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Louisiana Covid BI ruling seen as outlier, NJ court reverses similar decision

Eileen AJ Connelly June 23, 2022

The ruling by a Louisiana appeals court in favor of a New Orleans restaurant seeking business interruption coverage for forced closures under the state's Covid lockdown measures counters every appellate ruling on the issue and is unlikely to impact similar cases in other states, sources said.

The Louisiana case came to light as the state's Fourth Circuit Court of Appeal ruled in a 3-2 split decision last week that the language in policies written for restaurant Oceana Grill was "ambiguous", and that Covid-19 should be viewed as physical loss or damage to the insured property, overturning a lower court ruling that the BI policy did not apply.

The ruling reversed a verdict in favor of several unnamed Lloyd's underwriters, who argued that contamination as a result of Covid-19 did not amount to direct physical loss or damage, as required for BI losses.

They also argued that the restaurant was able to continue take-out and delivery service, so it was not completely shut down.

Yet, the 3-2 decision in the Oceana Grill case was not as definitive as it appeared, said Michael Menapace, an insurance lawyer with the firm Wiggin and Dana.

Menapace explained that one of the three judges who joined the majority decision did not support the reasoning behind it. "Not even a majority of the judges on the panel were buying into the rationality of the decision," he said.

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Ryan Maxwell, Hurwitz Fine

The attorney also noted that the decision is not binding on other cases in Louisiana. "It's not precedential because of Louisiana Code, and not binding on federal courts applying Louisiana law," he said.

It will also likely be appealed to the Louisiana Supreme Court, Menapace predicted.

"I think this court has found an ambiguity where it doesn't exist," agreed Ryan Maxwell, an attorney with the firm Hurwitz Fine in Buffalo, New York.

Maxwell said the case reminded him of a decision handed down amid litigation regarding flood claims after Hurricane Katrina, when an intermediate appellate court upheld coverage for thousands of claims. That ruling was later struck down by the state's high court.

"Obviously in this situation, we have decisions across the country," Maxwell said. "Numerous jurists and judges have articulated well-reasoned decisions opposite this decision," often based on the same policy language.

"Across the country, there have been numerous decisions that have identified the problem with this reasoning," Menapace said. "The properties are not uninhabitable."

"Really, what we have is a public health concern, trying to keep people away from each other; it has nothing to do with the property's habitability," he added.

BI coverage denied for similar case

In fact, a New Jersey appellate court on Thursday overturned a similar decision and denied BI coverage for an Atlantic City casino, a case that Menapace was involved in.

The ruling by the Superior Court of New Jersey appellate division denied coverage to AC Ocean Walk LLC, which operates the Ocean Casino Resort in Atlantic City.

The decision said that the casino could not claim direct physical loss or damage of the property from the coronavirus, a factor that all of its policies required to trigger coverage.

Restaurants and bars have filed 751 Covid BI cases, or 36% of the 2,095 cases filed seeking BI coverage during the pandemic, according to the University of Pennsylvania Covid Coverage Litigation Tracker. It also shows that cases over coverage requiring physical loss or damage have been decided in 13 states, with only Louisiana ruling in favor of the insureds.

Maxwell predicted that the Louisiana ruling will prompt many other companies to file claims in that state. “It’s certainly something that’s going to be run up the flagpole pretty quick,” he said.

But Menapace said that the potential for the Louisiana case to be overturned by the state’s high court, combined with the fact that it does not set a precedent under state law, “is likely going to have limited impact”.

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