10th Circuit says COVID-19 not a basis for Aspen restaurant's insurance claim

Colorado Politics

COVID-19 did not cause an Aspen restaurant to suffer income losses that entitled it to compensation from its property insurer, the federal appeals court based in Denver ruled on Tuesday.

L'Hostaria, a since-closed restaurant, filed suit against The Cincinnati Insurance Company in December 2020, alleging it lost approximately $40,000 per month due to pandemic-related closures or alterations to its operations. Under its policy, Cincinnati would compensate for L'Hostaria's reduced business income if there was a direct loss to restaurant property — meaning "accidental physical loss or accidental physical damage."

The novel coronavirus, argued the restaurant, settled on surfaces and made its premises unsafe, causing it to lose its full physical use of the property. But a three-judge panel of the U.S. Court of Appeals for the 10th Circuit disagreed that the presence of the coronavirus could form the basis for an insurance claim.

"We note that every circuit to have addressed this question has found COVID-19 does not cause physical loss or damage under similar policy language," wrote Judge Timothy M. Tymkovich in the panel's Jan. 3 opinion. "For coverage, the loss or damage itself must be physical, not simply stem from something physical."

The case generated interest from outside groups representing both insurers and policyholders, with insurance companies worrying about the financial hit if they were required to cover losses stemming from public health measures, and policyholders arguing the industries' continued profits during the pandemic belied any monetary concerns.

In December 2021, the 10th Circuit addressed the issue in a similar case arising from Oklahoma, in which

Goodwill Industries claimed it suffered a “direct physical loss” of its own property when it shut down stores in compliance with public health orders.

“It did not,” wrote Judge Scott M. Matheson Jr., who also sat on the panel that decided L’Hostaria’s appeal. A physical loss involves “immediate and perceptible destruction or deprivation of property,” he clarified. “Goodwill never lost physical control of its buildings or merchandise from its stores. It thus was not deprived of its property.”

Because Goodwill’s case hinged on Oklahoma law and L’Hostaria’s implicated Colorado law, the restaurant argued its appeal deserved a different outcome based on the Colorado Supreme Court’s interpretation of physical losses.

In 1968, more than 50 years before the COVID-19 pandemic, the court decided *Western Fire Insurance Company v. First Presbyterian Church*. The Littleton Fire Department closed a church building because gasoline infiltrated the soil around it. The leak contaminated the interior of the church, “making the same uninhabitable and making the use of the building dangerous.”

At the time, the Supreme Court acknowledged that the inability to use the church might not qualify as a “direct physical loss” on its own. However, the saturation of gasoline into the church had rendered the entire building dangerous, meaning the property insurance company could be held liable for a claim.

“*Western Fire* and this case similarly involve direct physical loss to property caused by a physical substance that could be cleaned or removed and that did not cause any alteration of property visible to the naked eye, in tandem with a shutdown order by a public authority,” attorney Bradley A. Levin wrote to the 10th Circuit. “Like the gasoline fumes in *Western Fire*, the COVID-19 virus contaminated the property owned by L’Hostaria, rendering it unsafe and dangerous.”

Previously, U.S. District Court Judge William J. Martínez dismissed the restaurant’s lawsuit, declining to use *Western Fire* as a guidepost. An “alteration of the structure” was not present in L’Hostaria’s situation, he believed.

“The overwhelming majority of courts to address the issue have determined that potential viral contamination is not physical damage, given that it does not alter the structure of the insured

property," Martínez wrote in a September 2021 order.

On appeal, Cincinnati described the restaurant's insurance policy as covering income losses only for physical damage, and solely during the time need to repair or replace damaged infrastructure. That did not apply to L'Hostaria's modified operations under COVID-19 protocols, in which the alleged damage amounted solely to coronavirus particles on surfaces.

"My first real job in life was as a dishwasher at a steakhouse. And one of the things I had to do every night was mop the floor," attorney Daniel G. Litchfield told the 10th Circuit. "Mopping the floor never occurred to me to be a repair of direct physical loss or damage to the floor. I was cleaning the floor. That's essentially what we're dealing with here."

The American Property Casualty Insurance Association, which represents insurers, submitted a brief in support of Cincinnati, warning that a decision forcing insurance companies to compensate for income losses in the wake of public health measurers could threaten their solvency and their ability to cover other claims. But United Policyholders, which advocates for insurance consumers, deemed the industry's argument a scare tactic, noting insurers turned a profit even in 2020.

The 10th Circuit panel agreed L'Hostaria's policy did not cover lost income due to COVID-19. In contrast to the *Western Fire* case, the virus did not render the restaurant "uninhabitable." In reality, L'Hostaria resumed serving customers as soon as public health orders allowed.

"The gasoline in *Western Fire* led to a total physical loss of use; the church could not use the building until the gasoline was cleaned up," Tymkovich wrote. "*Western Fire* establishes that in Colorado there may be a total physical loss when property is rendered unusable or uninhabitable, a conclusion in line with other jurisdictions."

L'Hostaria closed in late 2021, after the owner received an offer to sell, the Aspen Daily News reported.

The case is *Sagome, Inc. v. The Cincinnati Insurance Company.*