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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Calif. Panel Sides With Restaurant After COVID-19 Settlement

By **Elizabeth Daley**

Law360 (January 3, 2023, 7:03 PM EST) -- A San Francisco restaurant's virus endorsement in its insurance policy must apply, because otherwise the provision would be virtually illusory, a California appeals court ruled in siding with the restaurant after a settlement in its bid for COVID-19-related business interruption coverage.

In the December **opinion**, issued after John's Grill **agreed to dismiss** its case against its insurer, justices explained they were not dismissing the case against Sentinel Insurance Company Ltd. and instead partly publishing an opinion on the matter because it was in the public interest, as cases presenting similar issues were likely to recur.

While many courts have offered opinions on virus-related cases, Associate Justice Jon B. Streeter wrote that "nearly all of these cases turn on standard form language that was not customized in any material way by modifying endorsement."

"The twist in this case is that Sentinel's policy has customized trigger-of-coverage language that is virus-specific," Justice Streeter wrote, explaining why the court decided to opine on this case and reached its particular conclusions.

The panel, consisting of Presiding Justice Stuart R. Pollak and Associate Justice Jeremy M. Goldman in addition to Justice Streeter, found that though there was a virus exclusion in the restaurant's policy, the provision was in conflict with the policy's virus endorsement and so the endorsement would take precedence.

"What we decide today does no more than follow the established principle that we must interpret the provisions of a contract to avoid rendering the instrument 'illusory,'" Justice Streeter wrote.

"If the pervasive presence of a virus on the interior surfaces of John's Grill's premises led patrons to cease coming to its restaurant for a period of time due to the fear of contracting a potentially fatal illness — which is what is alleged here — we believe a reasonable insured would also have an expectation of coverage...for the resulting loss of its ability to use the restaurant for its intended purpose."

According to John's Grill attorney, Brian Danitz, many other restaurants also hold the Hartford Financial Services Inc. policy sold by Sentinel Insurance Company Ltd. and this opinion was therefore important.

"Several California federal courts had already issued decisions that would have been different had this case already been out there," he said. "This decision does clarify California law."

Despite the significant impact of the pandemic, businesses across the country have had challenges obtaining insurance coverage.

In similar cases, state high courts across the country, including those in South Carolina, Massachusetts, Iowa and Wisconsin, have sided with insurers.

Meanwhile, federal district courts around the country have permanently tossed about 51% of the 1,431 suits from policyholders against their insurance companies seeking pandemic loss-related

coverage, according to Law360's **COVID-19 Insurance Case Tracker**. Another 20% of the pandemic insurance suits filed in federal courts have been voluntarily dismissed, the tracker shows, with about 26% yet to be fully decided.

Danitz said he was surprised that the court decided to issue an opinion though his client had agreed to dismiss the case after an undisclosed monetary settlement was reached and called the move "extremely rare." Still he said, "I think that was absolutely the right result here."

According to Danitz, it was notable that the court decided to adopt the standard of "virtually illusory" coverage rather than allowing the argument that the coverage wasn't completely "illusory" to prevail. He said that the insurer could show that in some bizarre and outlandish circumstances, coverage might apply, but he was glad the court didn't buy those arguments.

"Essentially Sentinel was saying 'we will give you coverage when pigs fly' and that cannot be an objectively reasonable way to interpret insurance coverage," Danitz said, referring to a Nebraska case cited by the insurer in which pigs became sick because of a windstorm transmitting a virus from a neighboring farm.

The court agreed with Danitz, writing that insurance coverage should not apply only to such unlikely circumstances as to render it virtually useless: "Imaginary exercises involving pigs caught in windstorms and cows encountering wild animals will not do," Judge Streeter wrote.

"The test for illusory coverage must focus on objective reality and the insured's reasonable expectations of coverage," he continued.

Danitz said he will represent John's Grill as the case has been remanded back to the trial court, but he could not say more about what his client was hoping to accomplish in the trial court, as that might reveal aspects of the settlement which he was not allowed to discuss.

The grill brought its suit against Sentinel and Hartford in April 2020 after it was denied insurance coverage for the shutdown of its business due to COVID-19.

Representatives of the insurer declined to comment on the case.

John's Grill Inc. is represented by Nanci Eiko Nishimura, Brian Danitz, Andrew F. Kirtley and Julia Qisi Peng of Cotchett Pitre & McCarthy LLP.

The Hartford Financial Services Group Inc. is represented by Anthony J. Anscombe of Steptoe & Johnson LLP and Tadhg Dooley and David R. Roth of Wiggin and Dana LLP.

The case is John's Grill Inc. et al. v. Hartford Financial Services Group Inc., case number A162709, in the California Court of Appeal, First Appellate District.

--Editing by Nick Petrucio.