable state law is 'uncertain or undetermined, district courts should be particularly reluctant' to exercise [declaratory judgment action] jurisdiction") (quoting *State Auto Ins. Cos. v. Summy*, 234 F.3d 131, 135 (3d Cir. 2000)); *Mitcheson v. Harris*, 955 F.2d 235, 240 (4th Cir. 1992) (noting that state courts should address unresolved state law issues

With respect to the reason many of the cases were filed in states with unfavorable insurance laws, it is possible that the laws of all the potentially available states were unfavorable to the policyholders, so the policyholders' counsel were left with only poor choices. Or, perhaps the policyholders' attorneys were not aware that courts routinely apply the laws of the forum state regardless of where the parties are domiciled. Perhaps counsels also were not aware of how easy it is to satisfy the minimum contacts requirements for personal jurisdiction, so they did not even consider suing in any state other than the policyholder's home state.

B. *Inexperienced*

Another possible explanation for the filing of so many lawsuits in federal court, and in states with insurance laws unfavorable to policyholders, is that many of the attorneys who have brought the COVID-19 business interruption insurance cases do not have much experience handling complex insurance coverage matters. Insurers and their attorneys are repeat players when it comes to coverage litigation, but there are not that many attorneys who regularly handle complex insurance coverage cases nationwide on behalf of policyholders, especially business interruption cases.

In reviewing the backgrounds of the attorneys who have brought many of the COVID-19 business interruption lawsuits, it is clear that many, if not most, of them do not have national reputations for handling insurance coverage cases.⁴⁶ Indeed, the law firm that has filed the most cases specializes in class action work, not complex insurance disputes.⁴⁷ Other firms that have brought a lot of the cases appear to primarily handle general, local legal work or are personal injury law firms that apparently just filed the cases in their home states.⁴⁸ Another firm, which has brought more than a dozen cases, is comprised of a total of two lawyers and one paralegal.⁴⁹

One of the consequences of using counsel who only have experience litigating in their home states, or are not insurance law specialists, is that they may not be aware of the differences in the insurance laws from state to state. They also may not have experience, through the school of hard knocks, figuring out how to satisfy the jurisdictional requirements necessary to bring the cases in favorable states, which may not necessarily be the most obvious forums in which to bring the cases. They also may not have experience structuring cases in a way that prevents the cases from being removed to federal court or transferred to another forum.

in the first instance rather than federal courts, in directing the District Court to decline to exercise jurisdiction in an insurance coverage declaratory judgment action).

46. See *Plaintiff Law Firms*, UNIV. PENN. CAREY L. SCH., <https://cclt.law.upenn.edu/plaintiff-law-firms/> [<https://perma.cc/6HFZ-Q92S>] (last visited Sept. 5, 2020).

47. *Id.*

48. *Id.*

49. *Id.*

Indeed, perhaps policyholders' counsel filed their lawsuits in federal court as class actions based on the assumption that the insurer or insurers would remove the cases to federal court based on the minimal diversity of citizenship requirement for federal class actions.⁵⁰ So, perhaps they thought it would be expeditious to simply file in federal court in the first instance to avoid wasting the time associated with the removal process due to the urgency of getting the cases resolved for their clients who desperately need the insurance money.

To avoid removal to federal court even if the case is brought as a class action, however, the policyholders' counsel could have brought the class actions only on behalf of in-state policyholders and sued the insurer in the insurer's home state. Such cases are not as easily removed to federal court.⁵¹ Of course, in light of the difficulties associated with preventing the removal of class actions to federal court, and the dramatically low success rate of federal class actions against insurers, perhaps the COVID-19 business interruption insurance cases should not have been filed as class actions at all. This conclusion invites the question of why so many of the cases were brought as federal class actions. The next part of the Essay provides some potential answers to that question.

C. Greed

One reason why policyholders' counsel may have brought so many of the lawsuits in federal court as class actions could be to increase the dollar value of the litigation, which in turn would increase the attorneys' fees if there were a favorable resolution of the litigation. Although the dollar amounts of the business interruption losses for each individual policyholder may be significant to the individual policyholders, the amounts at issue for many of the policyholders may not be large enough to entice counsel to pursue the cases individually. So, counsel may have brought class actions to increase the value of the litigation.

As noted above, the cases likely were brought in federal court because federal class action law – the Class Action Fairness Act of 2005 – would have allowed the insurers to remove most of the cases if they had been brought in state court unless all of the parties were predominantly from the same state, such that the interests in the cases were local, not national.⁵² Further, counsel also may have rapidly filed so many federal class actions in a race to accumulate as many cases as possible in an attempt to be appointed lead class counsel, again to increase the potential payout to the lawyers if the litigation were successful.

It will be a pyrrhic victory for the policyholders' counsel, however, to be named lead class counsel only to subsequently lose the entire case because the law applied by the federal court is unfavorable to the policyholders or due to the general lack of success federal class action plaintiffs have in cases brought against insurers. Bringing smaller class actions comprised of policyholders from the same states in state court or bringing actions on behalf of single or multiple

50. See 28 U.S.C. § 1332(d)(2)(A).

51. See 28 U.S.C. § 1332(d)(3).

52. See 28 U.S.C. § 1332(d)(3).

individual policyholders in state court likely would have increased the policyholders' chances for favorable outcomes even though doing so would not have presented the opportunity for as large a payout for counsel.

