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Starr Surplus Lines Ins. Co. v. Dist. Ct., 139 Nev. Adv. Op. 32 (Sep. 14, 2023)¹

COMMERCIAL PROPERTY INSURANCE DOES NOT COVER DAMAGES RESULTING FROM THE COVID-19 PANDEMIC

Summary

The Nevada Supreme Court analyzed whether Starr’s commercial property insurance policy covered AGB’s economic losses resulting from the COVID-19 pandemic. The Court ruled that it did not. A commercial property insurance policy does not cover economic losses resulting from the COVID-19 pandemic because the COVID-19 virus does not have the requisite direct and physical impact on property that the insurance policy covers. Additionally, Starr’s commercial property insurance policy specifically defined virus in their policy exclusion therefore excluding damages resulting from COVID-19 from being covered.

Background

JGB Vegas Retail Lessee, LLC (hereinafter “JGB”), owns and operates the “Grand Bazaar Shops” (hereinafter “the Shops”) on the Las Vegas Strip and is one of Starr Surplus Line Insurance Company’s (hereinafter “Starr”) policyholders. JGB suffered significant economic losses when the COVID-19 pandemic forced stores to shut down. JGB filed an insurance claim with Starr seeking coverage for lost income, extra expenses, and any applicable coverage because of the forced shutdown due to the pandemic. Starr had concerns over whether coverage existed under their policy.

Starr’s commercial insurance policy covers “all risks of direct physical loss or damage to covered property while at insured locations...loss directly resulting from necessary interruption on the insured’s normal business operations caused by direct physical loss or damage to real or personal property...[and when] access to such described premises is specifically prohibited by order of civil or military authority.”² Starr’s policy also contains many exceptions including damages from pollution and contamination which are defined as “any solid, liquid, gaseous, or thermal irritant or contaminant including, but not limited to, smoke, vapor soot, fumes, acids, alkalis, chemicals, virus, waste”³ and more.

JGB filed suit against Starr for breach of contract, declaratory Judgement, violations of Nevada Unfair Claims Practices Act⁴, and breach of the covenant of good faith and fair dealing. JGB alleged that it was highly likely that COVID-19 was present at the Shops and therefore damaged the property JGB leased to its tenants. Starr denied JGB’s claims. Upon discovery it was determined that the COVID-19 virus is a physical particle that can remain on property for several days, there were confirmed cases of COVID-19 at the Shops, the likelihood that infected individuals contaminated the property, and that JGB ensured various protected measures were put in place to present the spread of the virus.

Starr moved for summary judgement arguing that the presence of COVID-19 did not amount to the required direct physical loss or damage the policy covers as a matter of law. They

¹ By Elizabeth Haigh.

² Starr Surplus Lines Ins. Co. v. Dist. Ct., 139 Nev. Adv. Op. 32, 3-4 (Sep. 14, 2023).

³ *Id.* at 5.

⁴ NEV. REV. STAT. § 686A.310 (2021).

also argued that the loss of use of the property does not qualify because it is solely economic loss. Finally, Starr asserted that JGB's loss was precluded by the policy's pollution and contamination exclusion. JGB responded that undisputed scientific evidence that the COVID-19 virus is a physical particle that cannot be removed by routine cleaning shows how the virus both damaged and rendered the Shops unsafe as to amount to direct physical loss or damage.

The district court granted summary judgment in part and denied it in part. The court ruled that the question of whether the COVID-19 virus physically alters property in order to trigger the insurance policy is a matter of fact to be determined at trial. The district court also did not determine if the COVID-19 virus is precluded by the pollution and contamination exclusion. Although the district court rejected JGB's extra contractual claims as matter of law and granted summary judgment in Starr's favor on those claims. Following this Starr filed an instant writ petition challenging the denial of summary judgment on the remaining claims and the Nevada Supreme Court decided to hear the petition for a writ of mandamus.

Discussion

Starr's all-risk policy requires direct or physical loss or damage to the covered property, meaning coverage applies when there is a material or tangible destruction of or injury to the covered property itself.

Starr argues that direct physical loss or damage requires a demonstrable alteration or a change that alters the property's functionality or use. Conversely JGB argues that requiring a demonstrable physical alteration is too limiting and that a physical alteration force, such as COVID-19, that renders a property unusable or unsafe for its intended use is recoverable under the policy. The Nevada Supreme Court first assessed the insurance policy's text and aim to execute the intent of the parties. By looking at the plain meaning of direct, physical, loss, or damage the court analyzed both the definitions of each word and the grammar within the policy. The Court concluded that the language of the policy requires material or tangible destruction as a result of material or tangible harm to the property itself. The court analogized this to instances of damage or destruction created by fire, water, or smoke. The court found that these instances are all physical impacts that require repair or remediation, unlike this case.

The Court then analyzed the case law provided by JGB that addressed loss of use of property. The Court found that the situations presented in the case law necessitated some physical or disabling impact that harms the property. The Court further concluded that loss of use specifically depends on some essential harm or disablement of the property. They highlighted that physical loss provisions ask whether property experienced material or tangible harm or injury and not forced closure due to exogenous reasons.

