

Trends in COVID-19 Business Interruption Coverage Actions

by Patrick Frye

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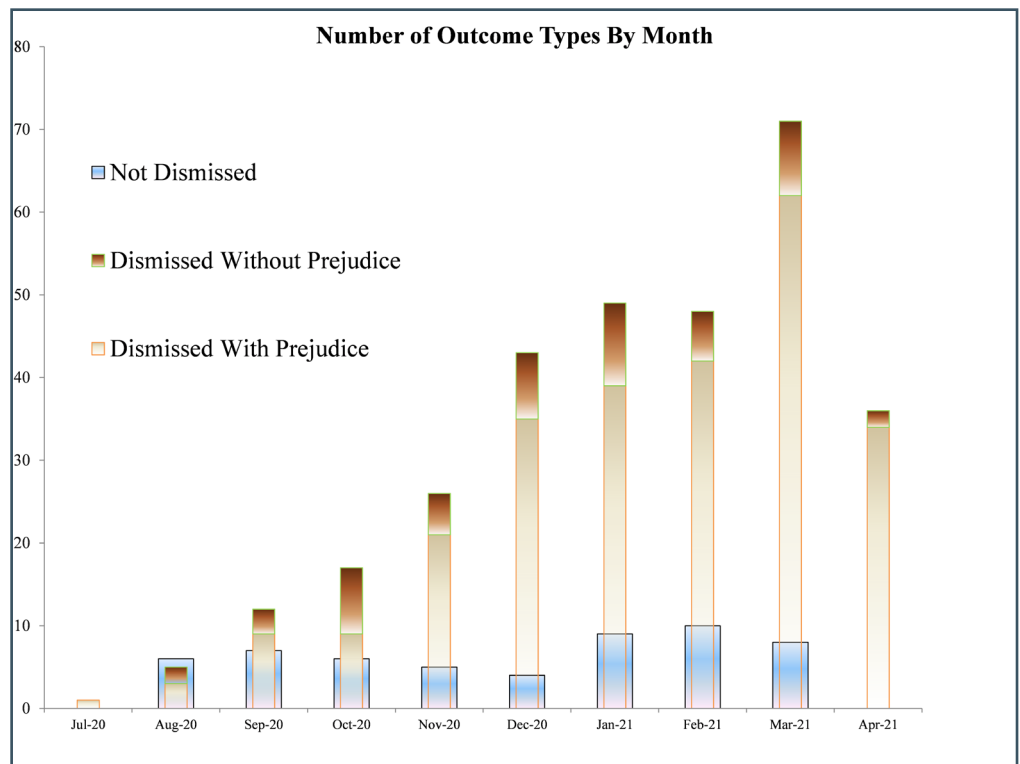


Since July 2020, trial courts have issued more than 370 decisions on dispositive motions in coverage litigation over whether business interruption coverage applies when a business shuts down due to either the coronavirus or government orders issued in response to the pandemic.¹ 85% of those decisions resulted in some form of dismissal of the insured’s coverage claim. The other 15% allowed the case to proceed into discovery (except for one, which found coverage as a matter of law).

This paper identifies trends in these decisions. Those trends include: (i) dismissals have become increasingly common; (ii) the presence of a virus exclusion strongly suggests the claim will be dismissed; (iii) state courts are less likely to dismiss these claims than federal courts; and (iv) Ohio courts so far have uncommonly refused to dismiss these claims.

Dismissals Have Increased Over Time

The chart (right) shows the number dismissals (the thinner tan-to-brown bar) superimposed on the number of non-dismissals (the wider blue bar). The number of non-dismissals has remained relatively stable – roughly five to ten a month. In contrast, the number of dismissals steadily grew until April 2021, when the total number of decisions declined – but all of the April decisions resulted in dismissals.

