

Law360 Insurance Authority: NY Top Court Preview: Justices Weigh COVID-19 Insurance

The outcome of arguments before New York's top court Wednesday over insurance coverage for a restaurant operator's pandemic losses should help resolve questions over covered physical loss and damage in the state, experts said.

While most insurance experts said the Texas-based Consolidated Restaurant Operations Inc. is up against tough odds in its fight against Westport Insurance Corp., there remains a split between policyholder and insurer attorneys over whether most courts have prematurely dismissed virus coverage suits like CRO's.

Here, Law360 breaks down CRO's \$50 million case ahead of oral arguments, which are currently scheduled for Wednesday afternoon in the New York Court of Appeals.

The Court of Appeals CRO's suit in November 2022, months after the operator failed to convince a New York appellate panel that it has suffered the kind of physical loss or damage typically required for coverage under its so-called all-risk policy.

In a brief, CRO said upholding the dismissal of its coverage suit against Westport, a subsidiary, would severely hamper policyholders and upend decades of insurance law. It further argued that the New York First Judicial Department panel's decision established a so-called tangible-alteration test unsupported by any top court ruling.

"This interpretation of 'direct physical loss or damage' violated nearly every one of this Court's core principles of insurance policy interpretation and must be reversed," it said.

In its March 2023 brief, Westport reiterated the judicial department's findings in saying that tangible loss or damage gave effect to the plain meaning of "physical" in the operator's policy. The coronavirus can't cause those types of losses, Westport said, because property that only needs to be cleaned doesn't constitute physically damaged property.

"Adopting CRO's theory would turn every sneeze in New York into a potential property insurance claim," Westport said in its brief.

Andy Lundberg, a managing director of litigation-finance company , and a former insurance attorney, said CRO's suit was notable because of the amount of thought and persuasive authority available to both sides nearly four years after the start of the pandemic. Acknowledging carriers have largely won virus coverage suits, he still said they're "not batting 1.000," and a pro-CRO ruling could cause alarm in other courts.

"New York is generally regarded as a pro-insurer jurisdiction," Lundberg told Law360. "Having a court that is viewed both as a thought leader and as friendly to insurers give the policyholders the win would be quite a development."

Most insurance experts agree, however, that the sheer number of federal and state decisions favoring insurers makes it likely that CRO won't win the appeal of its dismissal. The Second Circuit, which includes New York, has ruled with all the federal appellate courts in rejecting policyholders on questions of coverage for virus losses.

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As a population and business center, "decisions from New York always carry a certain level of import, and that's always certainly been the case for insurance law decisions," said Nicholas M. Insua, a policyholder attorney with [REDACTED], who authored a brief backing CRO on behalf of consumer advocacy group [REDACTED].

Robin Cohen, the [REDACTED] attorney who will argue for CRO Wednesday, told Law360 the case was particularly important for small businesses.

"I think this is going to have a very significant impact on the small businesses in New York that paid significant premiums for coverage that was designed to cover indivisible, dangerous contaminants that cause you to lose use of your property," Cohen said.

An attorney for Westport declined to comment on the suit ahead of oral arguments.

Federal district courts across the country have permanently tossed about 54% of the 1,449 suits from policyholders against their insurance companies seeking pandemic loss-related coverage, according to [REDACTED]. Another 22% of the pandemic insurance suits filed in federal courts have been voluntarily dismissed, the tracker shows, though about 21% have yet to be fully decided.

CRO, a Texas-based company that operates eateries including Ill Forks, El Chico and Cantina Laredo, brought its pandemic coverage suit to New York under a choice-of-law provision in its policy that requires New York law to apply to coverage suits.

CRO claimed in its August 2020 complaint that, before the pandemic, its restaurants in the U.S. and the United Arab Emirates attracted thousands of daily visitors and served over 7 million meals annually. But the eateries lost all foot traffic and turned into “ghost towns” because of government shutdown orders, it said.

CRO is represented by Robin L. Cohen, Alexander M. Sugzda and Orrie A. Levy of Cohen Ziffer Frenchman & McKenna LLP.

Westport Insurance is represented by Aidan M. McCormack and Robert C. Santoro of [Westport Insurance](#).

The case is Consolidated Restaurant Operations Inc. v. Westport Insurance Corp., index number 450839/21, in the Court of Appeals of the State of New York.

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