

Daily Dicta: Two Legal Sluggers Go to Bat for Minor League Baseball in COVID Insurance Fight

Represented by McKool Smith insurance recovery practice head Robin Cohen and Andy Sandler, a former Skadden partner who went on to co-found Buckley Sandler (now Buckley) and Mitchell Sandler, 15 Minor League Baseball teams are demanding their insurers pay up for coronavirus-related losses.

By Jenna Greene
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As the owner of the North Carolina-based Kannapolis Cannon Ballers, Andy Sandler knows firsthand how financially devastating the coronavirus has been to minor league baseball.

As a former Skadden partner who went on to co-found Buckley Sandler (now Buckley LLP) in 2009 and Mitchell Sandler last year, Sandler also knows how to fight back.

He's teamed up with star insurance litigator Robin Cohen, who heads McKool Smith's insurance recovery practice. On Tuesday, the duo filed suit on behalf of 15 minor league teams in U.S. District Court for the Eastern District of Pennsylvania for breach (or anticipatory breach) of contract, demanding that the ball clubs' insurers pay up for business interruption coverage.

But Sandler's team is not among the plaintiffs suing Philadelphia Indemnity Insurance Co., Acadia Insurance Co., National Casualty Co., Scottsdale Indemnity Co., and Scottsdale Insurance Co.. "I figured I could be a client or a lawyer, but not both," he said.

COVID-19 related insurance coverage litigation has been flaring up around the country. I wrote previously about a suit by the Simon Wiesenthal Center against its insurer, Chubb, and a coverage fight between law firm Geragos & Geragos and Travelers



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The Minor League Baseball case shares many of the same questions—namely, has the virus caused the kind of direct physical loss or damage that's covered by insurance policies?

Sandler and Cohen in their complaint argue that it has.

“Current evidence suggests that SARS-CoV-2 may remain viable for hours to days on surfaces made from a variety of materials,” they wrote, noting that it was identified on surfaces of the Diamond Princess cruise ship a full 17 days after the cabins were vacated.

“[I]t is statistically certain that the virus is present at the teams’ ballparks and nearby properties or that the threat of the virus’s presence at the ballparks is imminent,” they wrote. “Moreover, the ballparks are incapable of their intended function—serving as a venue for ball games attended by fans.”

Their clients are about as sympathetic (and all-American) as they come. Most minor league teams are located in smaller cities and communities across the United States, and are owned by local businesses or families. More than 40 million fans attended games last year.

But that doesn’t mean the suit will be a homerun.

To date, at least one lawyer struck out (sorry, the baseball metaphors are irresistible) on a similar physical loss/ damage argument. Last month, U.S. District Judge Valerie Caproni of the Southern District of New York denied a request by solo practitioner Gabriel Fischberg on behalf of Social Life Magazine to issue a preliminary injunction against Sentinel Insurance Co..

“What is the damage?” Caproni asked, according to a transcript of the proceedings. “There is no damage to your property.”

But Cohen, who has a long track record of successful insurance recovery litigation, is undeterred.

“The virus attaches to surfaces and makes the facilities uninhabitable. That’s sufficient to trigger the policies,” she said confidently.

The complaint does acknowledge that the policies exclude “loss or damage caused by or resulting from any virus, bacterium or other microorganism that

induces or is capable of inducing physical distress, illness or disease.”

But Cohen and Sandler argue that provision is “void, unenforceable, and inapplicable. Nor does any other policy provision exclude the teams’ claims for coverage.”

“Exclusions are applied very narrowly,” Cohen told me.

For example, after Hurricane Katrina, some policyholders whose coverage excluded hurricane damages were nonetheless able to collect by blaming the U.S. Army Corps of Engineers for their losses.

In the MiLB suit, the teams invoke multiple grounds for coverage.

For one thing, the minor league teams don’t actually employ or manage their players. Instead, the players are supplied by Major League Baseball teams through player development contracts—and that hasn’t happened this year.

“It is now clear that MLB teams will not provide players to MiLB teams for the entire 2020 season,” Cohen and Sandler wrote. “MLB’s denial of players to the MiLB teams is a cause of the teams’ business interruptions.”

Both Cohen and Sandler say they’d be happy to try the case to a jury—because c’mon, it’s baseball versus insurance companies.

But Sandler also sees it as “really a problem-solving exercise. The insurance industry is under a lot of stress and financial pressure too. It’s a situation that’s begging for the problem to be solved.”

But he added, “If we have to be warriors, OK, we’ll be warriors.”

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