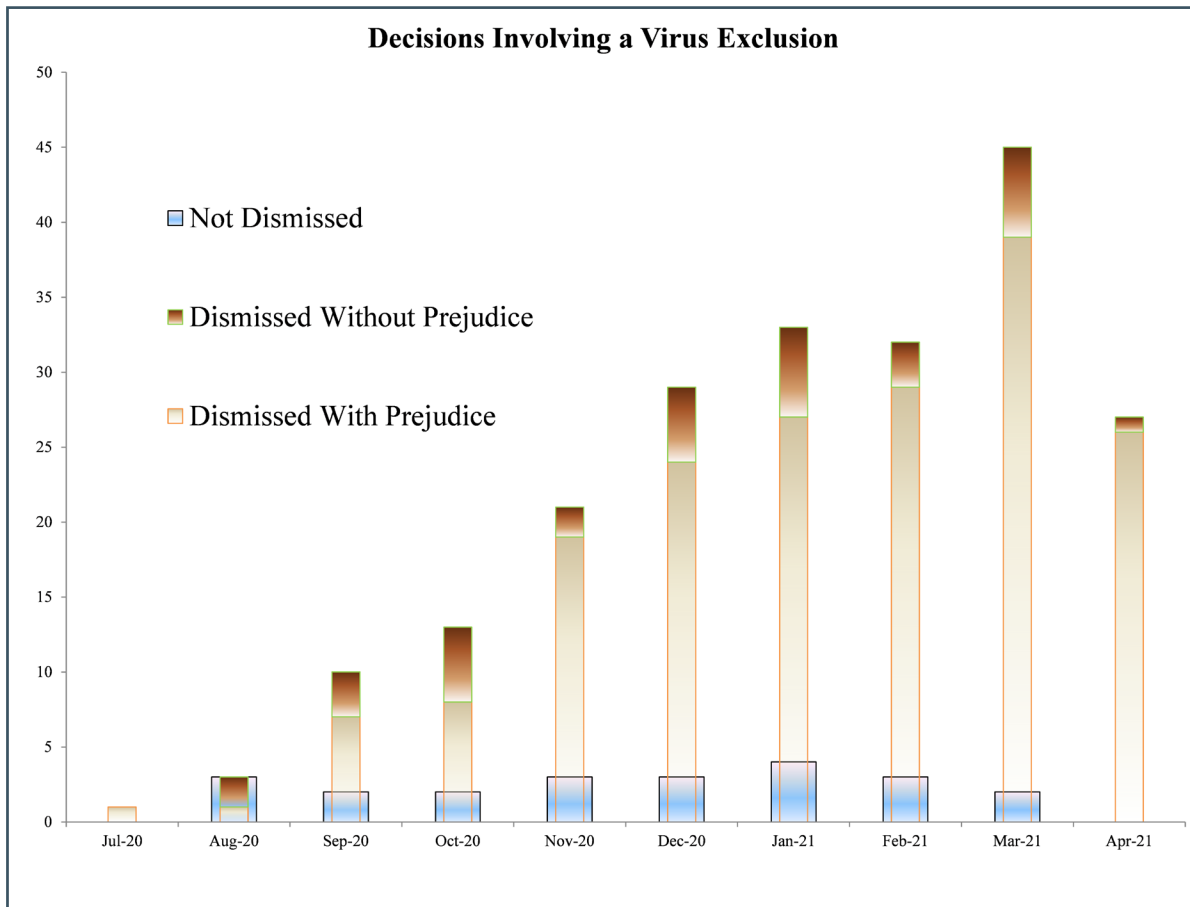


¹ Those decisions are listed here: <https://cclt.law.upenn.edu/judicial-rulings/>.

The chart also shows the proportion of dismissals that have been without prejudice (the darker end of the thinner bar). 83% of dismissals have been with prejudice – meaning the plaintiff is not permitted to amend the complaint to remedy the legal deficiency of their claims. The proportion of dismissals without prejudice, which allows the plaintiff to amend the complaint, peaked at nearly half in October 2020, then hovered around 20% through January 2021, before dropping to 13% in February and March 2021 and then to 6% in April 2021.

