

**In the Supreme Court of Nevada**

STARR SURPLUS LINES INSURANCE CO.,  
Petitioner,

*vs.*

THE EIGHTH JUDICIAL DISTRICT COURT  
of the State of Nevada, in and for the  
County of Clark; and THE HONORABLE  
MARK DENTON, District Judge,

Respondents,

and

JGB VEGAS RETAIL LESSEE, LLC,  
Real Party in Interest.

Electronically Filed  
Jul 15 2022 04:53 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**MOTION TO EXTEND DISTRICT COURT’S  
STAY PENDING WRIT PETITION**

Petitioner moves to extend the 21-day stay ordered by the district court below on July 11, 2022.

The underlying lawsuit seeks insurance coverage for COVID-related losses as “direct, physical loss or damage” under a policy from petitioner. There are many such cases in Nevada<sup>1</sup> and across the country.

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<sup>1</sup> See, e.g., *Nakash Showcase II LLC v. Federal Insurance Company* (EJDC Case No. A-21-829284-B); *Boyd Gaming v. Ace American Insurance Company* (EJDC Case No. A-21-834849-B); *Bloomin’ Brands*,

In the underlying matter, the district court denied summary judgment on coverage and held that the interpretation of the insurance policy was a matter of fact not ripe for summary judgment, despite Nevada authority holding that interpretation of insurance policies is a matter of law for the Court to decide. *See, e.g., Fed. Ins. Co. v. Coast Converters*, 130 Nev. 960, 965, 339 P.3d 1281, 1284 (2014); *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161, 252 P.3d 668, 672 (2011).

After the filing of this petition, on July 11, 2022, the district court granted a stay of proceedings for 21 days. *See* District Court Minutes, attached as Exhibit 1. Starr asks this Court to extend the district court's stay through the resolution of the petition.

**1. Because this Threshold Legal Issue is Presented  
in a Number of Pending Cases in Nevada,  
this Court Should Intervene and Order a Stay**

Not all insurance coverage cases are important enough to bother this court with a petition for extraordinary writ. But this one is.

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*Inc. v. ACE American Insurance Company* (EJDC Case No. A-21-830204-B); *Caesars Entertainment, Inc. v. ACE American Insurance Company* (EJDC Case No. A-21-831477-B); *Nevada Property 1 LLC v. Factory Mutual Insurance Company* (EJDC Case No. A-21-831049-B); and *Panda Restaurant Group v. Lexington Insurance Company* (EJDC Case No. A-22-849969-B). Undersigned counsel believe there are other cases in Nevada's district courts.

One of the circumstances to consider in taking a writ is “whether the resolution of the writ petition will resolve related or future litigation.” *See Torremoro v. Eighth Judicial Dist. Court*, 138 Nev., Adv. Op. 54, \_\_\_ P.3d \_\_\_, 2022 WL 2542022, at \*2 (2022) (quoting *Williams v. Eighth Judicial Dist. Court*, 127 Nev. 518, 525, 262 P.3d 360, 365 (2011)). This Court considers writs where the petition “will mitigate or resolve related or future litigation” or promote “judicial economy.” *Id.*; *see also Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997) (“The interests of judicial economy ... will remain the primary standard by which [the] court exercises its discretion.”).

This case is very much like *Williams*. There, an important issue of evidence arose in quite a number of “endoscopy” cases heading for trial before several different judges. This court heard—and resolved—those issues before any of the trials to preserve judicial economy.

So, too, here. The same threshold legal standard for coverage is presented in quite of number of coverage cases (some are set out in note 1) involving whether COVID can constitute direct, physical loss or damage so as to be covered. This court could prevent needless trial by

addressing that issue in advance, just as in *Williams*. That is why this Court should hear the petition and order a stay during the consideration.

**2. This Court Should Hear this Petition  
because Coverage is an Issue of Law**

Insurance coverage matters present issues of law for the Court, not a jury, to decide. *Fed. Ins. Co. v. Coast Converters*, 130 Nev. 960, 965, 339 P.3d 1281, 1284 (2014). In *Coast Converters*, this Court held that the district court erred in sending a coverage question to a jury. *Id.*

This is identical to the case here. There are no genuinely disputed material facts. For the purposes of this legal interpretation, this district court should have ruled whether there was coverage even assuming COVID-19 did exist on the insured's property. That is among the threshold legal questions. Even accepting that COVID-19 could sit on property for hours or days and that it is harmful to humans, the coverage issue is whether that amounts to physical loss or damages to qualify for coverage. No facts need to be tried to determine the coverage issue.<sup>2</sup> The

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<sup>2</sup> Notably, the *Coast Converters* Court found that there was a particular fact to be determined by a jury, particularly on what date did the insured become aware that its continued actions would result in the harm. 130 Nev. at 966, 339 P.3d at 1285. However, the Court still made all of the determinations as a matter of law and instructed the district court to apply those rulings to the remaining fact issue. *Id.* at 968, 33p P.3d at 1286. While Petitioner submits that there are no factual issues to be

same holds true for the exclusion. The necessary definition of “Pollutants or Contaminants” in the subject Policy necessarily includes “virus” as among the triggering pollutants or contaminants. No jury’s fact-finding could ever change that.

### **3. The Rule 8 Factors Compel a Stay**

***The Object of the Petition Will Be Defeated.*** The point of the petition here is to have the Court determine that the coverage questions here are legal matters to resolved by the courts to prevent numerous needles trials in various state court cases.

