

Wis. Justices Told Biz Insured For 'Short Term' Virus Closures

By **Shawn Rice**

Law360 (April 12, 2022, 6:51 PM EDT) -- Wisconsin's high court justices pushed a group of restaurants and taverns to explain in a hearing Tuesday how long it took them to recover from COVID-19 closures, with the businesses arguing their insurance policies were "meant to bridge the short-term situation" like short-term disability coverage.

The Wisconsin Supreme Court justices challenged the virus being the cause of the losses as businesses across the country are living with the coronavirus just as cases rise again on the East Coast. The Wisconsin high court said government shutdown orders were the root cause of the losses.

Attention on the period of restoration then came up when Jay Urban of Urban & Taylor SC, counsel for the Wisconsin businesses, told the justices that not every business could do takeout. Businesses had to retool operations as little was known about the virus at the beginning of the pandemic, he said.

Urban recognized that the policies aren't like long-term disability policies and that "coverage runs out." But he said what was repaired, replaced or rebuilt are damages questions. The claims made by the Wisconsin restaurants and taverns have to do with the fact that they had to retool, Urban said.

If a business has this type of interruption in their spaces of operation, including air, Urban said the policies were sold to "provide a little bit of income" until a business "can get back on their feet."

'This Isn't McDonald's'

The justices heard from the Wisconsin businesses led by Colectivo Coffee Roasters, which fought off dismissal of its proposed class suit by Society Insurance in trial court. The businesses claim losses caused by COVID-19 and resulting government-imposed restrictions.

The high court accepted bypass of the appeal on the ruling by Judge Laura Gramling Perez of the Milwaukee County Circuit Court that loss of use was enough to show physical loss of or damage to property. She held limitations on indoor dining were enough for a claim of contamination coverage.

The Wisconsin justices turned to the policy's contamination coverage clause, which requires access be barred "to the described premises or production of your product." The high court asked Urban to describe the inability to serve carry-out alcohol and how it fits in with the prohibition of product language.

Urban highlighted to the justices that part of a club's experience is the ambiance. It's not just about a sandwich that a customer can take out, he said. A restaurant, tavern or café's income comes from the personality of the atmosphere, the type of music that is played or the sale of alcohol, he said.

"There are certain things that aren't just portable. It's not McDonald's," he said. "And they aren't writing policies for something that you can get through a window. Part of a restaurant is the experience."

Laura Foggan of Crowell & Moring LLP, counsel for Society Insurance, argued the policy didn't insure all operations. There wasn't underwriting for the ambiance or socialization of a restaurant or tavern. The policy covers against physical loss of or damage to the buildings and personal property, she said.

Foggan argued that loss of use isn't enough to show physical loss or damage as recognized by rulings by federal appellate courts. Not a single appellate court has come out another way and no dissent, she said.

The court asked Foggan to push back on the idea that loss of dining use can be seen and tangible. She said the loss itself isn't physical. It's not a physical loss of the building as it still remains there, she said. And there was no prohibition of access but a restriction on dine-in purposes, she said.

"If smoking is prohibited, you cannot smoke. If access is prohibited, you cannot access the premises," she said, noting that the Wisconsin businesses could offer takeout and prepare food.

Foggan also said contamination coverage doesn't apply because there was no order closing the restaurants or taverns due to contamination. Restaurants were ordered to stop indoor dining as long as the government orders were in effect, not because of the presence of the virus, she argued.

Urban acknowledged that the restoration period is a measure for damages that not all businesses will meet. Society suggests that if some businesses weren't damaged, then others weren't, he said, but that's for a court to decide. The property is the elements around it, such as air, he said.

"In hindsight, you can't rewrite a policy to say, 'We only meant table and chairs,'" Urban said.

'Deeper Understanding'

Urban told Law360 on Tuesday that "there is always the case within the case." With the questions asked, he said the justices "were interested in some deeper understanding." He said he believed they are "much more willing to engage in big picture stuff" with the coverage issues affecting businesses.

Society's policy "is completely different" from other policies, Urban said, as the language "sounds the same until you look word for word." There isn't a virus exclusion and there is contamination coverage. It's the "perfect" policy for bars and restaurants concerned about salmonella and smoke damage, he said.

If the justices uphold, Urban said Society "will have some tough decisions to make" given the case looks to represent a class of policyholders. Urban said he felt the amicus briefing filed by United Policyholders and the Tavern League of Wisconsin added a "punch in the mouth" to the appeal.

Marshall Gilinsky of Anderson Kill, co-counsel for the Tavern League of Wisconsin, noted the court's discussion about what life was like in March 2020. He told Law360 the idea that there wasn't a loss "is

kind of hard to fathom," pointing out how people wore gloves to avoid surfaces and cleaned packages.

"The fact that we wear masks now doesn't have to do with why businesses lost money in 2020. It was an entirely different environment then. Both physically and economically," he said. "Now you can have a mask mandate and go to a movie theater or restaurant. In March 2020, people didn't do that."

Gilinsky said this business interruption coverage exists "to protect the revenue stream." When courts bring up that owners and employees could enter the premises, Gilinsky said it is the prohibition of customers that matters.

"The customers are the ones fueling the revenue stream," he said.

Counsel and a representative for the insurer declined to comment Tuesday.

The Wisconsin businesses are represented by Jay A. Urban and Nicole A. Flemming of Urban & Taylor SC and Richard W. Schulte of Wright & Schulte.

Society Insurance is represented by Laura A. Foggan of Crowell & Moring LLP and Heidi L. Vogt, Beth J. Kushner, Janet E. Cain and Christopher E. Avallone of Von Briesen & Roper SC.

The case is Colectivo Coffee Roasters Inc. et al. v. Society Insurance, case number 2021AP000463, in the Supreme Court of Wisconsin.

--Editing by Roy LeBlanc.