

Trade Groups Back Travelers In 9th Circ. Virus Coverage Spat

By **Hailey Konnath**

Law360 (June 17, 2021, 8:58 PM EDT) -- A pair of insurance industry associations on Wednesday threw their support behind Travelers units battling appeals from two Los Angeles restaurants, urging the Ninth Circuit not to revive their COVID-19 business interruption lawsuits.

The American Property Casualty Insurance Association and National Association of Mutual Insurance Companies lodged amicus briefs in both cases, asking the appellate court to affirm a California federal court's finding that Travelers Indemnity Co. of Connecticut and Travelers Property Casualty Co. of America needn't cover the restaurants' losses stemming from the pandemic.

The policies' plain terms require "direct physical loss of or damage to property," the groups said in their briefs.

"Commercial property insurance policies with business interruption coverage, like the Travelers Indemnity Co. of Connecticut policy in this appeal, do not — and were never intended to — provide coverage for economic losses untethered to physical loss of or physical damage to property," they said.

Ignoring the plain language of the policies would open them up to a slew of claims they were never meant to cover, the groups said. That would subject insurers to "overwhelming claims payment liability that would threaten their solvency and ability to honor their promises made in other existing insurance policies," according to the briefs.

The restaurants are asking the court to ignore "the unambiguous policy language" and find coverage for purely economic losses caused by executive orders, the groups said. But under this approach, any executive order could trigger coverage under such policies, they said.

"If this court departed from the well-reasoned holdings of nearly all courts, which recognize that the 'physical' loss or damage requirement in property insurance policies requires tangible harm to or physical dispossession of property (such as theft), it would hurt insurers, policyholders and the insurance marketplace," the groups said.

The restaurants have asked the Ninth Circuit to revive their lawsuits against Travelers in two briefs last month. Mark's Engine Co. No. 28 Restaurant, which serves American comfort food, and 10e Restaurant, a Mediterranean cuisine eatery, said their Travelers policies' virus exclusions are not triggered because they "never detected any virus on the property."

The virus exclusion, which was not designed to bar losses related to civil authority closure orders, only precludes coverage when a loss results from "on-site outbreaks or contamination where a virus is detected," the two restaurants argued at the time. The two eateries' suits were dismissed by the Central District of California last August and October.

Last week, Travelers argued that the appeals should be denied because the policies' virus exclusions and their property insurance don't, in fact, cover COVID-19 losses.

"Property insurance insures property; if the property is not lost (such as by theft) or damaged (such as by fire), there cannot be a covered claim," it said.

Travelers said the policies cover only "direct physical loss of or damage to property," such as when a fire damages the insured property, resulting in a suspension of operations. But the two luxury restaurants failed to show that anything "direct" or "physical" happened to their properties and alleged only financial losses, the insurer said.

Mark Geragos, who's representing the restaurants, told Law360 on Thursday, "This full-court press by the insurance industry was always about shifting their risk to the taxpayers."

"They took the premiums and now want the taxpayer to pay their debt," he said. "We are hopeful that the courts will rectify this abomination."

A Travelers representative and counsel for the industry groups didn't immediately return requests for comment Thursday.

The two restaurants are represented by Mark John Geragos of Geragos and Geragos APC.

Travelers is represented by Deborah L. Stein of Gibson Dunn and Crutcher LLP.

The American Property Casualty Insurance Association and National Association of Mutual Insurance Companies are represented by Laura A. Foggan of Crowell & Moring LLP.

The cases are Marks Engine Company No. 28 Re v. Travelers Property Casualty Co. et al., case number 20-56031; and 10E LLC v. The Travelers Indemnity Co. et al., case number: 20-56206, both in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Daphne Zhang. Editing by Kelly Duncan.