Extending the stay is warranted here because the purpose of the Petition will be frustrated if it is not granted. *See Hansen v. Eighth Judicial Dist. Court*, 116 Nev. 650, 658, 6 P.3d 982, 986 (2000). The purpose of this petition is to avoid the waste of judicial resources, including the time of the potential jurors if this case, which as established above should not be presented to a jury, proceeds to trial in September, with this petition on the legal issues remaining pending. Just as it would be error under *Coast Convertors* to present the legal issues to the jury, it

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tried, if this Court disagrees, it should still interpret the Policy as a matter of law and then remand to determine any remaining issues of fact, applying this Court’s legal determinations.

would be similarly erroneous to allow the jury try to determine coverage when that issue is presently pending before this Court. As such, pursuant to *Williams* and *Torremoro*, not only should the Petition be considered on its merits, but this Court should stay the proceedings below until Petition is resolved here.

***Parties and courts will suffer irreparable or serious injury if the stay is denied.*** The point of this petition is to avoid unnecessary trial in all cases where this legal coverage issue is presented. Without the court's intervention, the district court will spend a significant amount of judicial time and public resources to cases that should not be tried—or at least not without guidance. In addition, both parties will be needlessly forced to incur expense to litigate and defend this claim. While such expense may not always justify a stay, where the wasted resources are compounded over multiple cases, this presents a situation that affects the judicial system as a whole. These resources are better devoted to other cases until the threshold legal issue is resolved.

***JGB will not suffer any irreparable or serious injury if the stay is granted.*** This case is just a shade over two years old. Few cases, especially those with as much at stake as this one make it to trial within

two, especially as this case involves the circumstance of those last two years. If this case is stayed, the court can decide the controlling principles under which these cases can all be decided.

***The Petition is likely to prevail on the merits.*** Nearly all courts considered this issue, including federal cases interpreting Nevada law, have concluded that there is no coverage because the virus does not cause “direct physical loss or damage” in this circumstance. *See, e.g., Circus Circus LV LP v. AIG Specialty Ins. Co.*, No. 21-15367, 2022 WL 1125663, at \*1; 2, n.1 (9th Cir. Apr. 15, 2022) (rejecting the policyholder’s request to certify the case to this Court as unnecessary because it found no reason to believe that this Court would rule differently).

Petitioners’ position is also strong in that the coverage question is a matter of law for the courts. This is not a matter for a jury trial.

To find that a writ petition presents a sufficient “likelihood of success” to grant a stay, it is enough that the appeal presents a “substantial case on the merits when a serious legal question is involved.” *Fritz Hansen A/S v. District Court*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)); accord *Simon Prop. Grp., Inc. v. Taubman Centers, Inc.*, 262 F.

Supp. 2d 794, 798 (E.D. Mich. 2003). The Court need not determine, at this stage, that the district court erred. *See, e.g., Mamula v. Satralloy, Inc.*, 578 F. Supp. 563, 580 (S.D. Ohio 1983); *Scullion v. Wis. Power & Light Co.*, 614 N.W.2d 565, 573–74 (Wis. Ct. App. 2000). Accordingly, an appeal is more likely to succeed if it presents legal questions subject to *de novo* appellate review than if it presents purely discretionary questions. *Scullion*, 614 N.W.2d at 573–74.

Under this standard, courts have granted stays even when they believe the appeal will ultimately fail. For example, in one case the D.C. Circuit hazarded the “tentative conclusion” that the appellant would not succeed, but given the difficulty of the legal issues, the “balance of the equities” favored granting a stay. *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977).

Here, the petition presents a purely legal question, the interpretation of an insurance policy. But it is an important issue because it affects so many other cases. A stay to decide the issue will create judicial economy far beyond this one case. The balance of the equities weighs heavily in favor of granting the stay. *Hansen*, 116 Nev. at 659 6 P.3d at 987.



## CONCLUSION

This is an unusual circumstance. Considering this petition can avoid needless trial in multiple cases. Under this unusual circumstance, this court should grant a stay.

Dated this 15th day of July 2022.

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**CERTIFICATE OF SERVICE**

I certify that on July 15, 2022, I submitted the foregoing “Motion to Extend Stay” for filing *via* the Court’s eFlex electronic filing system.

Electronic notification will be sent to the following:

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I further certify that I served a copy of this document by emailing a true and correct copy thereof, as follows:

The Honorable Mark Denton  
DISTRICT COURT JUDGE – DEPT. 13  
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*Respondent*

/s/ Cynthia Kelley  
An Employee of Lewis Roca Rothgerber Christie LLP

**EXHIBIT 1**

**EXHIBIT 1**

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A-20-816628-B      JGB Vegas Retail Lessee, LLC, Plaintiff(s)  
vs.  
Starr Surplus Lines Insurance Company, Defendant(s)

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July 11, 2022      09:00 AM      Motion For Stay

HEARD BY:      Denton, Mark R.      COURTROOM: RJC Courtroom 16D

COURT CLERK: Pyatt, Quara

RECORDER:      Gerold, Jennifer

REPORTER:

PARTIES PRESENT:

Daniel F. Polsenberg      Attorney for Defendant

Douglas M. Cohen      Attorney for Plaintiff

Lee H. Gorlin      Attorney for Defendant

Marc T Ladd      Attorney for Plaintiff

#### JOURNAL ENTRIES

Douglas Cohen, Esq. present in Court along with Marc Ladd, Esq. via BlueJeans for Plaintiff.  
Lee Gorlin, Esq. present via BlueJeans and Daniel Poisenberg, Esq. in Court for Defendant.

Colloquy regarding how case should move forward. Mr. Poisenberg argued for Summary Judgment. Colloquy regarding Rule 62 and Rule 8. Mr. Ladd argued the facts and extraordinary circumstances. Mr. Poisenberg argued no intentional action taken.

COURT ORDERED Defendant's Motion for Stay GRANTED FOR TEMPORARY STAY;  
additionally seek further relief in the Supreme Court.