New York court to hear critical COVID business insurance case

Insurance Business

New York's highest court is set to preside over a restaurant's COVID-19 business interruption case that could have widespread ramifications for businesses and insurers in the state and further afield should the court veer away from a US-wide trend of insurer pandemic business income victories.

Oral arguments in the case, which pits restaurant group Consolidated Restaurant Operations (CRO) against Swiss Re's Westport Insurance over whether the insurer is on the hook to pay out for business interruption losses due to closures and disruption during the COVID-19 pandemic, are set to be heard by the New York Court of Appeals on Wednesday afternoon.

CRO has sought to claim for COVID-driven closures under its Westport Insurance all-risks policy, said to include a US$50 million per occurrence limit for business interruption coverage, which did not contain a virus exclusion.

New York case comes as COVID-19 business interruption suits have overwhelmingly gone insurers' way Policyholders looking to dispute denied COVID claims have faced an uphill battle. Across the US, including where policies have not specifically excluded viruses or pandemic, decisions in COVID-19 business interruption cases have largely gone insurers' way.

As per the American Property & Casualty Insurance Association, pandemic-related claims have been rejected by every federal circuit court except the D.C. Circuit; by state high courts in Connecticut, the District of Columbia, Iowa, Louisiana, Maryland, Massachusetts, Nevada, New Hampshire, Ohio, Oklahoma, South Carolina, Washington, and Wisconsin; by intermediate appellate courts in several other states; and by the majority of state and federal trial courts.

There have been scant triumphs in clearing court system hurdles for policyholders and big wins have

been few and far between.

In 2022, Baylor College of Medicine secured a landmark win in its Texas trial against Lloyd's underwriters, ACE American Insurance, and XL Insurance America, when a jury awarded the medical school and research centre more than US$48 million. The case has thus far proved a trial outlier.

New York Court to puts its stamp on revived pandemic business interruption case

Now, whichever way it might lean, New York's highest court will look to puts its stamp of approval on the COVID business income issue.

With the case initially having been dismissed by The First Judicial Department before being revived to face the appeals court, CRO will be hoping its case can flip the switch on the broad trend of US federal and state claim denials.

Commentators say New York State business income COVID case could have far-reaching ramifications
If it does, given New York State's (population 19.6 million) status as a key insurance law battleground and its choice-of-law provisions, commentators have suggested that any pro-CRO ruling could prove a costly blow to insurers and a boon for businesses, both within and outside the state, if others were to follow suit.

Among amicus brief filers to the hotly contested case, the Metropolitan Transport Authority (MTA) and associated subsidiaries have claimed to have "billions of dollars of insurance coverage at stake" for losses incurred during the pandemic.

"There are many policyholders whose cases and claims will be tied to this decision, even though they may not be based in New York, incorporated in New York, didn't have a New York broker, or didn't buy insurance from a New York insurance company," said Nick Insua, partner at Reed Smith, which has filed amici briefs in the case on behalf of transit authorities, New York restaurants, and United Policyholders.

"Their policy will still be governed by New York law, and this is not only for US policies, but also a lot of international insurance and reinsurance policies have New York choice of law provisions," Insua told Insurance Business.

Insurers and businesses square off on physical loss and pandemic intent
Key battlelines have been drawn around whether COVID-19 caused physical losses – CRO, represented by Cohen Ziffer Frenchman & McKenna, is set to argue that the virus physically permeated its properties and impaired functionality – and, as ever, whether pandemics were ever intended to be covered by insurers more broadly.

Restaurant and hospitality groups have accused insurers of “crying wolf” over what insurance carriers say would be the devastating impact to the insurance sector if most COVID-19 pandemic business income cases were found to be covered.

In an emailed statement, APCIA senior vice president and general counsel Claire Howard set out insurers’ stance that property policies are only intended to cover “actual physical loss”, such as fire or tornado.

“These policies are not intended to cover diseases or pandemic-related losses,” Howard said. “In the vast majority of cases, insurers did not price policies to include such coverage, and policyholders did not pay for it.”

In New York alone, APCIA has estimated that, were coverage to be mandated, business interruption losses would range from US$5.8 billion to US$21.5 billion per months for businesses with under 250 employees. This is at least 18 times the US$300 million total monthly premiums written for commercial property in the state, according to an APCIA and National Association of Mutual Insurance Companies Amici brief.

Across the US, three-quarters of small businesses lost revenue during the first year of the pandemic, with the average loss at 30%, according to an October 2020 WISS survey.

Around 40% of these would have had business interruption coverage, the National Insurance Association of Commissioners (NAIC) said in December of that year, with 83% of policies having had a virus, disease, or pandemic exclusion according to NAIC figures.

“Judicial decisions or legislative enactments to mandate retroactive business interruption coverage to include COVID-19 losses not in contracts would undermine the stability of the insurance industry and its ability to pay claims on all existing insurance policies,” Howard said.

COVID-19 business interruption picture – a mixed picture for insurers outside the US
Outside of the US, insurers have had mixed success with the courts on COVID-19 business interruption arguments and faced varying degrees of regulatory intervention on pandemic cover.

UK insurers face continued legal action including from Premier League clubs

As of March 2023, UK insurers had paid out in excess of £1.4 billion following regulatory intervention from regulator the Financial Conduct Authority (FCA) via a Supreme Court test case that determined some but not all policies should pay out.

It's a figure that could rise substantially after, in 2022, the High Court ruled that AXA was liable to pay £4.4 million to restaurant group Corbin & King for losses sustained over multiple incidences of COVID lockdowns.

While a high-profile multi-million-pound case from pub chain Stonegate settled out of court, insurers face the prospect of a legal clash with Premier League football clubs over COVID-19 business interruption payouts they have claimed they are owed for multiple lockdowns.

With QBE having been told to pay out more than £380,000 total to 86 companies for delayed pandemic-related insurance payments, one loss assessor recently claimed that UK insurers could face a further £1.6 billion delay interest bill, The Guardian reported.

Australia's COVID-19 business interruption test cases saw mixed results
An Australian test case heard in the New South Wales Court of Appeal in 2020 ruled in favour of policyholders and set out that insurers were unable to rely on Quarantine Act exclusions to prevent payouts. However, policyholders were dealt a blow when a second Federal Court test case went largely insurers' way, with insurers not liable to indemnify policyholders in nine out of 10 tested instances.

The Australian Financial Complaints Authority (AFCA) issued its first COVID-19 business interruption complaint decisions last May, when it had around 200 related complaints outstanding, with results having been described as "largely good news for insurers" by Clyde & Co partner Gareth Horne.

Canadian insurance companies face COVID claim class actions
Canadian insurance companies, meanwhile, have thus far found themselves for the large part unscathed

by legal action emerging from businesses' COVID-related closures and loss of income claim denials.

Class actions against insurers have been working their way through the Canadian provincial courts. Last November, the Ontario Superior Court of Justice found in insurers' favour on common issues in a class action lawsuit led by Workman Optometry Professional Corporation.

UK-headquartered Aviva, Canada's second largest P&C insurer, faces three class action suits that have yet to be ruled on, including one from 100s of branches of the Royal Canadian Legion.

Canadian provincial courts have also been called on to rule on aggregate issues, with an Ontario appeal court having found in 2022 that daycare group Helping Hands was entitled to payouts from insurer Northbridge, totalling US$350,000 for seven locations affected by pandemic-driven loss of income.