The Presence of a Virus Exclusion Suggests the Claim Will Be Dismissed

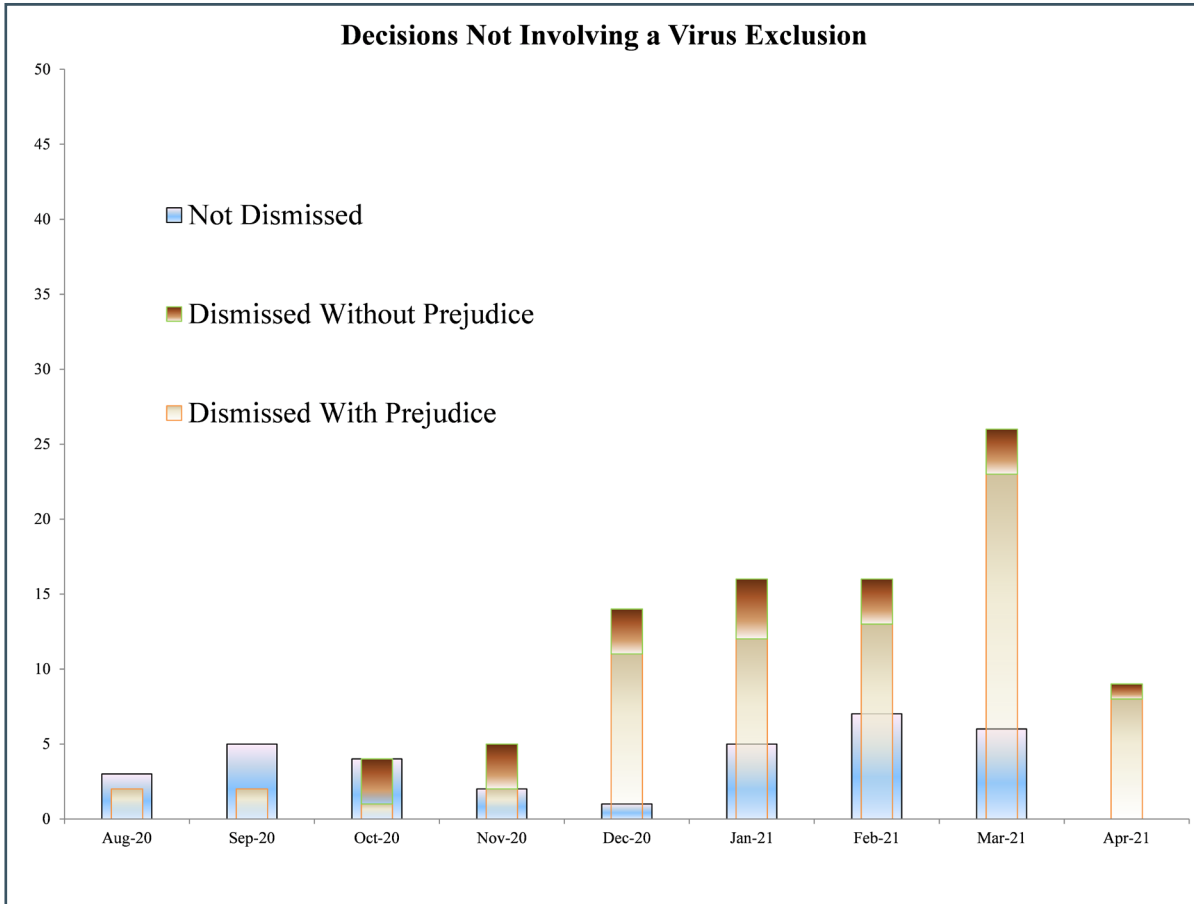
Roughly two-thirds of the decisions addressed a policy that included a virus exclusion.² Of those, 90% resulted in dismissal, more than the overall dismissal rate of 85%.



As is evident from the chart above, claims under a policy with a virus exclusion have been dismissed in increasingly greater numbers.

One-third of the decisions did not involve a virus exclusion. 74% of them resulted in dismissal, which rate is less than the dismissal rate of 85% for all business-interruption coverage claims for COVID-19.

² A virus exclusion might read, for example: “We [the insurer] will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.”

