

## NY High Court Takes Up COVID-19 Coverage Appeal

By **Ben Zigterman**

*Law360 (November 17, 2022, 9:05 PM EST)* -- New York's highest court agreed to take on a COVID-19 coverage appeal from a restaurant operator arguing that a lower court established a so-called tangible-alteration test that has no support from any top court decision.

On Thursday, the New York Court of Appeals granted Consolidated Restaurant Operations Inc. leave to appeal the First Judicial Department's decision affirming dismissal of the company's complaint against Swiss Re subsidiary Westport Insurance Corp.

CRO's suit asserted that the presence of the coronavirus on restaurant premises can cause physical loss or damage requiring coverage.

In its bid to get the case before the state's high court, CRO argued that its appeal raises novel issues of statewide importance for thousands of policyholders because the court has never addressed the meaning, scope and application of the words "direct physical loss or damage" in a property and business interruption insurance policy.

CRO said the Appellate Division court wrongly established a new tangible-alteration requirement under New York law that has no support in any decision from the high court.

"We are really pleased that the Court of Appeals has taken up this very important issue for New York policyholders across the state," CRO attorney Robin Cohen, of Cohen Ziffer Frenchman & McKenna LLP, told Law360.

An attorney for Westport, Aidan M. McCormack of DLA Piper, told Law360 that he hopes the Court of Appeals can put an end to COVID-19 coverage litigation.

"Thus far, 98 New York cases have addressed the issue and all, unanimously, have ruled there is no coverage for COVID," he said. "The Court of Appeals decision will, we hope, at last lay to rest the pandemic of litigation burdening her lower courts."



The New York Court of Appeals will take on an appeal by a restaurant operator hoping for COVID-19 business interruption coverage from its insurer. (iStock.com/demerzel21/)

CRO, a Texas-based company that operates eateries such as Ill Forks steakhouses, El Chico and Cantina Laredo, lost its appeal in April when the First Department became the first appellate court in New York to rule that the COVID-19 pandemic hadn't caused the type of damage that would be covered.

In August 2021, New York State Supreme Court Justice Jennifer G. Schechter dismissed CRO's \$50 million suit, joining a chorus of state and federal judges in New York who have ruled that the presence of coronavirus particles at an insured business does not equal covered physical loss.

The company 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 more than 7 million meals annually. But the eateries lost all foot traffic and turned into "ghost towns" because of government shutdown orders, it said.

Scott Greenspan, a policyholder attorney with Pillsbury Winthrop Shaw Pittman LLP who is not involved with CRO's case, hailed the court's decision to take it up.

"It's a tremendous step by the court," he told Law360. "And it's an acknowledgment by New York's highest court that the physical loss or damage issue is an issue of major consequence that state highest courts all over the country are deciding. And it's an acknowledgment that there is a split in authority among state highest courts, where we see its neighboring court in Vermont going for policyholders."

In September, the Vermont Supreme Court revived Huntington Ingalls' lawsuit seeking coverage for losses it suffered during the COVID-19 pandemic, becoming the first state high court to side with policyholders in such cases.

High courts in Delaware, Washington, Oklahoma, Massachusetts, Iowa, Wisconsin and South Carolina have sided with insurers in COVID-19 coverage fights, with most finding that losses from shutdown orders aren't covered. The Massachusetts, Wisconsin and South Carolina justices went further, ruling that businesses didn't have coverage for losses caused by the presence of the virus at their premises.

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 DLA Piper.

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.

The underlying case is Consolidated Restaurant Operations Inc. v. Westport Insurance Corp., case number 2021-02971, in the Supreme Court of the State of New York, Appellate Division, First Judicial Department.

--Additional reporting by Joyce Hanson, Eli Flesch and Emily Enfinger. Editing by Emma Brauer.