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NYC Hotel Wants 2nd Circ. To Revive Virus Coverage Suit

By **Eli Flesch**

Law360 (May 5, 2022, 9:01 PM EDT) -- The owners of a New York City hotel told the Second Circuit that its pandemic losses are covered by a communicable disease provision that a district court improperly limited when ruling that the hotel didn't show covered physical damage.

The Brooklyn-based St. George Hotel **said Wednesday** that the communicable disease provision, working in concert with coverages for "attraction properties" that help the hotel's business, broadened the amount of properties that could sustain covered losses. The hotel, which is currently being used to provide housing for over 1,000 students from nearby colleges, is seeking to revive its suit against Affiliated FM Insurance Co.

"The schools, which attracted students to the housing offered at the St. George Hotel, shut down as a result of the virus. As such students no longer needed to utilize the St. George facilities, directly leading to plaintiffs' loss in revenue," the hotel owner said.

Joshua L. Mallin, an attorney for St. George from Weg & Myers PC, told Law360 that the communicable disease coverage afforded in the policy didn't depend on direct physical loss or damage to the hotel's property. St. George told the Second Circuit that its appeal wasn't seeking to challenge the appellate court's previous findings on the physical damage question, which has typically doomed policyholders in federal courts.

"The question in this appeal is whether the communicable disease endorsement extends to the attraction properties," Mallin said in an interview Thursday.

The district court's mistake was that it didn't extend that endorsement to those properties, St. George said in its 29-page brief. The communicable disease coverage was an extension to the base business interruption coverage, the hotel noted.

The attraction property extension offered coverage for physical loss or damage to insured property that attracts business to a "described location" within 1 mile, according to policy language included in court documents. But in a **December ruling**, U.S. District Judge Diane Gujarati said, "The communicable disease extension does not reference the attraction property extension at all, much less include language suggesting that it in any way incorporates the attraction property extension."

The federal court outlook for policyholders seeking coverage for their pandemic losses has been challenging. Also on Wednesday, the owner of a Manhattan Italian restaurant lost its bid for coverage when a federal judge said the eatery didn't allege direct physical loss or damage. U.S. District Judge Ronnie Abrams said the Second Circuit's rulings in pandemic coverage cases made it clear that was a precondition to any coverage.

So echoed Lee S. Siegel, an attorney from Hurwitz & Fine PC representing the winning carrier, Lancer Insurance Co. He told Law360 that the case law in both state and federal courts have reinforced the notion of direct physical loss being a coverage requirement.

"The Second Circuit has clearly set forth that under a standard commercial property policy, that

claims of COVID-19 business income loss aren't covered," Siegel said.

In her decision, Judge Abrams wrote that the policy in the Second Circuit case controlling Campagnola's suit was "materially identical" to the eatery's policy. That appeal, [10012 Holdings Inc. v. Sentinel Insurance Co.](#), was decided last year.

Federal district courts around the country have permanently tossed about 46% of the 1,373 suits from policyholders against their insurance companies seeking pandemic loss-related coverage, according to Law360's **COVID-19 Insurance Case Tracker**. Another 17% of the pandemic insurance suits filed in federal courts have been voluntarily dismissed, the tracker shows, though about 34% have yet to be fully decided.

Counsel to Affiliated FM and Campagnola didn't immediately respond to requests for comment, and neither did representatives of the parties in both suits.

The St. George Hotel is represented by Joshua L. Mallin and Dennis T. D'Antonio of Weg & Myers PC.

Affiliated FM is represented by Robert F. Cossolini and Edward T. Hagan of Finazzo Cossolini O'Leary Meola & Hager LLC.

Campagnola is represented by Christopher A. Seeger and Stephen A. Weiss of Seeger Weiss LLP and by Lindsey H. Taylor and James E. Cecchi of Carella Byrne Cecchi Olstein Brody & Agnello PC.

Lancer Insurance Co. is represented by Dan D. Kohane and Lee S. Siegel of Hurwitz & Fine PC.

The cases are St. George Hotel Associates LLC et al. v. Affiliated FM Insurance Co., case number 22-114, in the U.S. Court of Appeals for the Second Circuit, and Camp 1382 LLC v. Lancer Insurance Co., case number 1:20-cv-03336, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Ganesh Setty. Editing by Nick Petruncio.