

[Trade Group Backs Legal Sea Foods In Virus Insurance Appeal](#)

Law360

Law360 (May 11, 2021, 4:11 PM EDT) — [Legal Sea Foods](#)' quest to cover losses from the COVID-19 pandemic earned the backing of nonprofit insurance trade group United Policyholders, which told the First Circuit on Monday that a lower court was wrong to dismiss the restaurant chain's suit.

United Policyholders, which has backed other coronavirus-related insurance lawsuits around the country, said U.S. District Judge Nathaniel M. Gorton was too narrow in his definition of "direct physical loss or damage" to the nearly three dozen seafood restaurants that had to shutter at the outset of the pandemic in March 2020.

"In reaching these conclusions, the district court disregarded the insurance company's decision not to include a virus exclusion in a policy sold in March 2020," United Policyholders said, "as well as evidence that the insurance company (1) specifically stated its intention to provide coverage for virus-caused losses and (2) knew that restaurants expected to have coverage for business interruptions caused by virus and bacteria."

Legal Sea Foods sued Strathmore Insurance Co., claiming its insurer should be on the hook for losses caused by the popular restaurant chain having to shut down 32 of its restaurants under government orders.

The chain is pursuing the case on two fronts. In addition to appealing Judge Gorton's ruling to the First Circuit, it has also pitched the federal appellate court on asking the [Massachusetts Supreme Judicial Court](#) to **clarify the meaning** of "direct physical loss of or damage to" property.

In its brief to the First Circuit on Monday, United Policyholders argued that insurance companies were on notice before the pandemic began that viruses and diseases could be a cause of "direct physical loss or

damage” to a property if they rendered the space unsafe for people.

“The district court’s misinterpretation of ‘direct physical loss of or damage to’ property in this specific case was compounded by disregarding controlling pre-pandemic Massachusetts authorities and the strong majority of cases nationwide that previously accepted that an event or condition which renders property unfit and unsafe for its intended use causes ‘loss’ and ‘damage’ to that property,” the brief stated.

In a March ruling, Judge Gorton held that Legal Sea Foods didn’t actually allege the coronavirus was present at its locations and that a physical loss required “some kind of tangible, material loss.”

For 50 years, Legal Sea Foods said, courts have found a physical loss occurs when a policyholder’s property is uninhabitable or unfit for its intended purpose. And physical damage happens when property is physically altered to the point it adversely affects functionality, the restaurant chain said.

“That is exactly what Legal Sea Foods alleged here: The virus, residing in indoor air and on surfaces, caused Legal Sea Foods’ property to become physically unfit for human occupancy,” the restaurant said in a brief to the First Circuit.

United Policyholders’ Executive Director Amy Bach told Law360 on Tuesday that Judge Gorton took too narrow a view of the issue, citing past Massachusetts law that said not being able to see a threat like an airborne particle does not mean it is not present. She said that the approach the judge took seemed “outcome-oriented.”

“The insurer did not have a virus exception, they chose not to put one in, so I think the judge should have had ample basis to let the suit proceed,” Bach said.

United Policyholders said in its brief that it has been backing insureds since the pandemic began. It told the Eleventh and Seventh circuits [in April](#) that businesses like R.T.G. Furniture Corp. — better known as [Rooms To Go](#) — and Sandy Point Dental PC are covered for government shutdown orders issued to thwart COVID-19. Bach said judges around the country might be being swayed by an aggressive publicity campaign by insurance companies that mirrors what took place after other major events like the Sept. 11, 2001, terror attacks.

The companies “conveyed this message that pandemics are uninsurable because of their breadth and extent, that ‘we can’t handle it as an industry,’” Bach said. “I feel like courts really hear that and have rushed to judgment to try to knock the claims out before they even get to first base.”

Counsel for Legal Sea Foods did not immediately return comment requests Tuesday. A Strathmore representative said the company does not comment on litigation.