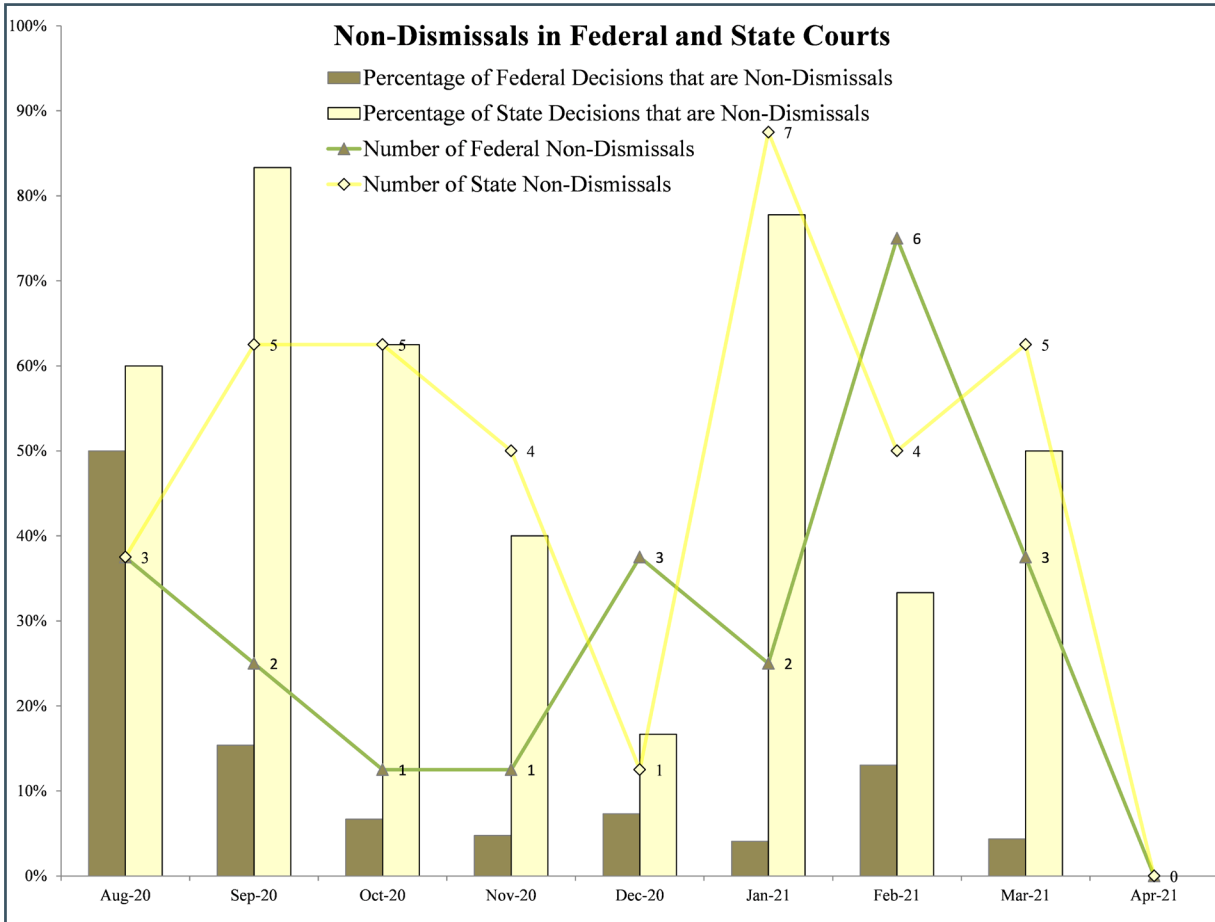


Policyholders' claims survived at their greatest rate in decisions that were issued in the first few months and dealt with a policy that did not have a virus exclusion. As recently as February 2021, policyholders staved off dismissal in 30% of the decisions that did not involve a virus exclusion.

State Courts Dismiss These Claims Less Frequently than Federal Courts Do

State courts have proved to be more likely to refuse to dismiss policyholders' coverage claims. 47% of state court decisions have not resulted in dismissal, while 8% of federal decisions have not resulted in dismissal. It is no accident that policyholders often file their actions in state court or join non-diverse defendants to defeat federal jurisdiction. When their claims are properly before a federal court, policyholders often move the federal courts to not decide their coverage claim by abstaining on prudential grounds or certifying the coverage question for the state supreme court to answer.

The following chart shows the extent to which state and federal court decisions have not dismissed coverage claims:



