

# Insurance Business America: New York court to hear critical COVID business insurance case

New York's highest court is set to preside over a restaurant's COVID-19 business interruption case that could have widespread ramifications for businesses and insurers in the state and further afield should the court veer away from a US-wide trend of insurer pandemic business income victories.

Oral arguments in the case, which pits restaurant group Consolidated Restaurant Operations (CRO) against 's Westport Insurance over whether the insurer is on the hook to pay out for business interruption losses due to closures and disruption during the COVID-19 pandemic, are set to be heard by the New York Court of Appeals on Wednesday afternoon.

CRO has sought to claim for COVID-driven closures under its Westport Insurance all-risks policy, said to include a US\$50 million per occurrence limit for business interruption coverage, which did not contain a virus exclusion.

## **New York case comes as COVID-19 business interruption suits have overwhelmingly gone insurers' way**

Policyholders looking to dispute denied COVID claims have faced an uphill battle. Across the US, including where policies have not specifically excluded viruses or pandemic,

As per the American Property & Casualty Insurance Association, pandemic-related claims have been rejected by every federal circuit court except the D.C. Circuit; by state high courts in Connecticut, the District of Columbia, Iowa, Louisiana, Maryland, Massachusetts, Nevada, New Hampshire, Ohio,

Oklahoma, South Carolina, Washington, and Wisconsin; by intermediate appellate courts in several other states; and by the majority of state and federal trial courts.

There have been scant triumphs in clearing court system hurdles for policyholders and big wins have been few and far between.

In 2022,

, when a jury awarded the medical school and research centre more than US\$48 million. The case has thus far proved a trial outlier.

### **New York Court to puts its stamp on revived pandemic business interruption case**

Now, whichever way it might lean, New York's highest court will look to puts its stamp of approval on the COVID business income issue.

With the case initially having been dismissed by The First Judicial Department before being revived to face the appeals court, CRO will be hoping its case can flip the switch on the broad trend of US federal and state claim denials.

### **Commentators say New York State business income COVID case could have far-reaching ramifications**

If it does, given New York State's ( ) status as a key insurance law battleground and its choice-of-law provisions, commentators have suggested that any pro-CRO ruling could prove a costly blow to insurers and a boon for businesses, both within and outside the state, if others were to follow suit.

Among amicus brief filers to the hotly contested case, the Metropolitan Transport Authority (MTA) and associated subsidiaries have claimed to have "billions of dollars of insurance coverage at stake" for losses incurred during the pandemic.

“There are many policyholders whose cases and claims will be tied to this decision, even though they may not be based in New York, incorporated in New York, didn’t have a New York broker, or didn’t buy insurance from a New York insurance company,” said Nick Insua, partner at Reed Smith, which has filed amicus briefs in the case on behalf of transit authorities, New York restaurants, and United Policyholders.

“Their policy will still be governed by New York law, and this is not only for US policies, but also a lot of international insurance and reinsurance policies have New York choice of law provisions,” Insua told *Insurance Business*.

### **Insurers and businesses square off on physical loss and pandemic intent**

Key battlelines have been drawn around whether COVID-19 caused physical losses – CRO, represented by Cohen Ziffer Frenchman & McKenna, is set to argue that the virus physically permeated its properties and impaired functionality – and, as ever, whether pandemics were ever intended to be covered by insurers more broadly.

Restaurant and hospitality groups have accused insurers of “crying wolf” over what insurance carriers say would be the devastating impact to the insurance sector if most COVID-19 pandemic business income cases were found to be covered.

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