Because the claimed losses stemming from the physical presence of SARS-CoV-2 virus do not fall within the ordinary meaning of the policy's direct physical loss or damage coverage as a matter of law, the district court erred in not granting summary judgment in Starr's favor.

The Nevada Supreme Court concluded that the district court erred in not granting Starr's motion for summary judgment because the physical presence of the COVID-19 virus does not fall within the ordinary meaning of the policy's coverage for direct or physical loss. Despite the scientific evidence provided in discovery, JGB failed to demonstrate how the Shops suffered tangible harm constituting direct physical loss or damage as covered by the policy. JGB

demonstrated the presence of the COVID-19 virus on the property but failed to show how the property was affected by the actual physical harm of the COVID-19 virus particles. The Court reasoned that if they were to adopt this logic then “every sneeze, cough, or even exhale” would constitute a qualifying harm.

The Court cited the Wisconsin Supreme Court’s earlier recent decision that “the presence of COVID-19 does not constitute a physical loss or damage to property because it does not alter the appearance, shape, color, structure or other material dimension of the property”⁵. The Court found that JGB’s argument that the COVID-19 virus is harmful in the air is unconvincing because it fails to show that the virus is harmful to the property specifically. The Court accepted the fact that the presence of the COVID-19 virus is harmful, but they highlight that it is harmful to people and not property.

The Court also found that JGB’s remediation efforts were not a coverable loss or damage either because such preventative measures are aimed to protect people and not to repair the property. They cited the fact that the Shops remained intact, functional, and unchanged despite the presence of the COVID-19 virus. The Court further argued that there have been cases in which losses are covered by a property becoming uninhabitable, but this case does not. In previous uninhabitability cases damages have been covered when the physical forces originate from the property itself. As the Court points out, the risk of the COVID-19 virus is dependent on the presence of people and not a defect of the property itself and therefore cannot be covered by the insurance policy.

In regard to the coverage under damages from civil or military provisions the court found coverages cannot exist in this case. The Court found that coverage under these provisions ensue from damage to property or perils within one mile of the shops as a direct result of loss by said perils. Furthermore, JGB’s evidence does not support that the Shops or property within one mile were subjected to the kinds of harm that these provisions cover as a matter of law. The evidence only shows economic loss sustained during a worldwide pandemic and not by direct physical loss or damage to the property.

The pollution and contamination exclusion also bars coverage because the policy explicitly and unambiguously defines “pollution or contamination” to include a virus.

The Court analyzed the plain text meaning of the pollution and contamination exclusion and found that it barred JGB from receiving coverage. There was a question of law as to whether virus as used in the pollutants and contaminants exclusion included the COVID-19 virus. The Court looked at the exclusion and the policy as a whole to refrain from making illogical conclusions. The Court highlighted that the definition of “pollutants or contaminants” in the policy undisputedly includes “virus”. JGB argued that the word virus is intended to excluded viruses originating from pollution, but the Court found this unpersuasive.

The Court cited to their previous decision in *Casino West* and said “[a]n exclusion ‘must be narrowly tailored so that it clearly and distinctly communicates to the insured the nature of the limitation, and specifically delineates what is and is not covered’⁶. In *Casino West* the Court held that a pollution exclusion was open to more than one interpretation and required insurers to

⁵ *Colectivo Coffee Roasters, Inc. v. Soc’y Ins.*, 974 N.W.2d 442, 447 (Wis. 2022).

⁶ *Century Sur. Co. v. Casino West, Inc.*, 130 Nev. 395, at 398 (2014).

plainly state outer bounds of an exclusion. The Court found that Starr had done so by explicitly listing “virus” as one of these exceptions. The Court found that *Casino West* was fundamentally different from this case. While the other listed substances may indicate traditional environmental pollutants the inclusion of the word “virus” bars the COVID-19 virus from being a coverable damage. A court interpreting the same exclusion in the Starr policy held that it excluded coverage for similar alleged damages⁷.

Given the policy inclusion expressly lists “virus” the Court was not prepared to say that it only refers to viruses stemming from environmental pollution. The Court also pointed out that many of JGB’s arguments consist of contamination cases and here the Court is analyzing a contamination exclusion. The Court concluded that the exclusions stand as an independent basis justifying summary judgement in Starr’s favor.

Conclusion

Ultimately, the Court concluded that the district court erred in denying summary judgment to Starr because JGB’s claims did not stand as a matter of law. JGB failed to prove the direct physical loss or damage to their property that is required under Starr’s commercial property insurance policy. Furthermore the court ruled that the COVID-19 virus is precluded by Starr’s pollution and contamination policy. The Nevada Supreme Court ordered the district court to vacate their order denying Starr’s motion for summary judgement on the breach of contract and declaratory relief claims. The Nevada Supreme Court therefore granted summary judgement in Starr’s favor.

⁷ Ford of Slidell, LLC v. Starr Surplus Lines Ins. Co., No. CV 21-858, 2021 WL 5415846, at *10-11 (E.D. La. Nov. 19, 2021).