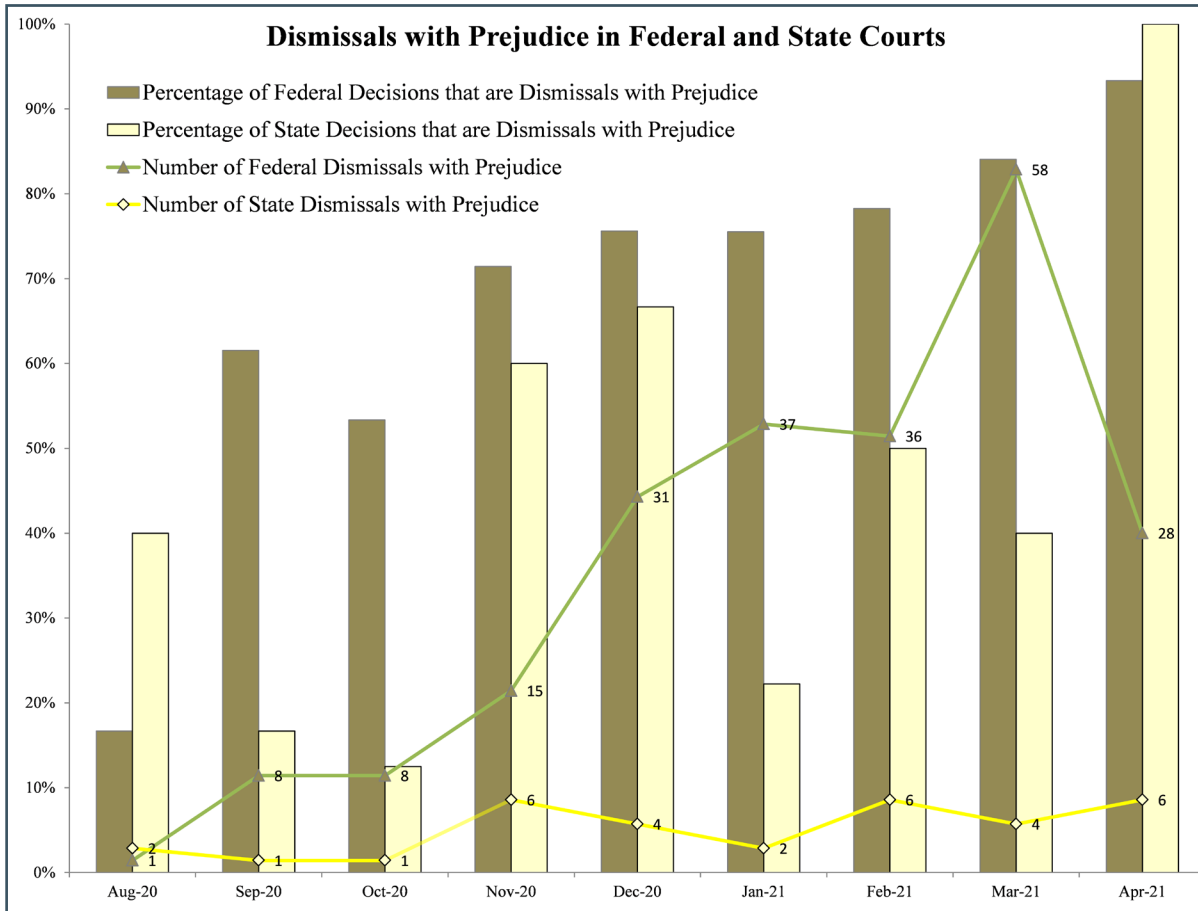
As the bar graph indicates, state courts issue non-dismissals more commonly than do the federal courts, which have consistently dismissed claims. Starting in September 2020, the percentage of federal decisions that were non-dismissals has stayed below 15%. In all but two of those months, the percentage has been 7% or lower.

The rate of non-dismissals has been more volatile in state courts. It was as high as 83% in September 2020, and was at or above 50% every month except for November 2020 (40%), February 2021 (33%) and April 2021 (0% – out of six total decisions).

Further, as seen by the lines snaking through the bar graph, state courts have issued a greater quantity of non-dismissals than the federal courts have. Only in December 2020 and February 2021 did the federal courts render more non-dismissals than the state courts did. This fact is particularly remarkable given that federal courts account for 80% of the total decisions.

