

Bars and restaurants lose COVID insurance decision at Wisconsin Supreme Court

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Bars and restaurants that counted on business insurance to help cover major losses from 2020 COVID-19 shutdowns are out of luck, the Wisconsin Supreme Court has found.

To the layperson, the forced closures due to the pandemic would seem to meet the definition of a “business interruption” under policies that cover it, but the high court agreed with an insurance company that only interruptions from physical damage trigger coverage. It also rejected a claim COVID contaminated a business’ property, which could have led to coverage under another provision.

Wednesday’s unanimous decision reversed a Milwaukee judge’s ruling that a lawsuit by 17 businesses against Society Insurance could proceed. Colectivo Coffee Roasters was the lead plaintiff. Society said the case should be dismissed because its policy did not cover the COVID-related losses.

According to briefs in the case supporting the plaintiffs, courts in about half the states that have considered the issue have found in favor of policyholders, in what has been only the first trickle of an expected flood of litigation.

In the federal court system, five of 13 appellate circuits — including the Seventh Circuit, which covers Wisconsin — have sided with insurers. Those rulings conclude that most policies only cover lost income from the kind of interruptions — fires, explosions, catastrophes — that physically damage a business’ property.

Wednesday’s ruling from the Wisconsin Supreme Court says “the overwhelming majority” of other courts to address the issue agree that COVID-19’s presence does not amount to a physical loss or damage to property.

A federal court in Illinois is currently handling dozens more cases against Society from around the country, combined into a multidistrict litigation. Society made the same arguments against coverage in seeking to have that action dismissed, but the Illinois federal court denied the request.

The Wisconsin Supreme Court decision called that judge's ruling in error as well.

The Tavern League of Wisconsin, The Restaurant Law Center and a group called United Policy Holders filed "friend of the court" briefs in the case in support of Colectivo's position. United Policy Holders argued that under Wisconsin law, property can suffer damage and loss without being altered as it would be in a fire, flood or explosion.

"The Court should not be swayed by self-serving warnings about ruining the insurance industry—insurers make these claims after every market shock, and they are always overstated," the United Policy Holders brief reads.

According to The Restaurant Law Center, some 13,000 restaurants across Wisconsin had sales of \$10.7 billion and employed about 280,800 people before the pandemic.

Government orders that made restaurants close or dramatically alter their operations led to huge losses. They should be covered by the "all risk" policies the restaurants paid high premiums to maintain, according to the center.

"Society insured Plaintiffs as functioning and operational bars and restaurants, but because of Covid-19 and the Governor's Orders, Plaintiffs suffered the insurable loss of use of the normal fully functioning operations of these covered properties," wrote the plaintiffs in their own brief.

The court, however, saw a clear distinction for when coverage would apply.

"Thus, for a harm to constitute a physical loss of or damage to the property, it must be one that requires the property to be repaired, rebuilt, or replaced—that is, it must alter the property's tangible characteristics," Justice Rebecca Dallet wrote for the court.

“So although Colectivo could not use its dining room for in-person dining for a period of time, the dining room was still there, unharmed—it was not physically lost or

damaged,” she wrote.

“Without such a harm, the policy’s business-income and extra-expense provisions do not apply.”

Jay Urban, an attorney for the plaintiffs, called Wednesday’s ruling unfortunate and disappointing, and said the court “took a narrow view of coverage on a unique insurance policy that should have covered the bar and restaurant owners of Wisconsin, and held against not only the business owners but the restaurant association and tavern league who agreed with our interpretation of this Society policy.”