

Colectivo v. Society Reversed by Wisconsin Supreme Court

Jun 01 2022

Posted By: Christopher E. Avallone & Heidi L. Vogt

Practice Area: Insurance Coverage and Risk Management

Today, the Wisconsin Supreme Court, in a unanimous opinion authored by Justice Rebecca Frank Dallet, reversed a Milwaukee County Circuit Court decision that allowed a purported class action to proceed against Society Insurance seeking coverage for business income losses arising from the COVID-19 pandemic. The plaintiff, Colectivo Coffee Roasters, Inc., sought coverage for these losses under the business income, extra expense, civil authority and contamination coverages of its businessowners policy.

The Court ruled that neither the loss of use of an insured's property caused by COVID-19-driven governmental restrictions, nor the alleged presence of COVID-19 particles on the insured's premises caused a "direct physical loss of or damage to" covered property, a prerequisite to business income coverage. Starting with the plain text of the policy and established Wisconsin law, the Court reasoned that "loss" means that property is "destroyed or affected to such an extent that it cannot be repaired," while "physical damage is harm to the tangible characteristics of the insured property that does not rise to the level of a physical loss." Consequently, Colectivo's "loss of use" arising from governmental restrictions on in-person dining, was not a physical "loss." And, agreeing with a majority of courts nationwide, the Court ruled that the "presence of COVID-19 particles" did not cause "physical damage."

Next, relying on the plain text of the civil authority and contamination coverages, the Court concluded that there was no coverage because the governmental restrictions did not "prohibit" access to Colectivo's premises—the state expressly allowed businesses like Colectivo to operate for takeout service.

The Wisconsin Supreme Court joins both state and federal appellate courts nationwide in concluding that business losses resulting from the COVID-19 pandemic are not covered under property insurance policies.

Colectivo Coffee Roasters, Inc. v. Society Insurance, Case No. 2021AP463 (June 1, 2022)

von Briesen & Roper Legal Update is a periodic publication of von Briesen & Roper, s.c. It is intended for general information purposes for the community and highlights recent changes and developments in the legal area. This publication does not constitute legal advice, and the reader should consult legal counsel to determine how this information applies to any specific situation.