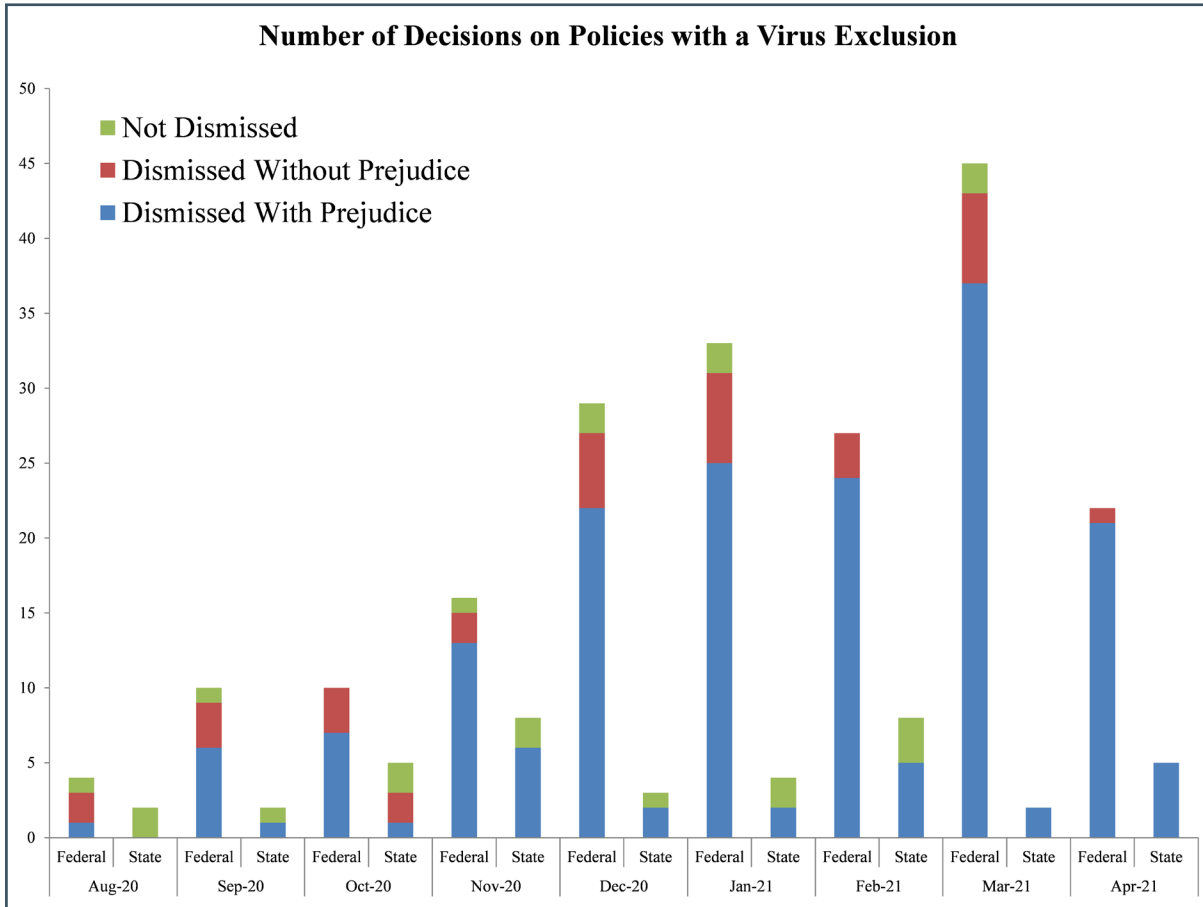
The contrast between state and federal courts could be even greater, considering that it is easier to obtain federal court decisions nationwide (which often are published) than it is to obtain state court decisions nationwide.

Interestingly, federal courts issued a higher percentage of dismissals without prejudice than state courts did. When we divide the data between dismissals with prejudice and all other decisions (instead of between dismissals of any type and non-dismissals), we see that the gap between federal and state courts on dismissals with prejudice is narrower than it is on dismissals of any type. Even so, the quantity of federal dismissals with prejudice far outruns their state counterparts.



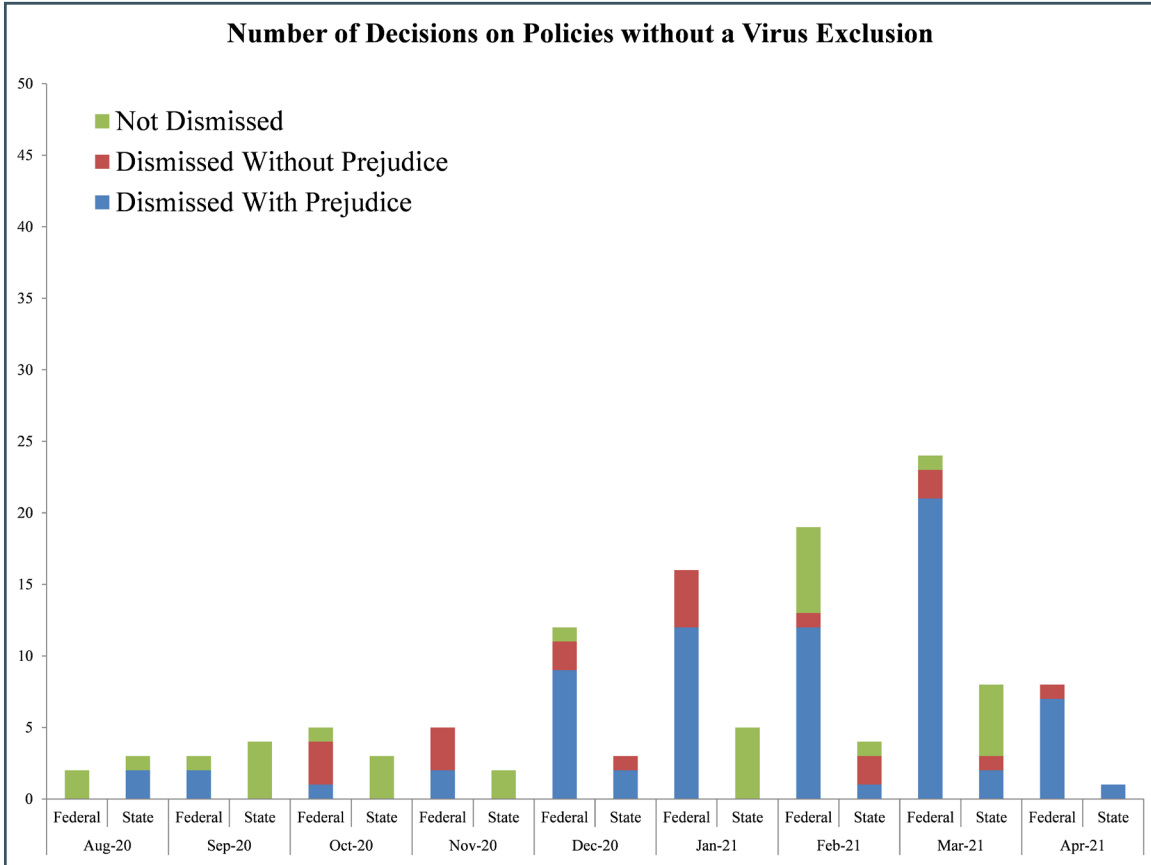
The percentage of dismissals with prejudice has grown in both federal court decisions and state court decisions. While that growth has been steady in the federal court decisions, it has come in fits and starts in the state court decisions.

