Case No. 84986

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.

District Court Case No. A-20-816628-B

PETITIONER'S NOTICE OF SUPPLEMENTAL AUTHORITIES

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PETITIONER'S NOTICE OF SUPPLEMENTAL AUTHORITIES

Pursuant to NRAP 31(e), Petitioner Starr Surplus Lines Insurance Company ("Starr") provides the following supplemental authorities, which issued shortly after briefing concluded.

1. *"Direct Physical Loss or Damage" requires a tangible alteration of the insured property.*

At the heart of Starr's briefing is that the phrase "direct physical loss or damage" as used in the Policy requires a tangible alteration of insured property to trigger coverage. Petition for Writ of Mandamus or Prohibition (Pet.) at 13-14; Reply in Support of Petition for Writ of Mandamus or Prohibition (Reply) at 9-12.

In *Neuro-Communication Services, Inc. v. Cincinnati Insurance Co.*, __ N.E.3d __, Slip Op. No. 2022-Ohio-4379, 2022 WL 17573883 (Ohio Dec. 12, 2022), the Ohio Supreme Court reflected Starr's reading of nearly identical language. *Id.* at *2-4 (¶¶14, 17) (holding that for "direct physical loss or damage to property" to exist "there must be loss or damage to Covered Property that is physical in nature. Such loss or damage does not include a loss of the ability to use Covered Property for business purposes"). Indeed, echoing a point that Starr made in its briefing, the Ohio Supreme Court further explained that any alternate interpretation would ignore the word "physical." *See* Reply at 11-12 (noting that the alternate interpretation requires "the Court to

improperly read the word 'physical' out") *and compare with Neuro-Communication,* 2022 WL 17573883 at *4 (¶18) (noting that "by defining "loss" as a particular *type* of loss . . . the policy distinguishes between losses to Covered Property that are physical and those that are nonphysical").

Just a few days later the Supreme Court of Maryland reached the same conclusion, reflecting with near exactness the plain language analysis Starr's briefing laid out. *Compare* Reply. at 8-9 (discussing dictionary definitions of the terms) *with Tapestry, Inc. v. Factory Mut. Ins. Co.*, (Misc. No. 1) 2022 WL 17685594, at *8 (Md. Dec. 15, 2022) ("From their dictionary definitions, we thus glean that "physical loss or damage" to covered property must involve tangible, concrete, and material harm to the property or a deprivation of possession of the property").

2. Loss of use of insured property is not the same as a "direct physical loss."

Closely tied to the first principle of Starr's briefing, noted above, is that the mere loss of use of the insured property is not a "direct physical loss" within the meaning of the Policy. *See* Pet. at 19-20; Reply at 18.

Confirming this position, the court in *Neuro-Communication* ably emphasized the difference between loss of use and a direct physical loss: "It is one thing for the government to ban the use of a bike or a scooter on city sidewalks; it is quite another for someone to steal it." 2022 WL 17573883 at *4 (¶18) (quoting *Santo's Italian Café, L.L.C. v. Acuity Ins. Co.*, 15 F.4th 398, 402 (6th Cir. 2021).

And the *Tapestry* court likewise noted its "skeptic[ism]" that "that 'physical loss' can embrace a 'functional loss of use' for the simple reason that losing a thing is conceptually different than losing the functional use of that thing for a period of time." 2022 WL 17685594 at *8.

3. The general presence of COVID in the community or at an insured location is not a material alteration.

Starr's briefing argued that the presence of COVID in the community, or even its assumed presence at the insured property, could not constitute the sort of tangible alteration "direct physical loss or damage" requires. Pet. at 14-18; Reply at 12-14.

In *Neuro-Communicaition,* the Ohio Supreme Court agreed, holding that "direct physical loss or damage to property does not arise from (1) the general presence of Covid in the community, (2) the presence of Covid on surfaces at a premises, or (3) the presence on a premises of a person infected with Covid." 2022 WL 17573883 *6 (¶28).

And, in *Tapestry*, the Supreme Court of Maryland took that conclusion further, confirming that "the presence of Coronavirus *in the air* and on surfaces at Tapestry's properties did not cause 'physical loss or damage' as that phrase is used in the Policies." 2022 WL 17685594, at *12 (emphasis added).

4. Starr's position is consistent with the clear trend in the law of other jurisdictions.

Starr's briefing referenced the nearly unanimous authority from other jurisdictions that have read "direct physical loss or damage" as discussed above. Pet. at 20-21; Reply at 17-20.

In *Neuro-Communication* the Ohio Supreme Court likewise recognized this trend. 2022 WL 17573883 at *7 (¶29) (recognizing that "the clear trend in the law in other jurisdictions" is that "the mere loss of use of a premises [due to Covid and related shutdown orders] does not constitute a direct physical loss").[1]

Tapestry is in accord. 2022 WL 17685594, at *12 ("Our interpretation of the policy language and application of that interpretation to Tapestry's claim is in accord with the overwhelming majority of reported decisions addressing Coronavirus-related insurance claims under first-party commercial property insurance policies.").

[1] Indeed, the lone dissenter in *Neuro Communications*, did so on grounds that the court should not have accepted the certified question due to the "well-established jurisprudence" already available to Ohio's federal courts. *Neuro Comms.*, at *7 (¶31).

5. The limited case law adopting the minority position is unavailing.

Starr recognized the limited inapposite authority—*Cajun Conti*, *Marina Pacific*, and *Huntington*—but urged this Court not to follow it. Reply at 20-21.

The Supreme Court of Maryland considered these same decisions in *Tapestry*, and rejected them for the same reasons Starr articulated in its briefing. *Cf.* 2022 WL 17685594 at *15.

DATED: January 3, 2022

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CERTIFICATE OF SERVICE

I certify that on January 3, 2023, I submitted the foregoing *"Petitioner's Notice of Supplemental Authorities"* 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 mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

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