Did attorney fees issues also play a role in the filing of some of the individual cases in federal court? Perhaps. As discussed above, a plaintiff can always sue a diverse defendant in state court in the defendant's home state in order to deprive the defendant of the ability to remove the case to federal court.⁵³ But, if the policyholder's counsel does not practice law in the defendant's home state, then it will need to hire local counsel or refer the case to another attorney located in the defendant's home state. In either scenario, the policyholder's counsel loses attorney fees.

So, if the case is being handled on an hourly basis, then it is in counsel's own financial interest to file the case in its home state even though it may not be in the policyholder's best interests to do so in many cases. If the case is being handled on a contingency fee basis, then it is in neither counsel's nor the policyholder's best financial interest to file the case in federal court in the policyholder's and counsel's home state in most cases because neither the policyholder nor counsel will recover anything if the case is unsuccessful, as the empirical data predicts it will be.

D. Unconventional Wisdom

The most generous explanations regarding why many of the COVID-19 business interruption lawsuits were filed in federal court in unfavorable states are because counsel basically had no better choices or they had reason to believe that the judges who would be assigned to the cases would be more favorable than the alternatives. With respect to the first explanation, one possibility is that state courts were closed due to the pandemic when counsel was ready to file the complaints, but federal courts were accepting the electronic filing of complaints, so counsel simply filed the lawsuits in the only courthouses open at the time. Hopefully, however, policyholders' counsel did not concede the advantages of a state court forum solely for the convenience of immediately commencing the actions in federal court.

Another possibility is that there was complete diversity of citizenship and a lack of personal jurisdiction by the state courts over some of the parties in any state other than the one in which the lawsuit was filed. That, however, is an unlikely scenario because there typically are at least two states, and often more, that can satisfy the personal jurisdiction requirement if there is diversity of citizenship – the policyholder's home state and the insurer's home state.

Or, perhaps all the potential states were equally unfavorable to the policyholder, so it did not matter in which state the case was filed. Yet, that explanation still does not explain why more than 700 of the cases are in federal court where the policyholder's chances of winning are exceptionally low. As discussed in

53. See 28 U.S.C. § 1441(b)(2).

Part IV.A., there are ways to prevent removal from state court to federal court that can be accomplished in compliance with the rules. And, of course, the policyholder can always file in state court in the insurer's home state without the risk of removal.⁵⁴

Because this part of the Essay is, however, intended to provide generous explanations for what otherwise would appear to be by poor choices by many attorneys, one may assume that counsel had reason to believe the state court judges in the states where the cases could be filed would favor the insurers. So, despite being very low, they thought their chances of winning in federal court were still better than in state court.

Another generous explanation is that counsel had reason to believe the federal judges assigned to the cases would be pro-policyholder. That explanation, however, seems unlikely for most of the cases because counsel typically do not know in advance which judge will be assigned to the case, and many of the cases were brought in courts that have numerous judges.⁵⁵ Further, how likely is it that more than 700 of the 1000-plus cases are in federal court because the policyholder's counsel believed that each of the federal judges who would be assigned to each of the cases would be pro-policyholder? If the defendant historically wins seventy percent of the time in federal court in individual cases and insurer-defendants win seventy-five percent of the class actions brought against them in federal court, then what are the odds that the federal judges assigned to the COVID-19 business interruption cases would be the judges who preside in the meager twenty-five to thirty percent of the cases that policyholders win in federal court against insurers?

V. CONCLUSION

The conventional wisdom, which is supported by empirical data, provides that a plaintiff's chances of winning are twice as high in state court than in federal court. The COVID-19 business interruption insurance cases are governed by state law, and state insurance laws vary considerably, with some states being favorable to policyholders and others being unfavorable. With forum shopping, plaintiffs often have many choices regarding where they can bring a lawsuit, including choices regarding the states in which to bring the cases and whether to bring the cases in federal or state court.

Of the over 1000 COVID-19 business interruption insurance cases filed thus far, more than 700 of them were filed in, or removed to, federal court and many of them were filed in states with generally unfavorable insurance laws from the policyholders' perspective. There are a number of explanations regarding why this has happened, but most of them are unflattering to the attorneys bringing the lawsuits, and most of the explanations do not overcome the conventional wisdom and empirical data that provide the cases should have been filed as non-

54. See 28 U.S.C. § 1441(b)(2).

55. See *CCLT Case List*, *supra* note 7.

removable cases in state court in states with insurance laws favorable to policyholders, if possible. Consequently, the policyholders whose cases are pending in federal court can only hope that the unflattering explanations are wrong because their counsel possess unconventional wisdom, and, consequently, their cases will be among the twenty-five to thirty percent of the cases where the plaintiffs are successful in federal court.