These courts have largely followed the same patterns when reaching decisions on policies involving virus exclusions:



In these cases, the percentage of non-dismissals was higher among state court decisions, while dismissals of all types were higher among federal court decisions.

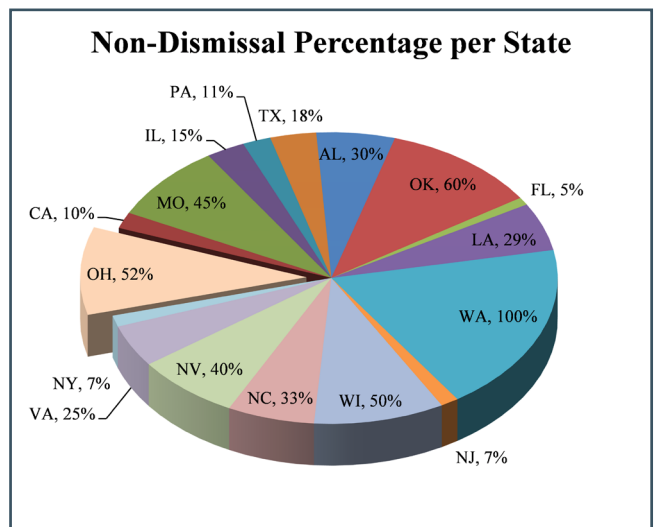
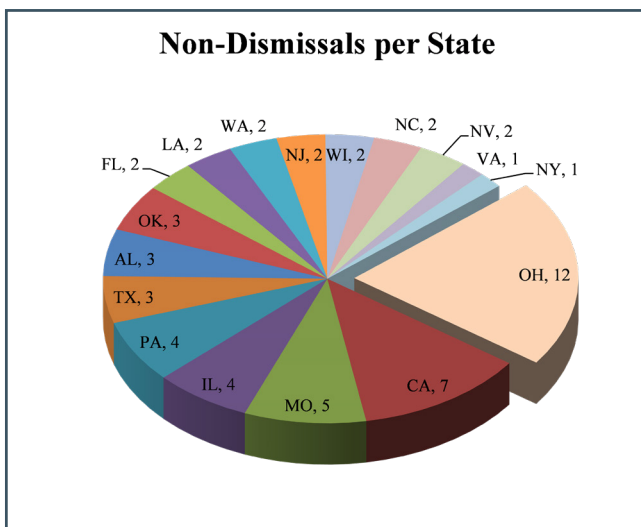
Not only did these patterns hold true in decisions on policies without virus exclusions, they were more pronounced in some ways:



The courts, particularly the state courts, less commonly dismissed claims when they sought coverage under a policy with no virus exclusion. While federal courts, too, less commonly dismissed claims that did not involve a virus exclusion (dismissing 87% of those cases) than they did claims involving a virus exclusion (dismissing 96% of those cases), a state court was almost half as likely to dismiss a claim not involving a virus exclusion (36%) than it was to dismiss a claim involving a virus exclusion (67%). And one-third of state court dismissals were without prejudice (as opposed to 8% of state court dismissals of claims involving virus exclusions).

