

## Wis. Justices Say COVID-19 Losses Not Covered

By **Shawn Rice**

*Law360 (June 1, 2022, 11:00 AM EDT)* -- The Wisconsin Supreme Court joined other state high courts Wednesday in finding that business losses stemming from the COVID-19 pandemic aren't covered by insurance, according to a ruling that one insurer attorney said "marked the death knell" for pandemic-era business interruption claims.

The state's high court, in a unanimous opinion, ruled that Society Insurance doesn't have to cover losses to a group of restaurants, according to the decision. The virus doesn't physically alter property, the court found citing the Seventh Circuit's ruling in *Sandy Point Dental v. Cincinnati Insurance Co.*, a decision policyholders attorneys have called a "body blow" to pandemic era business interruption suits.

In that decision, the Seventh Circuit interpreted the phrase "physical loss or damage" as requiring a physical alteration to a property to trigger insurance coverage. Citing that and a 1976 case in Wisconsin state court, the state justices said Wednesday that the virus particles on surfaces don't cause an alteration because they don't require significant repairs, according to the ruling.

"For a harm to constitute a physical loss of or damage to the property, it must be one that requires the property to be repaired, rebuilt or replaced — that is, it must alter the property's tangible characteristics," the court wrote. "The virus does not necessitate structural 'repairs or remediation;' it can be removed from a surface with a disinfectant."

The Wisconsin justices joined those in Massachusetts and Iowa in siding with the insurance industry in COVID-19 business interruption litigation. The Massachusetts Supreme Judicial Court ruled against a trio of restaurants in late April, similarly finding that the insurance policies cover only direct damage to property. The Iowa Supreme Court issued its ruling a day later against a golf club and a restaurant, finding that the losses incurred during the pandemic weren't covered under their policies.

Legal observer Scott Seaman, co-chair of the global insurance services practice group at Hinshaw & Culbertson LLP, said today's ruling "slammed the door" on the restaurants' attempt to obtain coverage for COVID-19 losses. The lack of any direct physical loss or damage "marked the death knell" of the claims, he said.

"The COVID-19 coverage wars are far from over, but policyholders are running out of arguments and jurisdictions," Seaman said.

No appellate court at the state or federal level has yet ruled in favor of policyholders on the issue.

As of May 23, Law360's COVID-19 Insurance Case Tracker has shown that federal district courts around the country have permanently tossed about 47% of the 1,377 suits from policyholders against their insurers seeking pandemic loss-related coverage. Another 17% of these suits filed in federal courts have been voluntarily dismissed, the tracker shows, though about 33% have yet to be fully decided.

The COVID-19 business interruption case came before the Wisconsin high court after Judge Laura Gramling Perez of the Milwaukee County Circuit Court declined to toss the proposed class suit brought by Wisconsin businesses led by Colectivo Coffee Roasters over their pandemic-related losses.

On April 12, the Wisconsin justices heard from both sides on whether there was coverage for losses caused by the presence of the virus and government-imposed restrictions.

Judge Perez said the Wisconsin businesses had sufficiently shown a possibility of physical loss or damage because they were unable to use their properties. She also ruled that limitations on indoor dining for the restaurants and bars were enough for a claim of contamination coverage under policies with Society Insurance.

The Wisconsin justices on Wednesday — in a unanimous opinion written by Justice Rebecca Frank Dallet — reversed Judge Perez's ruling, saying the overwhelming majority of other courts doomed the bars' and restaurants' bid for coverage of pandemic-related losses without any physical harm to property. Even the bars, which at one point lost total use of their space due to restrictions on alcohol takeout, didn't hit the threshold for the claims, the state high court found.

The justices also rejected the Wisconsin businesses' reliance on a February 2021 ruling in *In Re: Society Insurance Co. Business Interruption Protection Insurance Litigation* that allowed a group of restaurants, bars and theaters to pursue coverage claims with Society Insurance for pandemic-related losses. That ruling said a jury could find that a loss of use of physical space could mean a physical loss under the policy.

Colectivo and the other Wisconsin businesses couldn't use their properties for in-person dining for some time during the pandemic, but the Wisconsin high court explained that the dining rooms were still there. The protections in insurance policies for physical loss or damage refer to situations where a building might have burned down and need to be rebuilt, not a temporary pause on normal operations, the court said.

Lastly, the Wisconsin high court ruled that the businesses couldn't tap into the policies' contamination coverage because they didn't close their operations due to the presence of the virus. Rather, the government orders, which were later invalidated by a court, were the reason, the justices said.

The government orders also didn't stop the owners from accessing their properties, but placed limitations on their use, the court said. The orders didn't prevent at least some of the businesses from serving takeout, the court added.

Seaman said the Wisconsin high court's decision adds to the growing number of state intermediate appellate or high court rulings in favor of the insurance industry as well as every federal appellate ruling.

Courts aren't persuaded by policyholder arguments that the presence of COVID-19 on premises is a "game changer," he said. Seaman added that the policyholders also haven't gotten traction with their

argument that federal courts haven't been interpreting state contract law properly.

Laura Foggan of Crowell & Moring LLP, counsel for Society, said the insurer was grateful for the Wisconsin's top court's correct application of the policy terms to find no coverage. These challenging times that many of Society's policyholders are facing during the pandemic don't change the terms of the insurance contracts or create coverage for losses that aren't intended to be covered, she said.

"It is the insurance contracts that control," Foggan said. "Today's well-reasoned ruling should serve as another step toward bringing this litigation to an end."

Jay Urban of Urban & Taylor SC, counsel for the Wisconsin businesses, told Law360 that it's unfortunate and disappointing that the Wisconsin high court justices "took a narrow view of coverage on a unique insurance policy that should have covered the bar and restaurant owners of Wisconsin."

The ruling is also a blow to The Restaurant Law Center and Tavern League of Wisconsin, who had filed amicus briefs urging the court to adopt the policyholders' interpretation of the insurance policy.

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 Wisconsin Supreme Court.

--Additional reporting by Eli Flesch, Chris Villani and Ben Zigterman. Editing by Neil Cohen.