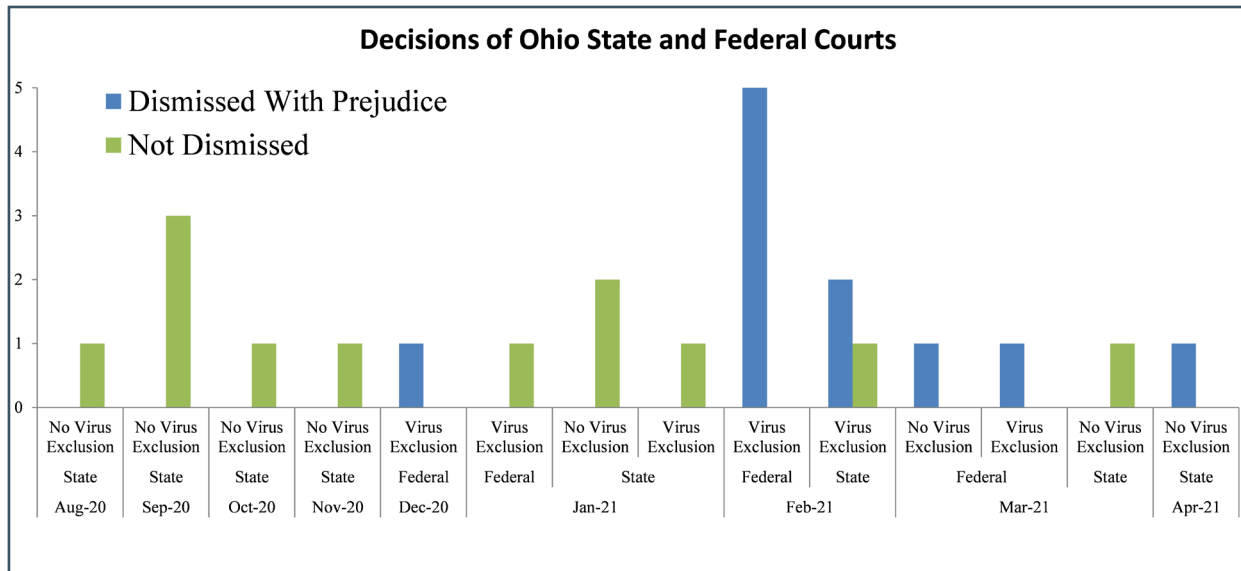
These Claims Have Been Dismissed the Least Often in Ohio

Non-dismissals are generally spread among the most populous states, but one state in particular does stand out. Ohio has the most number of non-dismissals and the third highest percentage of non-dismissals among all decisions in the state:



Despite Ohio having less than a third of California’s population, almost twice as many decisions denying an insurer’s request to dismiss policyholder coverage claims have been issued by Ohio courts than by California courts. While Washington and Oklahoma have higher percentages of non-dismissals than Ohio does, those states have far fewer decisions in total in comparison to Ohio (Washington: 2 total decisions; Oklahoma: 5 total decisions; Ohio: 23 total decisions). (Missouri might also be noteworthy, in that its percentage is similar to Ohio’s, and its courts have issued 70% as many non-dismissals as Ohio courts have, despite Missouri having barely more than half of Ohio’s population.)

The chronology of Ohio court decisions gives a basis to see a stark contrast between the decisions of its state and federal courts or to see a trend in favor of dismissals with prejudice:



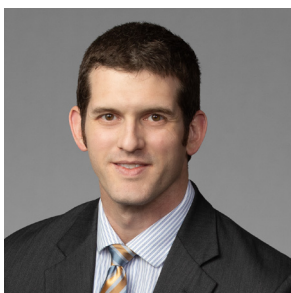
State courts issued the majority of the earliest decisions in Ohio, and through January 2021, those state court decisions categorically declined to dismiss coverage claims. Once the volume of federal decisions picked up in February 2021, dismissals with prejudice rose, and even state courts issued them. Ohio courts issued dismissals in 75% of the cases involving a policy with a virus exclusion, which is less than the national average of 85%. Further, in startling contrast to the national average of 74%, Ohio courts dismissed only 18% of the claims for coverage under a policy that did not have a virus exclusion.

Conclusion

The data confirms what coverage lawyers likely believed all along: Insurers fare better in disputes over a policy with a virus exclusion, in an action pending in federal court, while policyholders fare better – in that their claims aren’t dismissed as often – in disputes over a policy without a virus exclusion, in an action pending in state court. And according to the data so far, Ohio courts have been relatively favorable to policyholders.

Visit [Freeborn’s COVID-19 webpage](#) for more information.

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